

Background

Origin of the Inquiry

As old as armies and navies is the idea of a special discipline and a special body of law applicable to the armed forces.¹

- 1.1 Since the inception of armed forces, military personnel have always been subject to strict disciplinary and behavioural expectations. Indeed an enduring and universally recognised requirement for military forces throughout history has been disciplinary procedures to support command authority in war.
- 1.2 In Roman times 'the foundation of military law was the complete subjection of the soldier to the will of the commander'.² Although some regulation was evident by the Middle Ages, military discipline remained harsh and largely based on the whims of commanders rather than on prescribed laws. As late as the 18th century, the British military justice system had yet to be formalised, and was 'not built upon any settled principles, but was entirely arbitrary in its decisions and was something indulged rather than allowed as law'.³
- 1.3 'During the 19th century, the system of military justice as it applied in the British Army and the Royal Navy was radically reformed with the implementation in 1847 of the Naval Discipline Act, and, in 1879, of the Army Discipline and Regulation Act'.⁴ These acts provided military

1 Joint Service Publication (Australia) 201 Volume 1, p. 1-1.

2 *ibid.*

3 *ibid.*

4 *ibid.*

personnel with a wider range of rights and aligned the laws of military discipline more closely with the societal standards of the day. It was an amended version of this British legislation that provided the basis for the system of military law introduced into the Australian Defence Force (ADF) in the early 20th century.

- 1.4 By 1985, the legislation underpinning discipline in the ADF comprised: 'three United Kingdom Acts; two of which had ceased to operate in the UK; four sets of United Kingdom rules or regulations, all of which had ceased to operate in the UK; three Australian Acts; and nine sets of regulations under the Australian Acts'.⁵ This 'complex, outmoded and separate Navy, Army and Air Force legislation of yesteryear'⁶ was discarded on 3 July 1985 and replaced by the *Defence Force Discipline Act 1982*; 'a single uniform disciplinary code...intended to reflect as closely as possible contemporary Australian political, legal and social values.'⁷
- 1.5 The Defence Force Discipline Act (DFDA) provides the framework for a strict disciplinary system; a layer of regulation that applies to members of the military in addition to the common and criminal laws of Australia. However, in the modern context, military justice is not merely concerned with the issue of discipline. Rather the military justice system comprises two separate and discrete areas: military discipline and military inquiries.
- 1.6 Military inquiries are provided for under Defence (Inquiry) Regulations (D(I)R) which were framed in the aftermath of the sinking of HMAS *Voyager*. The Regulations came into force on 3 July 1985 providing a framework to expeditiously and properly investigate matters that have the potential to detract from the operational capability of the ADF. Military inquiries are primarily concerned with determining facts; they are not employed to investigate disciplinary or criminal matters nor empowered to impose punishment. Rather, military inquiries provide an internal management tool to enable corrective action to be taken by the commander.
- 1.7 The current military inquiry and discipline systems of the ADF have been in operation for several years⁸ and the legislation underpinning the systems has provided a sound framework for the application of military justice. However over the past few years, a number of military inquiries, and disciplinary matters conducted by the ADF, have become the subject

5 *ibid.*

6 Report of the Defence Force Discipline Legislation Board of Review, p. 23.

7 *ibid.*

8 Both the Defence Force Discipline Act and Defence Inquiry Regulations have been in operation since 1985.

of considerable public interest and media comment. Predominantly these cases involved the loss of lives of Service personnel or seeming injustices to members of the ADF in their dealings with the military disciplinary system. The significant public attention and criticism surrounding these cases has included questions regarding the application of natural justice and human rights within military discipline, the efficacy of the current military inquiry system and demands for external reviews of internal ADF proceedings intended to deal with the matter.

- 1.8 Concerns, arising from such cases, were subsequently expressed in Parliament regarding the need for external reviews of particular military investigations. These concerns culminated in a resolution in the Senate establishing this inquiry into the existing system of military justice in the ADF, including internal investigations such as boards of inquiry. The Terms of Reference for the inquiry authorised the Committee to examine the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military inquiries and ADF disciplinary processes. The Parliament referred the matter to the Joint Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report on 25 November 1997 (38th Parliament) and re-referred the matter on 10 March 1999 (39th Parliament).

Submissions to the Inquiry

- 1.9 The Committee advertised for submissions⁹ on 13 December 1997, and conducted public hearings from 11 May 1998 until 24 July 1998. The inquiry attracted more than 80 submissions and 30 supplementary submissions with the overwhelming majority of evidence provided by persons, or the relatives of persons, with recent military experience.
- 1.10 A substantial number of submissions related to individual cases and alleged mistreatment of individuals by the ADF. Several of these cases had been the subject of substantial investigation, by the ADF, the Defence Ombudsman, the Administrative Appeals Tribunal, the Federal Court and in some cases, separate Ministerial and Senate Committee inquiries.
- 1.11 Valuable sources of information in this inquiry included the submissions received from members of the legal community. The authors of a significant number of such submissions have military experience or are

⁹ Advertising mediums included *Weekend Australian*, *Brisbane Courier Mail*, *Adelaide Advertiser*, *Canberra Times*, *Northern Territory News*, *Financial Review*, *Sydney Morning Herald*, *Hobart Mercury*, *Army Newspaper*, *Navy News*, *RAAF News*, *Melbourne Age* and the *West Australian*.

serving members of the ADF in either a full-time or part-time capacity. Their contributions provided the Committee with valuable insights into the defence disciplinary and inquiry process.

- 1.12 Almost a quarter of all submissions were accepted as confidential, either at the request of the author, or at the behest of the Committee. Where it was considered that the material in a submission was defamatory of named individuals or that the submission contained material that should be kept confidential in fairness to individuals, the Committee chose not to make the submission publicly available. In the interests of fairness, individuals who were adversely mentioned in submissions to the inquiry were invited by the Committee to respond to the allegations against them. A significant number accepted the invitation and made individual submissions.
- 1.13 Where the Committee has chosen to use material from confidential submissions in the report, all efforts have been taken to maintain the privacy of the authors of those submissions.

Focus of the Inquiry

- 1.14 Throughout the inquiry the Committee adhered closely to the Terms of Reference (TOR) and sought to examine the avenues for investigative and punitive action within the ADF to determine if extant procedures are unfair, inappropriate or open to misuse. The Committee restricted its investigations to the legislative framework and procedures for military inquiries and disciplinary processes and did not attempt to re-hear specific cases.
- 1.15 The Committee advised all parties who tendered evidence that the focus of the inquiry was specifically rectifying deficiencies in processes and procedures of the ADF and not a forum to investigate individual cases. Notwithstanding, the Committee sought to use the evidence presented on individual cases to identify injustice and systemic failures.

Concurrent Developments in Military Justice

- 1.16 Since the commencement of the Parliamentary inquiry, the ADF has taken action to implement substantial structural and procedural change to the military justice system. The impetus for action originated from within the ADF whilst the basis for change has been reports by the Deputy Judge

Advocate General, Brigadier the Honourable A R Abadee, RFD and the then Commonwealth Ombudsman, Ms P Smith.

Abadee Report

1.17 In November 1995, the Chief of Defence Force commissioned one of the Deputy Judge Advocates General, Brigadier the Honourable A R Abadee to conduct a study into arrangements for the conduct of military trials, with a view to determining whether these arrangements satisfied current tests of judicial independence and impartiality.¹⁰ In his comprehensive report, *A Study into Judicial System under the Defence Force Discipline Act*, presented on 11 August 1997, Brigadier Abadee provided 48 recommendations for change, 39 of which were agreed to by Chief of Defence Force. Brigadier Abadee's report is subsequently referred to as the Abadee Report. The recommendations of the Abadee Report are at Appendix E.

Ombudsman's Report

1.18 On 14 July 1995, the Chief of the Defence Force (CDF) asked the Commonwealth Ombudsman to conduct an 'own motion' investigation into matters surrounding an allegation of sexual assault on a Defence base.¹¹ After extensive consultation with the ADF the Ombudsman¹² presented her report, *The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976* in January 1998. The report addressed both systemic issues, arising from the way the ADF responds to serious personnel incidents, and the comprehensiveness and quality of the ADF's inquiry procedures and how they might be improved. In addition, some areas of current ADF policy and procedure were identified as requiring further attention including establishment of an appropriate framework for preliminary inquiries, selection of investigators, development of terms of reference, training of investigators, monitoring and supervision of investigations, support services where personnel incidents are being investigated, procedural fairness and privacy. The recommendations of the Ombudsman's Report are at Appendix D.

10 Department of Defence, Submission, p. 570.

11 *ibid*, p. 592.

12 Ms P. Smith (the then Commonwealth Ombudsman).

New Policy Guidance – D(I)R Inquiries in the ADF

- 1.19 A principal outcome of the Ombudsman's report is a new manual, Australian Defence Force Publication (ADFP) 202, titled *Administrative Inquiries and Investigations in the ADF*.¹³ Preparation of the manual commenced in mid 1997, during consultation with the Ombudsman on the drafting of her report. The manual is currently being reviewed for issue in the near future and providing consolidated guidance with respect to the conduct of inquiries under the D(I)R, clearer guidelines for the conduct of preliminary inquiries and specific guidance with respect to the use of mediation. The new manual will replace current guidance in the Defence Instruction (General) *Inquiries into Matters Affecting the Defence Force*.¹⁴

Complaints Resolution Agency

- 1.20 Another principal outcome of the Ombudsman's report is the establishment of an independent Complaints Resolution Agency, to assist the process of managing inquiries. While the director of the agency looks to the head of the Defence Personnel Executive for administrative support, the agency is otherwise directly responsible to the CDF and the Secretary and thus independent of any command chain that applies to the matters in which it deals. The Complaints Resolution Agency is currently available to provide advice on settling terms of reference for all general courts of inquiry and boards of inquiry.¹⁵

The Report

- 1.21 In the course of the inquiry the Committee identified three distinct components of the military justice system employed within the ADF: military inquiries, military discipline and administrative action. A broad overview of each component is provided at Chapter 2 with the subsequent three chapters devoted to a more detailed examination of each component.

13 Department of Defence, Submission, p. 593.

14 *ibid.*

15 Department of Defence, Private Briefing, Transcript, p. 33.