

Tabled 5-4-01

Government Response

To the Report

on

*Military Justice Procedures
in
The Australian Defence Force*

by

The Joint Standing Committee on
Foreign Affairs, Defence and Trade

March 2001

EXECUTIVE SUMMARY

BACKGROUND

On 25 November 1997 the Senate referred the matter of Australia's military justice system to the Joint Standing Committee on Foreign Affairs, Defence and Trade for investigation. 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 Australian Defence Force (ADF) discipline. The Joint Committee charged its Defence Sub-Committee with the conduct of the inquiry.

The Committee identified three distinct components of the military justice system operating within the ADF. These were:

- a. military inquiries;
- b. military discipline; and
- c. administrative action.

The Committee sought to examine the existing legislation, policies and framework of the system of military justice employed by the Australian Defence Force and to evaluate their effectiveness and relevance in practice.

A number of recent military inquiries conducted by the ADF had attracted public interest and media comment. Predominantly, though not exclusively, these cases involved the loss of life of service personnel undertaking Defence Force activities. Public and media attention, which focussed on these cases, resulted in public criticism of the efficacy of the current military inquiry system. Questions of natural justice and human rights also had been raised. Most public and media attention had centred on the military inquiry system and less upon the systems of military discipline and administrative action.

OVERVIEW OF THE INQUIRY

The Government and the ADF welcomed the Joint Standing Committee's inquiry into the military justice system. The current arrangements, both the Defence Force Discipline Act 1982 and the Defence (Inquiry) Regulations, had been in operation for 13 years and it was now appropriate to ensure that they continue to meet the needs of the ADF and at the same time take account of recent developments in legal and community standards.

Arising from similar concerns to those that led the Parliament to refer these matters to the Joint Standing Committee, the Chief of the Defence Force had initiated two separate reviews. On 17 November 1995, a Deputy Judge Advocate General, Brigadier The Honourable Mr Justice A.R. Abadee, was requested to conduct a study into the arrangements for the conduct of trials under the *Defence Force Discipline Act 1982* with a view to determining whether these arrangements satisfy current tests of judicial independence and impartiality. The report of that review, which was to become known as the Abadee Report, was presented to the Chief of the Defence Force on 11 August 1997. In November 1997, the Chiefs of Staff Committee agreed to the implementation of 39 of the 48 Abadee recommendations.

Following perceived difficulties arising from inquiries into a particular matter, the Chief of the Defence Force, on 14 July 1995, requested the Defence Force Ombudsman to conduct an 'own motion' investigation into the matter. In particular, the Chief of the Defence Force wished to obtain the Ombudsman's recommendations with respect to what lessons might be learned for the handling of similar inquiries in the future, and what administrative measures and/or management processes might need to be varied or new ones put in place. The Ombudsman's report was handed down in January 1998. The 'Own Motion' Report noted that the ADF had conducted a full consideration of a draft report prepared by the Ombudsman and had accepted the majority of the recommendations. Action was in hand to implement those recommendations that were agreed.

The Joint Standing Committee's inquiry into military justice procedures was able to take both these reviews into account in their investigations.

Throughout the Committee's deliberations, the ADF demonstrated its willingness to assist the inquiry whenever and however possible.

The Government and the ADF welcome the recommendations of the Joint Standing Committee which were included in the comprehensive report tabled in Parliament in June 1999. The 59 recommendations contained therein are directed at improving the military inquiry, military discipline and administrative action systems within the ADF. Many of the recommendations complement or reinforce those improvements to the military justice system that the ADF was in the process of implementing.

THE TERMS OF REFERENCE

The Terms of Reference for the Committee's inquiry were as follows.

The adequacy and appropriateness of the existing legislative framework and procedures for the conduct of:

- a. military boards of inquiry;
- b. military courts of inquiry; and
- c. Defence Force discipline.

Without limiting the scope of the inquiry, the Committee was to give consideration to:

- a. the needs of the ADF in peace and in the conduct of operations within Australia and overseas;
- b. the constitutional and legislative framework within Australia, and particularly precedents established by the decisions of the High Court of Australia;
- c. the Judge Advocate General's annual reports; and
- d. other reports including, but not limited to, reports of the Parliament, the Commonwealth and Defence Force Ombudsman's annual report for the 1996-97 financial year and reports from relevant overseas jurisdictions.

The Joint Standing Committee issued an Information Booklet in December 1997 containing the Terms of Reference, an Issues Paper, advice on how the inquiry would be conducted and a list of the members of the Defence Sub-Committee. The Issues Paper is reproduced at Appendix A.

Amongst other things, the Issues Paper stated that the inquiry was not intended as a forum for reviewing the judgements made in individual ADF disciplinary cases, although the circumstances of particular cases may be reviewed where they provide clear evidence of systemic failures in the conduct of ADF judicial procedures.

CONDUCT OF THE INQUIRY

The Committee advertised the reference on military justice procedures in the national press and invited submissions the closing date for which was 2 February 1998.

The public hearings began on 11 May 1998 and concluded on 24 July 1998. A total of 30 witnesses appeared before the Committee. The present and immediate past Chiefs of the Defence Force and the then Chiefs of the three services appeared before the Committee in their official capacities.

A total of 85 individuals and organisations made written submissions to the Committee. Some individuals submitted more than one submission. A number of written submissions were treated by the Committee as confidential and were not published.

The ADF (Department of Defence) made two major written submissions to the Committee. In addition, nine other submissions containing information requested by the Committee were provided. An initial information briefing was provided to the Committee by the Defence Legal Office prior to the commencement of the public hearings.

Following the prorogation of the Parliament on 31 August 1998, the inquiry ceased. The Senate re-referred the Terms of Reference to the Committee on 10 March 1999. The report of the inquiry was tabled on 21 June 1999.

SUMMARY OF THE INQUIRY REPORT

The Committee's inquiry was comprehensive and detailed. It examined what is unquestionably a complex system of legislation (acts and regulations), policy and procedures. The report of the Committee's inquiry contains six major sections as follows:

- a. a background to the inquiry;
- b. an examination of military justice;
- c. an examination of military inquiries;
- d. an examination of military discipline;
- e. an examination of administrative action; and

f. fifty-nine recommendations.

The report is positive and constructive. Reflected is the detailed consideration given by the Committee to the work done by Brigadier Mr Justice Abadee and the Defence Force Ombudsman. Many of the recommendations reflect this consideration.

While the Committee received no evidence to support allegations of a lack of independence in the military justice system, it considered that, unquestionably, there was a perception of this in some quarters.

The Committee recognised improvements to the current military justice system initiated by the ADF but was of the view that these changes would not fully address both the perceived and actual independence and impartiality of the system.

The Committee noted that the principal question confronting it in this inquiry was how to redress what they identified to be a shortfall in the military justice system without impeding the workings of the ADF.

The Committee accepted that the post-Abadee arrangements would significantly improve the impartiality and independence of the military discipline system. Nevertheless, seven of the Committee's recommendations are related to the military discipline system.

With regard to military inquiries, the Committee was of the view that the issues of independence and impartiality would not be fully addressed by the changes proposed by the ADF. Accordingly, the Committee made 45 recommendations for change to the military inquiries system.

The Committee also proposed some changes to the administrative action processes and procedures employed within the ADF in order to redress what it identified to be shortfalls in the areas of independence and impartiality. Seven of the Committee's recommendations were related to the administrative action system.

THE GOVERNMENT'S RESPONSE

The recommendations contained in the Committee's report are directed at improving the military discipline, military inquiry and administrative action systems of the ADF. Suggestions for increased independence and impartiality are at the focus of the changes suggested in the recommendations.

The Government's Response follows in sequence each of the 59 recommendations. Each recommendation has been given careful consideration by the Government.

In summary:

- a. forty-six recommendations have been supported and will be implemented;
- b. five recommendations have been supported in principle but there exist some practical difficulties or limitations to implementation;

- c. five recommendations have been supported in part and will be implemented accordingly;
- d. one recommendation has been supported subject to the outcome of the implementation of another recommendation; and
- e. Two recommendations have not been supported.

Acceptance and implementation of some of the recommendations will result in amendments to current legislation including the *Defence Act 1903*, the *Defence Force Regulations*, and *Defence (Inquiry) Regulations*. The outcome of various studies and consideration following agreement to a number of the recommendations may result in amendments to other legislation, such as the *Naval Defence Act 1910* and *Air Force Regulations*, and there may be others. Amendments to legislation will take some time to effect.

Agreement to other recommendations will result in changes to policy and procedures which in turn will require amendments to Defence Instructions and various Manuals. Of particular note is the initial issue of the *Administrative Inquiries Manual* and reference to this publication is made in the responses to a number of the Committee's recommendations and is itself the subject of a recommendation. Policy and procedural changes can be completed reasonably quickly.

Some of the Committee's recommendations recognise recommendations made in the Defence Force Ombudsman's 'Own Motion' Report and the Abadee Report and have previously been agreed by the ADF. Some of these have already been implemented and others are in the process of implementation.

The implementation of a small number of recommendations will involve major reviews, on an ADF wide basis, of present policies to determine their appropriateness with respect to the issues raised and suggestions made by the Committee. These reviews are likely to be complex and time consuming. Consequently, it will take some time to complete these reviews and to introduce any changes to policy and procedures that may follow from them.

Details of the Government's examination of and response to each of the Committee's recommendations follow.

RESPONSES TO THE RECOMMENDATIONS

RECOMMENDATION 1

The Committee recommends that, during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member participating in an ADF activity.

RESPONSE

Not Supported

This recommendation would mandate that the Minister appoint a General Court of Inquiry in every case involving the accidental death of an Australian Defence Force member participating in Australian Defence Force activities. The recommendation would remove a discretion currently afforded to the Minister by Defence (Inquiry) Regulation 5 as whether or not to appoint a General Court of Inquiry to inquire into matters affecting the Defence Force. The basis for this recommendation appears to be to provide a high degree of impartiality and independence from the Australian Defence Force in inquiries of the type mentioned. This recommendation, if supported, would require that the Defence (Inquiry) Regulations be amended.

The Defence (Inquiry) Regulations provide the Minister and the Australian Defence Force with the authority and procedures to inquire into matters affecting the Defence Force in order that the responsibilities of the command and administration of the Defence Force may be carried out effectively, efficiently and expeditiously.

The Defence (Inquiry) Regulations, as well as providing for a very formal type of external administrative inquiry also provides the Australian Defence Force with less formal internal methods of inquiry. These latter inquiries are essential for the Australian Defence Force to manage its operational capabilities and activities in an effective, efficient and expeditious manner.

The purposes of an inquiry are to determine the cause of an accident or incident and identify remedies that will prevent a recurrence. Speed is of the essence. In some cases the use of Defence equipment, such as aircraft, may be suspended pending the outcome of an inquiry. In such cases, provided that there is no other reason that would justify a General Court of Inquiry, a Board of Inquiry which can be conducted more expeditiously, would be preferred. Experience shows that some civilian investigative mechanisms such as Royal Commissions and Coronial inquiries may take a significant time to be appointed and to begin investigations. Indeed, it may be even years before the report of their investigation has been completed. This is unacceptable in the face of the imperatives of operational capability demanded of the Defence Force. Of course, there is no reason why military Boards of Inquiry should not be undertaken in advance of, or in parallel to, civilian investigations such as Coronial inquiries and this is very often what occurs.

Not all incidents involving the accidental death of an Australian Defence Force member participating in a Defence Force activity are of a nature as to require the highest level of formality, independence and legality as would be provided by a General Court of Inquiry. That is not to say that an incident involving the accidental death of a Defence Force member is not serious, but the circumstances may not be of a nature that a Board of Inquiry could not inquire into the matter in an efficient, effective and impartial way. Incidents which can be adequately investigated by the Defence Force do not warrant or demand the independence, formality or level of legality afforded by a General Court of Inquiry.

The most important elements to be considered in deciding between a General Court of Inquiry and a Board of Inquiry are the presence of a serious national interest in the matters to be the subject of the inquiry and the likelihood that a Defence Force inquiry may be perceived to be biased.

During the Committee's inquiry a number of next of kin of Australian Defence Force members were critical of the conduct of Boards of Inquiry conducted by the Australian Defence Force into accidental death of members. Some of this criticism has resulted in the Committee bringing recommendations that would improve the conduct of Boards of Inquiry from the viewpoint of next of kin of deceased members. In particular, the implementation of Recommendations 17, 24, 25, 26, 28, 30, 34 will significantly improve the inquiry process and could be expected to redress much of the criticism of the process that was presented to the Joint Standing Committee during its inquiry.

In peacetime, the accidental death of Australian Defence Force members involved in military activities are investigated by State or Territory coroners. These investigations, being external to the Australian Defence Force, provide the highest possible level of impartiality and independence. Moreover, State and Territory coroners possess considerable professional expertise with respect to the investigation of accidental death and provide this service to the community at large. The Government's acceptance of the Committee's Recommendations 3, 4 and 5 will facilitate the investigation of accidental death of Australian Defence Force members by State and Territory coroners.

The Defence (Inquiry) Regulations came into operation on 3 July 1985. They provided the Government and the Australian Defence Force with a range of inquiries to inquire into matters affecting the Defence Force. While similar provisions existed and applied to parts of the Defence Force, they did not apply to all three services. The Defence (Inquiry) Regulations were introduced to fulfil this need following the *HMAS Voyager* disaster and the subsequent inquiry by a Royal Commission.

Since the Defence (Inquiry) Regulations came into operation on 3 July 1985, no General Court of Inquiry has been appointed. While, as has already been stated, most instances of accidental death of Australian Defence Force members participating in military activities do not justify the highest level of formality, independence and legality afforded by a General Court of Inquiry, there may well be instances of sufficient gravity or special circumstances that might justify such an inquiry.

While the circumstances that might give rise to the appointment of a General Court of Inquiry may be similar to those circumstances that give rise to the appointment of a Board of Inquiry, the distinguishing features between the two that would warrant the appointment of a General Court of Inquiry are:

- a. the presence of a serious national interest in the matters to be the subject of the inquiry; and
- b. the likelihood that an inquiry by the Defence Force may be perceived to be biased because of the involvement, in the matters to be the subject of the inquiry, of the most senior officers of the Australian Defence Force.

The Government considers that while there may arise cases involving the accidental death of Australian Defence Force members participating in Australian Defence Force activities that may justify the appointment of a General Court of Inquiry, there will also arise cases that do not. Consequently, the Government does not agree that the appointment of a General Court of Inquiry should be mandatory in all cases of accidental death of Defence Force members involved in military activities.

However, to avoid concerns about the perceptions of bias or lack of independence in the conduct of certain types of ADF inquiries, the Government agrees as follows:

- a. In each case of accidental death of ADF members involved in military activities the CDF and/or relevant service Chief of the Defence Force or the Service Chiefs, as appropriate, advise the Minister to determine whether a General Court of Inquiry or a Board of Inquiry is appropriate. The discretion as to whether to appoint a General Court of Inquiry should remain with the Minister as currently provided for by Regulation 5 of the Defence (Inquiry) Regulations.
- b. A Military Inspector-General will be appointed whose responsibilities will include the appointment as President of a Board of Inquiry or as an Investigating Officer under the Defence (Inquiries) Regulations, advise and report to CDF on the conduct, findings and recommendations of specified Boards of Inquiry; and, authority to initiate independent inquiries into ADF activities. Legislative amendments will be required.

RECOMMENDATION 2

The Committee recommends that the Minister of Defence continue to have the discretion to convene a General Court of Inquiry in cases of major capital loss.

RESPONSE

Supported

This recommendation reflects the present situation whereby the Minister may exercise a discretion to appoint a General Court of Inquiry into any matter concerning the Defence Force.

RECOMMENDATION 3

The Committee recommends that the ADF develop policy to involve the coroner from the outset of inquiries involving any fatality.

RESPONSE

Supported

The coroner must be informed of all cases of accidental death of ADF members in Australia, usually through State and Territory police.

Policy and procedures will be developed to ensure that ADF authorities involve the coroners from the outset of an accident.

RECOMMENDATION 4

The Committee recommends that the ADF facilitate the involvement of the coroner in the initial stages of an inquiry into an accident involving death, through the provision, as required, of a liaison officer to the coroner.

RESPONSE

Supported

The Government agrees that the ADF should appoint a liaison officer to facilitate the involvement of the coroner in the initial stages of an inquiry into the accidental death of ADF members which occurs within Australia as appropriate to the circumstances.

The requirement to appoint an ADF liaison officer to assist the coroner will be incorporated into the policy and procedures to be developed and have been referred to in the Government's response to Recommendation 3.

RECOMMENDATION 5

The Committee recommends that the Australian Government ensure that State legislation does not preclude state coroners from investigating coronial deaths of military personnel and civilians involved in military enterprises or on military land or property.

RESPONSE

Supported in principle

This recommendation proposes that State legislation not preclude State and Territory coroners from investigating accidental deaths of military personnel and civilians involved in military enterprises or on military land or property. However, in their report the Joint Standing Committee stated, 'Moreover, the ADF should develop policy to involve the coroner from the outset of inquiries involving fatalities and Commonwealth legislation should not preclude State coroners from investigating coronial deaths of military personnel and civilians involved in military enterprises or on military land or property that would otherwise be the subject of a coronial inquiry.'

The jurisdiction of State and Territory coroners is established by the relevant State and Territory legislation. Currently, except in exceptional circumstances, State and Territory coroners are not precluded from investigating coronial deaths of military personnel and civilians involved in military enterprises or on military land or property.

Defence Force Regulation 27 provides that, subject to a direction of the Minister, a commissioned officer of the Defence Force may give directions for the disposal of a body of a member of the Defence Force who has died in service. Defence Force Regulation 28 provides that a law of a State or Territory relating to coroners or the registration of deaths does not apply in relation to a body with respect to which directions for disposal are given or in relation to the death of a member of the Defence Force with respect to whose body such directions are given. The Ministerial determination on this matter states that a commissioned officer of the Defence Force shall not give directions for the disposal of the body of a member of the Defence Force who died while on service in circumstances where, but for the operation of Defence Force Regulation 28, a law of a State or Territory relating to coroners would apply unless that commissioned officer first signs a written certificate certifying that the body is at a place where it is not practicable to comply with the law.

The Government considers that State and Territory coroners should not be precluded from investigating the death of a Defence Force member except during periods of armed conflict in Australia or where the death occurred overseas or on a ship at sea in waters outside State or Territory jurisdiction. In discussing the matter of coronial jurisdiction, the Joint Standing Committee's report referred to circumstances where death occurs in Australia. Consequently, it is taken that the recommendation also refers to deaths that occur within Australia.

The recommendation is supported in principle. Action will be taken to amend the current Ministerial determination and the relevant legislation.

RECOMMENDATION 6

The Committee recommends that a coroner investigating the death of an ADF member, should be encouraged to determine whether or not any potential criminal liability exists and, where appropriate, to attribute degrees of responsibility for the incident in his or her findings.

RESPONSE

Not Supported

State and Territory legislation that establishes the coroner and provides jurisdiction will determine whether the particular coroner may attribute degrees of responsibility for an incident, should it be appropriate to do so. Coroners will exercise their jurisdiction with respect to ADF members in the same way as they would with respect to all other members of the community over whom they may exercise their jurisdiction.

The Government does not consider that it should encourage State and Territory coroners to deal with ADF members in a different manner to that with which they deal with other persons who fall within their jurisdiction.

RECOMMENDATION 7

The Committee recommends that the practice of including specialist civilian personnel on BOIs be continued, with specialist qualifications being the basis for appointment.

RESPONSE

Supported

The Government agrees that the inclusion, as members of Boards of Inquiry, of specialist civilians, based on their qualifications and experience, enhances the actual and perceived independence of the inquiry process. The Board of Inquiry into the accident aboard HMAS *Westralia* is a case in point.

When he appeared before the Committee, the Chief of the Defence Force noted that the appointment of civilians to Boards of Inquiry could be considered more widely. Furthermore, he undertook to provide formalised guidance within the ADF on the inclusion of external, including civilian, experts on Boards of Inquiry where appropriate.

RECOMMENDATION 8

The Committee recommends that in order to provide a reasonable level of independence, Investigating Officers for military inquiries should be appointed from outside the chain of command of the individual(s) or element immediately under investigation and should not be personally acquainted with any of the parties involved in the incident.

RESPONSE

Supported in part

The Joint Standing Committee's recommendation is in two parts. Firstly, that Investigating Officers be appointed from outside the chain of command of the individual(s) or element immediately under inquiry and secondly, that Investigating Officers should not be personally acquainted with any of the parties involved in the incident.

While the Government agrees that the implementation of both elements of the recommendation would provide an increased level of independence to the military inquiry process, implementation of the latter element, as a requirement for the appointment of Investigating Officers, would be impractical and sometimes impossible.

A requirement for the appointment of an Investigating Officer who is not in the chain of command of the parties involved in the incident would be achievable. A unit/ship commander could appoint an Investigating Officer from one part or section of his/her unit to inquire into an incident involving another part or section of his/her unit. At higher levels, a senior commander, acting as an Appointing Officer could, but would not be compelled, to appoint an Investigating Officer from one unit to conduct an inquiry into a matter involving another unit. In this context, an *element* is taken to mean a part of a military organisation such as a section or part of a unit as well as a unit or ship organisation. Moreover, the chain of command is taken to refer to the immediate chain of command, either up the chain or down the chain, of the individual(s) under investigation. It does not include other elements under the command of the Appointing Officer. An Investigating Officer should not have day to day responsibility for the individual(s) under inquiry. This aspect of the Joint Standing Committee's recommendation is agreed.

Accordingly, the Government supports that part of the recommendation which requires the Investigating Officer to be appointed from outside the chain of command of the individual(s) or element under investigation. Detailed guidance on this issue has been drafted and included in the new *Administrative Inquiries Manual*.

With respect to the second element of the recommendation, it would not be possible for the commander of a ship or unit to appoint an Investigating Officer who is not known to the parties involved in an incident. In a discrete organisation such as a unit, squadron or ship, as an aspect of the function of command, leadership and management, officers are expected to be acquainted with all members of the organisation to which they belong. The strict application of this element of the Joint Standing Committee's recommendation would prevent a commanding officer, acting as Appointing Officer, from appointing an Investigating Officer from within his/her unit to inquire into any matter affecting his/her command. This is contrary to the intention of Defence (Inquiry) Regulation 69(1) which provides that commanding officers (as Appointing Officers) may appoint Investigating Officers. Acceptance of this element of the Joint Standing Committee's recommendation would effectively remove Investigating Officer Inquiries as a form of administrative inquiry available to commanding officers to command and administer their units.

Accordingly, the Government does not support that part of the recommendation that requires the Investigating Officer not be acquainted with the individuals under investigation on the grounds that this is impractical.

RECOMMENDATION 9

The Committee recommends that the ADF provide more extensive guidance to commanders regarding when to invoke the various levels of investigation.

RESPONSE

Supported

The Defence (Inquiry) Regulations provide for three types of inquiry within the Australian Defence Force. In addition, under the inherent authority of command a commander may conduct less formal inquiries not under the provisions of the Defence (Inquiry) Regulations.

The selection of the most appropriate form of inquiry to suit the particular circumstances is an important element to a successful outcome.

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 recommended that guidance be provided on when to choose a Board of Inquiry rather than an Investigating Officer's inquiry in order to encourage consistency and to minimise any perceptions that complaints were not being treated sufficiently seriously. The ADF agreed to the Ombudsman's recommendation and drafted guidance on this matter to be included in a new *Administrative Inquiries Manual*.

Detailed guidance on the selection of the most appropriate method of inquiry has been drafted and incorporated in the new Manual.

RECOMMENDATION 10

The Committee recommends that a legal review of the TOR be conducted prior to the commencement of an inquiry. Where possible for Investigating Officer inquiries and in all cases for BOIs, the review should be conducted by legal officers outside the chain of command of the Appointing Authority.

RESPONSE

Supported in part

Terms of Reference are critical to the successful outcome of an inquiry. Consequently, considerable attention to their drafting is warranted. The ultimate responsibility for the drafting and issue of Terms of Reference lies with commanders acting as Appointing Authorities for Boards of Inquiry and as Appointing Officers for Investigating Officer Inquiries.

The provision of legal advice and, when required, legal review, to senior commanders is the function for which staff legal officer positions are established. However, Terms of Reference especially for Boards of Inquiry are of such importance that special requirements are justified.

The matters inquired into by Boards of Inquiry are generally of a grave and serious nature. Moreover, Boards of Inquiry are not frequent and Appointing Authorities are normally of quite senior rank. There is a clear advantage in Terms of Reference for Boards of Inquiry across the ADF being monitored and reviewed for consistency, legality, practicality and appropriateness. Accordingly, the Government agrees that Terms of Reference for Boards of Inquiry should be reviewed by a senior legal officer outside the chain of command of the Appointing Authority.

Matters to be inquired into by Investigating Officers are generally of lesser gravity. Nevertheless, Terms of Reference for Investigating Officer inquiries also should be reviewed by a legal officer.

Investigating Officer inquiries are appointed reasonably frequently and the vast majority of these are appointed by Appointing Officers who are commanding officers, although they may also be appointed by senior commanders. Commanding officers usually do not have legal officers on their staff and consequently, review by any service legal officer not previously involved in drafting the relevant Terms of Reference is proposed.

Review of Terms of Reference by legal officers where the Appointing Officer is a senior commander presents practical difficulties. In such cases it would be appropriate and satisfactory for the legal review to be conducted by a service legal officer on the staff of, and therefore in the chain of command of Appointing Officers, provided they have not previously been involved in drafting the relevant Terms of Reference.

In summary, that part of the recommendation that proposes that all Terms of Reference for Boards of Inquiry and Investigating Officer inquiries be subject to legal review is supported. In addition, that part of the recommendation that proposes that Terms of Reference for Boards of Inquiry be reviewed by a legal officer outside the chain of command of the Appointing Authority is supported. However, that part of the recommendation that proposes that, where possible, Terms of Reference for Investigating Officer inquiries be reviewed by a legal officer outside the chain of command of the Appointing Officer is not supported for the reasons outlined above.

RECOMMENDATION 11

The Committee recommends that the Australian Government ensure that an Investigating Officer or Board of Inquiry is empowered, by the D(1)R, to make recommendations flowing from findings germane to the Terms of Reference.

RESPONSE

Supported

Defence (Inquiry) Regulations 25 and 70 provide that the instrument of appointment shall indicate whether or not a Board of Inquiry and an Investigating Officer are empowered to make recommendations arising from their findings. Where the instrument does not empower recommendations to be made, then there is no power to do so.

As the purposes of an administrative inquiry are to find facts concerning a particular incident and to identify remedial action to prevent a recurrence, the Government agrees that a Board of Inquiry and an Investigating Officer ought to be empowered to make recommendations flowing from the findings relevant to the Terms of Reference.

Defence (Inquiry) Regulations 25 and 70 will be amended to reflect the Committee's recommendation.

RECOMMENDATION 12

The Committee recommends that the ADF amend guidance on the conduct of military inquiries to ensure that Investigating Officers and BOI are always:

- a) **prohibited from finding that a specific offence has been committed, but**
- b) **empowered to find that specific grounds exist for a matter, or matters to be the subject of a DFDA investigation and to recommend the referral of that matter for DFDA action.**

RESPONSE

Supported

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 recommended that administrative inquiries under the Defence (Inquiry) Regulations should not be entitled to find that a specific offence has been committed. The reason for this recommendation was that such a finding would stem from evidence obtained where the rules of evidence did not apply.

The purposes of an administrative inquiry are to find the facts in a particular situation and to identify remedial action to prevent a recurrence. An administrative inquiry is not a criminal or disciplinary investigation.

Nevertheless, this should not prevent an administrative inquiry from recommending to the Appointing Authority/Officer that an investigation under the Defence Force Disciplinary Act be considered where evidence presented to the inquiry suggests that an offence may have been committed.

The Australian Defence Force agreed to the Ombudsman's recommendation. Accordingly, guidance on this issue has already been drafted and incorporated in the new *Administrative Inquiries Manual*.

RECOMMENDATION 13

The Committee recommends that the ADF complete the development of and issue, as soon as possible, a manual providing comprehensive guidance on the conduct of military inquiries under D(I)R.

RESPONSE

Supported

The Australian Defence Force has agreed to implement a number of recommendations made by the Defence Force Ombudsman in the 'Own Motion' Report of January 1998. As a consequence, appropriate guidance and advice was drafted and incorporated in a draft *Administrative Inquiries Manual*. This Manual will be published and issued in the near future.

The new Manual will gather together in one volume all the relevant legislation, policy, procedures and guidance relating to administrative inquiries in the Australian Defence Force.

RECOMMENDATION 14

The Committee recommends that the President of a BOI have the responsibility to ensure that lines of questioning are relevant to the TOR and do not include unnecessary personal questions or pursue personal theories.

RESPONSE

Supported

The duties of the President of a Board of Inquiry and an Investigating Officer are presently contained in Defence Instruction (General) Administration 34-1, although no specific mention is made of the President's responsibility to ensure that lines of questioning of witnesses is relevant to the Terms of Reference and do not include unnecessary personal questions or pursue personal theories.

The Government agrees that such advice is necessary to ensure that inquiries are properly focussed and remain relevant to the Terms of Reference in order to achieve successful outcomes. This duty of the President of a Board of Inquiry should apply equally to an Investigating Officer.

Appropriate guidance on this matter has been drafted and included in the draft *Administrative Inquiries Manual*.

RECOMMENDATION 15

The Committee recommends that the Australian Government ensure that legislation

- a) **does not provide a privilege against self incrimination to witnesses to an inquiry conducted by an Investigating Officer; but**
- b) **does provide that any statement or disclosure made to an Investigating Officer by a witness should not be admissible as evidence in civil or criminal proceedings against that witness.**

RESPONSE

Supported

The Defence (Inquiry) Regulations provide that a witness before a General Court of Inquiry and a Board of Inquiry is not excused from answering a question, when required to do so, on the ground that the answer may tend to incriminate them. The Defence Act 1903 provides that a statement or disclosure made by a witness before a General Court or Board of Inquiry is not admissible in evidence against that witness in civil or criminal proceedings or before a Service tribunal.

The Defence (Inquiry) Regulations require that a witness who appears before an Investigating Officer shall not, without reasonable excuse, fail or refuse to answer a question relevant to the inquiry. Furthermore, they provide that a statement or disclosure made by a member of the Defence Force in the course of giving evidence before an Investigating Officer is not admissible in evidence against that person before a Service tribunal. However, no similar protection applies before a civil court or in criminal proceedings. In consequence, the Federal Court has ruled that self-incrimination constitutes reasonable excuse for not answering questions in an Investigating Officer inquiry.

The Government agrees that it is in the interests of consistency to ensure that there is no distinction with respect to protection against self-incrimination in the case of Investigating Officer inquiries. The compulsion to answer questions before a General Court of Inquiry and a Board of Inquiry, (with self-incrimination not amounting to a reasonable excuse not to answer), is applicable to all witnesses and not just those who are legally represented. Consequently, in Investigating Officer inquiries where the same compulsion to answer questions applies, the same protection against the subsequent use before a civil court or in criminal proceedings of any evidence given to the inquiry and any adverse finding ought also apply to all witnesses. The issue of whether or not a member is legally represented before a General Court or Board of Inquiry ought not deprive a member who gives evidence before an Investigating Officer inquiry of the same protection afforded to witnesses before a General Court or Board of Inquiry.

In Investigating Officer Inquiries where refusal to answer a question on grounds of self-incrimination is provided for by the Regulations, the question of compulsion to answer is decided by the Investigating Officer. This issue may, and indeed has, resulted in conflict with one case having to be decided before the Federal Court. Implementation of the Joint Standing Committee's recommendation will remove the potential for conflict on this issue.

The distinction that currently exists between the legislative protection given to witnesses before General Courts and Boards of Inquiry on the one hand and Investigating Officer Inquiries on the other appears to be without foundation. Moreover, the distinction has the potential to hinder the effectiveness of outcomes achieved by Investigating Officer Inquiries.

The one factor that remains is the further protection that a witness before a General Court of Inquiry and a Board of Inquiry receives when not represented, and that is; that no adverse finding may be made against the witness unless that witness is given the opportunity to be represented. To ensure consistency, it is proposed that the Defence (Inquiry) Regulations and the Administrative Inquiries Manual provide that no adverse finding may be made against a witness before an Investigating Officer Inquiry unless the witness is given the opportunity to receive detailed legal advice before providing his/her evidence.

The Defence Act, the Defence (Inquiry) Regulations and the *Administrative Inquiries Manual* will be amended to reflect the recommendation.

RECOMMENDATION 16

The Committee recommends that the ADF amend guidance on the drafting of TOR to ensure that investigating bodies are not empowered to make specific findings apportioning blame.

RESPONSE

Supported

The Government agrees that the purpose of administrative inquiries as established through the Terms of Reference should not be to apportion blame for criminal or disciplinary issues. The purpose of administrative inquiries should not be distracted from the objective of fact finding and the identification of remedial action to prevent occurrences.

This will not prevent an administrative inquiry from bringing a recommendation based on the findings that consideration should be given to initiating an investigation under the DFDA or by civil police. It should not prevent a recommendation that adverse administrative action be considered. Nor should it prevent the identification of cause, as distinct from blame.

Guidance on this matter will be included in the general guidance on drafting Terms of Reference in the new *Administrative Inquiries Manual*.

RECOMMENDATION 17

The Committee recommends that where the case before a BOI is serious and of legitimate public interest, that BOI should be open to the public, with the option to take evidence *in camera*.

RESPONSE

Supported

Defence (Inquiry) Regulation 29(1) provides, subject to Regulation 29(2), that a Board of Inquiry shall not conduct its inquiry in public. Regulation 29(2) provides that the Appointing Authority may direct that all or part of the inquiry be conducted in public.

The Australian Defence Force Supplementary Submission to the Joint Standing Committee inquiry contained the following statement, 'It is considered that the option of open and closed inquiries should be available to the ADF depending on the circumstances being investigated but, in future, closed Boards should become the exception rather than the rule. Policy guidelines on these matters have been developed and included in the new *ADF Manual of Administrative Inquiries*.'

RECOMMENDATION 18

The Committee recommends that members of the ADF should be promptly informed of any complaint or allegation against them where any action under D(D)R is to be taken as a result. The only exception to this right to be informed should be where an individual is suspected of committing an offence and where forewarning may result in the destruction of evidence.

RESPONSE

Supported

The Defence Force Ombudsman noted in the 'Own Motion' Report of January 1998 that the Defence (Inquiry) Regulations contain no provision requiring that a Defence member be informed of any allegations made against them.

As a consequence of the Ombudsman's recommendation, the Australian Defence Force has drafted guidance for inclusion in the *Administrative Inquiries Manual* to the effect that a member is to be promptly informed where they are the subject of an accusation, allegation or complaint, not being of a criminal or disciplinary nature, that is to be inquired into under the Defence (Inquiry) Regulations.

RECOMMENDATION 19

The Committee recommends that a report that is critical of a member should not be made to an Appointing Authority without the member having been afforded the opportunity to appear before the inquiry and to make any submissions (either orally or in writing) as he or she sees fit.

RESPONSE

Supported

The Defence Force Ombudsman noted in the January 1998 'Own Motion' Report that the principles of procedural fairness require that a report that is critical of a member should not be made to an Appointing Authority without the member having been afforded an opportunity to appear before the inquiry and to make any submissions (either orally or in writing) as he or she thinks fit.

In their report, the Joint Standing Committee stated that the subject of a complaint or allegation, against whom action is to be taken as a result, should, after the right to be informed has been satisfied, be afforded adequate opportunity to respond to the allegations or complaint.

The Australian Defence Force agrees with this view and as a consequence of the Ombudsman's recommendation on the matter, appropriate directions and guidance have been developed and included in the draft *Administrative Inquiries Manual*.

RECOMMENDATION 20

The Committee recommends that a member against whom action is to be taken should have access to any evidence relied upon in making a decision or taking any action which affects them except where the release of evidence given by another witness may, if disclosed, constitute a threat to the safety of that witness.

RESPONSE

Supported

In the 'Own Motion' Report of January 1998, the Defence Force Ombudsman stated that where an investigation may adversely affect a person, he or she can have a reasonable expectation that the principles of procedural fairness will apply. This includes access to any evidence relied upon in making a decision, or taking any action, which affects them.

The Government agrees that the Australian Defence Force's use of the Defence (Inquiry) Regulations must comply with current standards of administrative law. Natural justice and procedural fairness must be observed throughout the inquiry process. Consequently, within the limitations of national security and personal privacy, evidence that is relied upon to make a decision or take any action that affects them adversely, must be made available to a member.

Guidance on this matter will be drafted for inclusion in the new *Administrative Inquiries Manual*.

RECOMMENDATION 21

The Committee recommends that members who may be adversely affected as a result of the investigating body's report on an inquiry should be afforded access to that report within the provisions of the *Privacy Act*.

RESPONSE

Supported

The Defence Force Ombudsman's 'Own Motion' report of January 1998 stated that members who may be adversely affected as a result of an investigator's report should be afforded access to the report.

Present ADF practice is that persons, against whom adverse action is to be taken consequent upon the report of an administrative inquiry under the Defence (Inquiry) Regulations, are provided with those parts of the report that are relevant to them. This practice takes account of the Privacy Act. Defence (Inquiry) Regulation 63 authorises the Minister to release all or part of the report of an inquiry under the Defence (Inquiry) Regulations.

As present ADF practice complies with the Joint Standing Committee's recommendation, no action is required to implement it.

RECOMMENDATION 22

The Committee recommends that when witnesses are informed regarding their status and the outcome of the inquiry in relation to matters relevant to them, they should also be informed as to their rights of review.

RESPONSE

Supported

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 recommended that the ADF spell out in the Defence (Inquiry) Regulations and Instruction, and particularly for Investigating Officers, the principle of procedural fairness and rights of review. The ADF's response to the Ombudsman's recommendation was to include in the new *Administrative Inquiries Manual* a requirement to advise members of their rights of review when advising them of the outcome of the inquiry.

The Joint Standing Committee's recommendation is being implemented.

RECOMMENDATION 23

The Committee recommends guidance on confidentiality and privacy be included in the proposed manual providing comprehensive guidance on the conduct of military inquiries under D(IR).

RESPONSE

Supported

Guidance on confidentiality and privacy has been drafted for inclusion in the new *Administrative Inquiries Manual* consequent upon the ADF's agreement to do so in response to a recommendation contained in the Defence Force Ombudsman's 'Own Motion' Report of January 1998.

The Joint Standing Committee's recommendation is being implemented.

RECOMMENDATION 24

The Committee recommends that the next of kin, or other immediate relatives, of an ADF member whose death is the subject of an inquiry, should always be permitted to attend that inquiry regardless of whether the inquiry is conducted in private or is open to the public. Exclusion of these next of kin or other immediate relatives from the inquiry should only be on a temporary basis, from those sections of the inquiry dealing with matters of national security.

RESPONSE

Supported

The Defence Supplementary Submission to the Joint Standing Committee's inquiry stated that the ADF had a special responsibility to the next of kin of its members who are killed in duty related accidents, particularly in peacetime. The Supplementary Submission stated that the ADF should ensure that the next of kin can attend Boards of Inquiry that might be closed to the public. The Submission noted that this change in policy could be achieved immediately by strengthening the guidance relating to the conduct of inquiries. As a consequence of the Supplementary Submission policy guidelines were drafted for inclusion in the new *Administrative Inquiries Manual*.

The Joint Standing Committee's recommendation is being implemented.

RECOMMENDATION 25

The Committee recommends that next of kin or other immediate relatives of personnel killed in military incidents should, within the provisions of the *Privacy Act* and relevant security considerations, be provided with a copy of the inquiry report and advice on all actions taken as a result of the inquiry. Where a recommendation from the inquiry report is not implemented, next of kin should be provided with the reasons underpinning the decision not to adopt that recommendation.

RESPONSE

Supported

The Government has agreed that the next of kin of deceased members be permitted to attend the Board of Inquiry whether the proceedings are open or closed to the public within the limitations imposed by privacy and security considerations.

However, release of the inquiry report either in whole or in part is at the discretion of the Minister in accordance with Defence (Inquiry) Regulation 63. Where the Minister authorises release of the report then it will be available to the next of kin.

Where release of the report has not been authorised by the Minister, the next of kin will be advised of the general outcome of the inquiry. Once the Appointing Authority has decided which recommendations relevant to the death of particular personnel are to be implemented and which are not, this will be communicated to the relevant next of kin in accordance with Defence (Inquiry) Regulations. The reasons for not implementing any recommendations will also be advised.

The Government believes that the implementation of this recommendation will make the entire inquiry process more transparent to next of kin and will assist them to fully understand the circumstances surrounding the death and the action taken by the ADF to prevent a recurrence of the accident.

RECOMMENDATION 26

The Committee recommends that next of kin or other immediate relatives of personnel killed in military incidents should be warned prior to the release of information to the press regarding the inquiry.

RESPONSE

Supported

During his appearance before the Joint Standing Committee, the Chief of the Defence Force stated that communication with relatives of members killed in military accidents was something the ADF resolved to do better. The implementation of this recommendation is part of that undertaking.

Accordingly, whenever practicable, the next of kin of deceased members will be advised before information is released to the media.

RECOMMENDATION 27

The Committee recommends that the Australian Government ensure that legislation provides a right to Service legal representation, at Commonwealth expense, for any member of the ADF who is likely to be affected by a BOI.

RESPONSE

Supported

Defence (Inquiry) Regulation 33 sub-sections (1), (2) and (3) provide that a person deemed to be likely to be affected by an inquiry may appoint a legal practitioner to represent them subject to the approval of the President of the Board or the Appointing Authority, as applicable. In practice, when a member is deemed by the Appointing Authority or the President, as appropriate, to be likely to be affected by a Board of Inquiry, a service legal officer will be appointed to represent them at Commonwealth expense. Alternatively, the affected person may be given approval to appoint a civilian legal practitioner at their own expense.

The Joint Standing Committee's recommendation will formalise and make mandatory what is presently usual practice.

Defence (Inquiry) Regulation 33 will be amended to reflect the recommendation.

RECOMMENDATION 28

The Committee recommends that where a deceased member of the ADF is likely to be affected by an inquiry, the next of kin or other immediate relatives should be afforded the option to have the interests of the deceased member represented, at Commonwealth expense, by Service legal counsel.

RESPONSE

Supported

In its report the Joint Standing Committee noted that where a deceased member is likely to be affected by an inquiry, a legal practitioner should be appointed by the Appointing Authority to represent the deceased member for the purposes of the inquiry. Furthermore, the Committee stated that the next of kin of a deceased member, who is likely to be affected by an inquiry, should have the alternative option to be represented, at their own expense, by a private legal practitioner.

The Government considers that where a deceased member is deemed to be likely to be affected by an inquiry, the same rights to legal representation should be afforded to that deceased member as would be afforded to any other member of the ADF.

Implementation of Recommendation 27 will provide that a member who is deemed to be affected by an inquiry will have a right to be represented by a service legal officer at Commonwealth expense. This same right will be afforded to a deceased member who is deemed to be affected by an inquiry.

Furthermore, the next of kin of a deceased member, who is deemed to be likely to be affected by an inquiry, may, if they wish, at their own expense, engage a civilian legal practitioner to represent the deceased member.

RECOMMENDATION 29

The Committee recommends that the appointment of a Counsel Assisting to a BOI should be strongly recommended in guidance to Appointing Authorities.

RESPONSE

Supported

Defence (Inquiry) Regulation 51 provides that an Appointing Authority may appoint a legal practitioner to assist a Board of Inquiry.

The Government agrees that the appointment of Counsel Assisting a Board of Inquiry would be advantageous and appropriate to most Boards but would be essential in the more complex inquiries.

The role of Counsel Assisting will be to identify relevant issues, determine appropriate witnesses and facilitate the leading of evidence so that Board members may concentrate on considering and weighing the evidence presented. Moreover, Counsel Assisting will be able to advise the Board on matters of law, procedure and precedence especially when such issues are put to the Board by legal representatives who appear before it.

This recommendation will be implemented by inclusion of appropriate guidance in the new *Administrative Inquiries Manual*.

RECOMMENDATION 30

The Committee recommends that the ADF establish processes to ensure that counselling services are available, if required, to witnesses to a military inquiry and to next of kin and close relatives of ADF members killed in the incident that is the subject of the inquiry.

RESPONSE

Supported

During his appearance before the Joint Standing Committee, the Chief of the Defence Force advised that communicating with relatives and providing them with appropriate support are key areas where the ADF is resolved to do better. He stated that follow-up support, already frequently provided through the good offices of Commanding Officers and supporting agencies, will be mandated.

Relevant guidance will be drafted for inclusion in the new *Administrative Inquiries Manual*. That guidance will require that, where necessary, counselling and other support services that are reasonably related to the accident and to the subsequent inquiry, are to be provided to witnesses and to next of kin of deceased members at Commonwealth expense.

RECOMMENDATION 31

The Committee recommends that all correspondence between the Appointing Authority and the investigating body should be in writing and should be disclosed to all legal representatives.

RESPONSE

Supported

The Government agrees that, as recommended by the Defence Force Ombudsman in the Own Motion Report of January 1998, an Appointing Authority/Officer should monitor the progress of an administrative inquiry without exerting undue influence with respect to the conduct of the inquiry, including selection of witnesses, interpretation of evidence or the determination of findings and recommendations. The independence and impartiality of the investigating body must be maintained.

All communication relevant to the inquiry between the Appointing Authority/Officer and the inquiry body should be in writing so that the process remains as transparent as possible.

In the case of Boards of Inquiry, written communications between the Appointing Authority and the President of the Board should be disclosed, subject to the limitations of secrecy, to all legal representatives appearing before the Board on behalf of affected persons.

Appropriate guidance will be included in the new *Administrative Inquiries Manual*.

RECOMMENDATION 32

The Committee recommends that the ADF should issue guidance to Appointing Authorities regarding their duties in monitoring a military inquiry.

RESPONSE

Supported

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 contained the observation that appropriate processes were needed for the supervision and monitoring of inquiries under the Defence (Inquiry) Regulations. The report noted that a regular reporting arrangement, particularly to cover process questions, would help to ensure that investigations were being conducted properly.

Following the Ombudsman's Report, appropriate guidance on monitoring inquiries was drafted for inclusion in the new *Administrative Inquiries Manual*.

The guidance includes written reporting by the inquiry body to the Appointing Authority/Officer in a set format and at regular, predetermined intervals.

RECOMMENDATION 33

The Committee recommends that, to protect the independence of the process, guidance should be provided to Appointing Authorities warning against any direct involvement with the conduct of the inquiry.

RESPONSE

Supported

The Defence Force Ombudsman noted in the "Own Motion" Report of January 1998 that structured supervision and monitoring arrangements of inquiry bodies do not amount to command influence.

The direct involvement with the conduct of the inquiry referred to in the recommendation is taken to mean that after the Terms of Reference have been issued there is no direction or suggestion by the Appointing Authority/Officer or other commander with respect to such matters as selection of witnesses, questioning of witnesses, evaluation of the evidence, or determination of findings or recommendations.

Relevant detailed guidance will be drafted for inclusion in the new *Administrative Inquiries Manual*.

RECOMMENDATION 34

The Committee recommends that, within the limitations of privacy and secrecy, and at the conclusion of all resultant disciplinary and administrative action, the ADF publicly account for its actions and decisions in discharging the recommendations of a BOI.

RESPONSE

Supported in part

Defence (Inquiry) Regulations 63 (3) provides that the Minister may authorise the disclosure to particular persons, or authorise the public release of either all or part of the report of a Board of Inquiry.

The public disclosure of the decisions made and the actions taken with respect to the recommendations of a Board of Inquiry would provide transparency to the entire inquiry process.

However, there will be Boards of Inquiry that, because of their subject, properly are not of public importance or may not create public or media interest. Some Boards of Inquiry into personnel matters may fall into this category. Moreover, where there are good reasons why a Board of Inquiry is held in private there may also be good and justifiable reasons why details of the decisions taken with respect to the recommendations ought not be made public.

Consequently, it would not be appropriate that the ADF be required to publicly account for its actions and decisions in discharging the recommendations of every Board of Inquiry. However, where there is no valid reason not to do so and where the Minister agrees, public disclosure will be made.

RECOMMENDATION 35

The Committee recommends that, following the conduct of a General Court of Inquiry, within the limitations of privacy and secrecy, and at the conclusion of all resultant disciplinary and administrative action, the Minister of Defence should table in Parliament:

- a) **the inquiry report;**
- b) **the recommendations of the investigating body;**
- c) **details of action taken to adopt those recommendations; and**
- d) **where a recommendation is rejected, the reasons for that action.**

RESPONSE

Supported in principle

Defence (Inquiry) Regulation 11 (1) provides that a General Court of Inquiry shall be conducted in public, however, Sub-regulation (2) provides that the President of a General Court of Inquiry, if satisfied that it is necessary to do so in the interests of the defence of the Commonwealth or of fairness to a person who the President considers may be affected by the inquiry, may order that all or part of the inquiry may be conducted in private.

Defence (Inquiry) Regulation 20 (1) requires that a report of a General Court of Inquiry shall be furnished to the Minister. In addition, Defence (Inquiry) Regulation 63 (3) provides that the Minister may make available to the public generally all or part of the report of a General Court of Inquiry.

The Joint Standing Committee's recommendation provides for exceptions to the tabling in Parliament of relevant information with respect to a General Court of Inquiry for reasons of privacy and secrecy. The Government agrees that, subject to the stated limitations of privacy and secrecy which should remain at the discretion of the Minister, the report of a General Court of Inquiry, including the recommendations, together with details of action taken to adopt the recommendations and where applicable reasons for rejecting any recommendation, be tabled in Parliament.

In order to implement this recommendation, the Defence (Inquiry) Regulations will be amended to provide that the Minister table the relevant documents in Parliament, subject to the discretion of the Minister not to do for reasons of privacy and secrecy.

RECOMMENDATION 36

The Committee recommends that informal investigations should be more appropriately referred to as preliminary inquiries.

RESPONSE

Supported in principle

Commanding Officers have always conducted inquiries under their own authority in response to a given situation or incident which falls within their scope of responsibility. The authority to do so is inherent in the exercise of command. These inquiries do not fall within the provisions of the Defence (Inquiry) Regulations and have sometimes been referred to as *informal* or *initial* inquiries. No policy, procedures or guidelines concerning their conduct were issued.

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 recommended that all reference to *informal* investigations be removed and that Defence Instructions provide clear guidance on the purpose and extent of the use and the accountability requirements for these inquiries. The Ombudsman considered the term *informal* to be a misnomer and suggested that it be replaced with the term *preliminary*.

In response to the Ombudsman's recommendation, the ADF agreed to cease use of the term *informal inquiry*. However, the term *preliminary inquiry*, as suggested by the Ombudsman, was not preferred.

The term *informal investigations* used in the Committee's recommendation is taken to mean all administrative inquiries that are not conducted under the provisions of the Defence (Inquiry) Regulations. There are two types of inquiry.

One involves a quick assessment of a particular situation with the purpose of identifying what further action, including the selection of the most appropriate form of formal inquiry or investigation, if necessary, is appropriate. This type of inquiry is referred to as the *Quick Assessment*.

The second type of inquiry involves an inquiry by a Commander into a minor matter or a matter of less seriousness than would justify a formal inquiry under the Defence (Inquiry) Regulations. This inquiry is sufficient to resolve the matter without any further inquiry. This type of administrative inquiry is referred to as a *Routine Inquiry*.

The terms used in the draft *Administrative Inquiries Manual* for informal inquiries as referred to in this recommendation are *Quick Assessment* and *Routine Inquiry*.

RECOMMENDATION 37

The Committee recommends that the ADF should issue guidance for the conduct of preliminary inquiries to be used to assist in determining the best course of action for dealing with an incident.

RESPONSE

Supported

The Preliminary Inquiry, to be called Quick Assessment (see response to Recommendation 36), is used by Commanders to determine the best course of action for dealing with an incident or accident.

This process does not fall within the provisions of the Defence (Inquiry) Regulations. The Defence Force Ombudsman noted in the 'Own Motion' Report of January 1998 that there is little guidance or adequate documentation or accountability requirements for this type of inquiry.

Following the Ombudsman's Report, detailed guidance covering the procedures and documentation applicable to the *Quick Assessment* were drafted for inclusion in the new *Administrative Inquiries Manual*.

RECOMMENDATION 38

The Committee recommends that the ADF should issue guidance to ensure that the requirements for procedural fairness are satisfied in the conduct of preliminary inquiries.

RESPONSE

Supported

The Government agrees that the requirements of procedural fairness and natural justice must be observed in the conduct of all types of administrative inquiries in the Australian Defence Force including those conducted under the Defence (Inquiry) Regulations and those that are not.

To implement this recommendation detailed guidance on this matter will be drafted and included in the new *Administrative Inquiries Manual*.

RECOMMENDATION 39

The Committee agreed that the ADF should include detailed guidance on the issue of secret investigations under the D(I)R in the proposed manual providing comprehensive guidance on the conduct of military inquiries under D(I)R.

RESPONSE

Supported

The Joint Standing Committee's reference to secret investigations under the Defence (Inquiry) Regulations refers to any administrative inquiry that is conducted without the knowledge of a person who may be deemed to be an affected person if the inquiry was a General Court of Inquiry or a Board of Inquiry. The reference also refers to an administrative inquiry by an Investigating Officer into any allegation, accusation or complaint made against a person.

Implementation of the Joint Standing Committee's Recommendation 18 will ensure that secret inquiries will not be conducted except as noted by the Committee in that recommendation.

The inclusion of detailed guidance in the new *Administrative Inquiries Manual* on this issue in response to Recommendation 18 will also implement this recommendation.

RECOMMENDATION 40

The Committee recommends that:

- a) **guidelines should be established to ensure that members making knowingly false, malicious or vexatious accusations against other members are held accountable and that suitable action is taken against them;**
- b) **members making accusations should be made aware of guidelines regarding the accountability of members making knowingly false, malicious or vexatious accusations;**
- c) **action taken against members making knowingly false, malicious or vexatious accusations should be taken as transparently as possible, to ensure that justice is seen to be done; and**
- d) **where an accusation is found to be false, malicious or vexatious, action should be taken, as transparently as possible, to put right any detriment to the member who was falsely accused.**

RESPONSE

Supported

Defence (Inquiry) Regulation 56 provides that a person shall not give false evidence before a General Court of Inquiry, a Board of Inquiry or an Investigating Officer and prescribes penalties for doing so.

A serious difficulty arises in determining whether a particular accusation or allegation is false, malicious or vexatious. Even in cases where it might be suspected that an allegation may have been made for revenge or to deflect action from the accuser, it is often extremely difficult to determine that an accusation or allegations were malicious or vexatious. Sometimes, even when allegations are subsequently proved to be without substance, there may have been something to investigate and at least some evidence gathered. Some cases are extremely difficult to resolve, being a matter of one person's word against another's. In cases of personal disagreements between members, accusations may be made by both members and a clear resolution of the matter is not possible.

When allegations are proven to be without substance it may still be a difficult matter to prove that the allegation was malicious or vexatious. Often, it is sufficient that a member has been proven to have no case to answer. This may be sufficient vindication of their innocence.

Nevertheless, in cases where there is no doubt that an accusation or allegation is false, malicious or vexatious, disciplinary or administrative action against the perpetrator is warranted.

Commanders have a responsibility to ensure that no member is placed in a position of disadvantage in any way whatsoever as a result of a false, malicious or vexatious complaint, accusation or allegation.

The Joint Standing Committee's recommendation is agreed and will be implemented by the drafting of guidance on the issue to be included in the new *Administrative Inquiries Manual*.

RECOMMENDATION 41

The Committee recommends that the ADF ensure that an adequate level of training is provided to officers required to conduct an investigation under D(I)R.

RESPONSE

Supported

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 contained the recommendation that the Australian Defence Force should develop a training strategy for officers who conduct investigations under the Defence (Inquiry) Regulations.

Following the Ombudsman's recommendation the Australian Defence Force initiated the development of a training strategy for officers who will be involved in administrative inquiries. This strategy will be included in the *ADF Training Management Package*. The package will include general awareness training for relevant personnel, a training module for Investigating Officers and a training module for Appointing Officers and Appointing Authorities.

RECOMMENDATION 42

The Committee recommends that the ADF provide comprehensive guidance to Investigating Officers regarding the conduct of investigations under D(I)R.

RESPONSE

Supported

The Defence Force Ombudsman's 'Own Motion' Report of January 1998 recommended that guidance on investigations under the Defence (Inquiry) Regulations should be revised to provide advice to Commanding Officers and Investigating Officers on how to plan and conduct investigations.

In response to the Ombudsman's recommendation, the Australian Defence Force drafted a chapter entitled *Investigating Officer Inquiries* for inclusion in the new *Administrative Inquiries Manual*. This chapter contains detailed and comprehensive direction, guidance and advice on Investigating Officer Inquiries as well as the appropriate policy and procedures to be followed by all personnel who may be involved in this type of administrative inquiry.

RECOMMENDATION 43

The Committee recommends that the ADF provide clear guidance to Appointing Authorities regarding the level of training or experience required of officers selected to conduct investigations under D(I)R.

RESPONSE

Supported

Specific advice regarding the level and type of training and experience required for officers selected to conduct inquiries under the Defence (Inquiry) Regulations will be included in the new *Administrative Inquiries Manual*.

Details to be included in the Manual will be identified when the current study into the development of a training strategy for officers involved in administrative inquiries has been completed.

RECOMMENDATION 44

The Committee recommended that the ADF examine the feasibility of capturing the cost of the military justice system.

RESPONSE

Supported in part

The Joint Standing Committee has used the term *military justice system* to mean the operation of the DFDA, the military administrative inquiries system and the administrative action procedures.

The administrative action system is operated by Service personnel whose normal duty includes the administration of personnel management and by other personnel who undertake relevant tasks in addition to their normal duties. In both cases, the operation of the administrative action system is inherent in normal Service duty and does not involve additional financial expenditure. Consequently, capturing the cost of the administrative action system is not appropriate.

At present the cost of the operation of the administrative inquiry system is not captured. Some inquiries such as simple and short duration Investigating Officer inquiries are conducted entirely by Service personnel using existing Service resources. Consequently, attempts to capture the costs of these would not be productive.

On the other hand, complex and reasonably lengthy Boards of Inquiry may require the allocation of considerable additional Defence resources. These costs may include travel and accommodation costs for the Board and for witnesses, payments for Reserve legal officers, costs for court recording, costs of office requisites, costs of establishing and maintaining a hearing room, etc. Different Defence authorities may be responsible for the provision of funding for various aspects of the inquiry. Capturing of the total costs of these inquiries is, at present, undertaken only when there is a particular need to do so.

The funding of trials under the DFDA follows a similar pattern as inquiries ranging from summary trials where no additional costs are usually involved to Defence Force Magistrate trials to Courts Martial where considerable additional funding may be involved.

The Government agrees that the capturing of the costs of the operation of the administrative inquiry system and the operation of the discipline system would provide valuable management information. Accordingly, an examination of the feasibility of capturing these costs on an ongoing basis will be undertaken.

RECOMMENDATION 45

The Committee recommended that the ADF provide a single annual report on the operation of the military justice system to the Minister of Defence and that the Minister table the report in the Parliament. The report should address the operation of the DFDA, the military inquiry system and the administrative action system.

RESPONSE

Supported in part

Defence Force Discipline Act. The DFDA Section 196A requires the Judge Advocate General to report annually to the Minister on the operation of the Defence Force Discipline Act. The operation of the Defence Force Discipline Act and the role of the Judge Advocate General are distinct from the conduct of military administrative inquiries and administrative action in that they are all governed by different legislation. The Judge Advocate General is a statutory, judicial officer appointed under the Defence Force Discipline Act and is independent of the Australian Defence Force. Implementation of the recommendation would require an amendment to the DFDA to remove the reporting responsibility of the Judge Advocate General and place it upon the ADF. This would be counter-productive to the intent of the Committee's recommendation and to the provision of the current independent reporting on the operation of the DFDA currently required by the Act.

Quick Assessments and Routine Inquiries. Quick Assessments and Routine Inquiries are conducted by commanders under their own authority and not under the provisions of the Defence Inquiry Regulations. The purpose of the Quick Assessment is to determine what action, including what particular form of inquiry or investigation, is appropriate in the circumstances. Routine Inquiries are conducted into minor and less serious matters which can be resolved without the appointment of a formal process of inquiry under the Defence (Inquiry) Regulations or a formal investigation under the Defence Force Discipline Act. Both these forms of inquiry constitute part of the day to day activities of commanders and consequently a public accounting of these activities is not practicable.

Defence (Inquiry) Regulations. There is no provision within the Defence (Inquiry) Regulations that requires reporting on the operation of the Regulations to the Minister and to Parliament. Given that the Regulations provide for a formal process in which the Australian Defence Force conducts internal inquiries into a wide range of matters, including quite serious matters of strong public interest, affecting the command and administration of the Defence Force, the Government agrees that a public accounting for the operation of the Defence (Inquiry) Regulations is appropriate. Accordingly, the Regulations will be amended to incorporate a requirement for the Australian Defence Force to report annually to the Minister on the operation of the Regulations and the Minister in turn to table the report in Parliament.

Administrative Action. Administrative action across the Services is not consistent and this would make reporting of statistics meaningless and unproductive. The Joint Standing Committee's Recommendations 54, 55, 56 and 57 recommended changes to the present policy and procedures for the application of administrative action within the Australian Defence Force. Should these recommendations be accepted and implemented then some comparable and useful statistical reporting may be possible. However, because the administrative action system covers a wide and comprehensive range of matters including reversion in rank, reduction in rank, formal warning, censure, involuntary discharge and termination of service, much of this activity constitutes routine personnel management which ought not be reported to Parliament. Moreover, although referred to as a 'system' by the Committee, it consists of a number of related and unrelated policies and procedures most of which have their basis in a range of legislative documents. Little would be gained in terms of the public accountability of the Australian Defence Force for a report on the administrative action system to be reported to the Minister and subsequently to Parliament.

RECOMMENDATION 46

The Committee recommends that, after the proposed post-Abadee arrangements have been in operation for three years, the issue of institutional independence in relation to prosecution in Courts Martial and DFM trials be reviewed.

RESPONSE

Supported

The Abadee Report on independence and impartiality in the operation of the Defence Force Discipline Act contained 48 recommendations of which 39 were accepted and one partially accepted by the Australian Defence Force. These agreed recommendations are currently being implemented and some are already in operation.

The Australian Defence Force was of the view that the recommendations that were agreed would significantly improve institutional independence with respect to prosecution in Courts Martial and Defence Force Magistrate trials without creating the position of an independent Director of Military Prosecutions. The Australian Defence Force held serious reservations about the practicality and need for such an appointment under present circumstances.

The Government agrees that a period of three years is a reasonable time in which to reassess these issues. Accordingly, the issue of institutional independence in relation to prosecution in Courts Martial and Defence Force Magistrate trials will be reviewed after the Abadee recommendations have been in place for a period of three years.

RECOMMENDATION 47

The Committee recommends that consideration should be given to reviewing current arrangements to allow the ADF to deal with all cases involving straightforward acts of indecency without requiring the consent of the Director of Public Prosecutions.

RESPONSE

Supported

This issue was the subject of a recommendation following the review of the Australian Defence Force Academy.

As a consequence, this recommendation of the Joint Standing Committee has already been implemented. Relevant documentation and instructions have been amended and are now in force.

Ministerial approval has been obtained for the Australian Defence Force to assert jurisdiction with respect to minor acts of indecency. Jurisdiction had always existed, however, the previous situation whereby the Australian Defence Force did not exercise jurisdiction was a policy response to the Senate Standing Committee inquiry into sexual harassment in the Australian Defence Force (the Swan Inquiry). The Commonwealth Director of Public Prosecutions was consulted on this matter and did not oppose the change in policy.

RECOMMENDATION 48

The Committee recommends that the ADF ensure that existing guidelines on the right of privacy are adhered to in the conduct of DFDA action.

RESPONSE

Supported

This recommendation reflects current practice and is accommodated by existing policy and procedures. Guidelines on the issue of the right to privacy and the need for confidentiality are adequately detailed in the relevant documentation.

Nevertheless, in response to the Joint Standing Committee's recommendation, action will be taken to reinforce the guidelines to appropriate personnel through initial and ongoing training and education.

RECOMMENDATION 49

The Committee recommends that the ADF undertake a formal training needs

analysis with respect to the use and implementation of the DFDA as a basis for the development and introduction of appropriate education and training courses.

RESPONSE

Supported

Five of the recommendations of the Abadee Report proposed that a training needs analysis be undertaken to determine and introduce appropriate training and education for personnel involved in the operation of the Defence Force Discipline Act in various capacities. That training needs analysis has been undertaken and education and training courses are being developed.

Accordingly, this recommendation of the Joint Standing Committee is currently being implemented.

RECOMMENDATION 50

The Committee recommends that the ADF consider the introduction of structured continuation training for Defence Force Magistrates and Judge Advocates on the DFDA.

RESPONSE

Supported

This recommendation will be referred to the Judge Advocate General for implementation.

RECOMMENDATION 51

The Committee recommends that, as part of a comprehensive public disclosure of the matter of AAT, the Meecham report, a comprehensive report on the matter of AAT and any relevant documents relating to AAT should be tabled in Parliament.

RESPONSE

Supported

The Australian Defence Force has agreed to the tabling in Parliament of the Meecham Reports and the two Long Reports subject to the removal of personal details from the reports.

RECOMMENDATION 52

The Committee recommends that the report on the operation of the DFDA should be tabled in a more timely manner.

RESPONSE

Supported in principle

The Defence Force Discipline Act Section 196A requires that the Judge Advocate General report to the Minister on the operation of the Defence Force Discipline Act be tabled as soon as practicable after 31 December each year. The Acts Interpretation Act 1901 provides that where a period for the furnishing of a report is not specified then the report is to be submitted to the Minister within six months of the due date. In the case of the Defence Force Discipline Act report that means by 1 July each year.

In its report the Joint Standing Committee noted that as at 24 May 1999, the Judge Advocate General's report for 1998 had not been tabled in the Parliament by the Minister. In fact, the report was forwarded to the Minister on 18 June 1999.

The *Acts Interpretation Act* provisions were not referred to in the report of the Joint Standing Committee. It may be that they were overlooked. No request for information was made by the Joint Standing Committee to the Judge Advocate General in relation to this issue.

The principal difficulty in providing a more timely report arises from the necessity to obtain and collate the statistics for the tables which are a central part of the report. In recent years the Judge Advocate General has expressed concern about the limited information provided by way of statistics and in the last report the tables have been reorganised to provide more useful information. This has involved the Judge Advocate General's staff officer in a considerable amount of work to ensure that the relevant information is forthcoming from the three Services. Delays have been experienced in obtaining the information and the complete statistics for the last report were not finalised until approximately four months after 31 December 1998.

Now that those responsible for providing the information have become familiar with the new system and the additional information required, it is to be hoped that future reports will be made available for tabling at an earlier time. However, it should be pointed out that the collection of the necessary data for the statistics seems to have proved a difficult task for a number of years. A survey of Judge Advocate General reports going back to 1989 indicates that the reports have taken approximately six months to prepare.

RECOMMENDATION 53

The Committee recommends that where professional failure involves negligence of a criminal nature, subject to the weight and probity of evidence being sufficient, criminal proceedings should be initiated.

RESPONSE

Supported in principle

The Australian Defence Force view is that a determination of the appropriate course of action to be taken in dealing with a matter of professional failure is a command decision, to be taken after consideration of all available information including legal advice. However, a difficulty occurs in determining exactly what constitutes professional failure involving negligence of a criminal nature.

Where a State or Territory Coroner finds that professional failure has occurred which constitutes negligence of a criminal nature, the Coroner would refer the matter to the relevant Director of Public Prosecutions for further investigation and decision as to whether criminal charges ought be laid.

An Appointing Authority may refer a matter for further investigation under the Defence Force Discipline Act or may refer the matter to civil police or the Director of Public Prosecutions following consideration of a Board of Inquiry recommendation that such action should be considered.

In general, current practice within the Australian Defence Force is that where there exists sufficient evidence to suggest that professional failure involves negligence of a criminal nature, then criminal proceedings would be initiated. In addition, where the evidence supports such action, proceedings under the Defence Force Discipline Act may be initiated.

RECOMMENDATION 54

The Committee recommends that the ADF prepare and issue guidelines regarding the use of the administrative action rather than the disciplinary process for cases of professional failure.

RESPONSE

Supported

In his 1995 Annual Report, the Judge Advocate General recommended that trial by Court Martial with its overtones of criminality is not the most appropriate method of dealing with cases of professional failure.

In November 1997, the Chiefs of Staff Committee decided that cases of professional failure should be dealt with by the use of administrative action rather than by action under the Defence Force Discipline Act.

Currently, there exists no policy or procedural guidelines on this matter.

Appropriate guidelines concerning the use of administrative action rather than the disciplinary process in cases of professional failure not amounting to criminal negligence will be developed and published as a Defence Instruction.

RECOMMENDATION 55

The Committee recommends that the ADF review current procedural arrangements to ensure organisational separation between the initiating officer and the decision maker for all administrative action involving the termination of a member's service with the ADF.

RESPONSE

Supported

The legislation which provides the policy and procedures for termination of an officer's appointment lies in the *Defence Act 1903*, the *Naval Defence Act 1910* and *Air Force Regulations*. These form the basis for DI(G) PERS 03-3 *Policy on the Retirement and Termination of Appointment of Australian Defence Force Officers*. The legislation lists a number of appointments with power to initiate termination procedures and power to terminate the appointments of officers of certain ranks. The power to initiate a termination and the power to terminate the appointment of an officer are both vested in the same appointment. These powers are vested in a relevant authority by the legislation.

The initiating process involves the issuing of a termination notice which includes: advice to the officer that termination of his/her appointment is proposed, a statement of the grounds on which termination is proposed, and an invitation to the officer to provide a statement (show cause) of why termination of appointment should not proceed. The decision-making process involves consideration of the officer's statement and a final decision as to whether termination of appointment is to be effected.

It could be argued that when the relevant authority specified by the legislation, as initiator of the termination process, issues a termination notice, a decision has already been taken to terminate, notwithstanding that the officer's statement has not yet been considered. In addition, it could be argued that in so doing the officer's show cause statement will not receive an impartial consideration as the mind of the initiator/decision-maker will already be made up on the matter. Consequently, the lack of organisational separation of the initiator and decision-maker would appear to make the final decision unfair.

On the other hand, under current practice, the relevant authority rarely, if ever, is the actual initiator of termination action. Almost invariably the relevant authority will decide to issue the Termination Notice on the detailed and considered advice of a senior staff officer who in turn was probably acting on the recommendation of a unit or other commander. Thus, it could be argued that although the relevant authority is the 'technical' (in accordance with the words of the legislation) initiator, he or she is not so in practice.

Should the Committee's recommendation be supported, other appointments within each Service will need to be identified as initiating authorities and the *Defence Act*, the *Naval Defence Act*, *Air Force Regulations* and *DI(G) PERS 03-3* will all need to be amended. The effect of the amendment in separating the functions of initiator and decision maker will technically and legally separate those functions which, in practice, are effectively separated already.

Under present legislation, the decision-maker is a very senior appointment in each Service and exercises powers under the legislation with the benefit of considerable specialist advice, including legal advice. As acknowledged by the Joint Standing Committee, there is a comprehensive process of review of a decision to terminate available to the officer if he/she chooses to pursue that course. Where the officer chooses to pursue review through the redress of grievance system, the decision to terminate cannot be implemented until the review process is finalised.

In its report, the Committee acknowledged that it had received no compelling evidence that to suggest that an individual's service had been wrongfully terminated. However, the Committee noted that current arrangement for the termination of the service of other rank members provides for a separation of the roles of initiator and decision-maker.

Accordingly, the Government agrees that there should be a separation of the roles of initiator and decision-maker for action involving the termination of an officer's service and that action be taken to amend the *Defence Act*, the *Naval Defence Act*, *Air Force Regulations* and *DI(G) PERS 03-3*.

RECOMMENDATION 56

The Committee recommends that the ADF consider the implementation of a revised framework for administrative censure and formal warning that:

- a) **makes the process applicable to all members of the ADF; and**
- b) **incorporates a separation between the roles of initiating officer and decision maker.**

RESPONSE

Supported

Currently, the three Services have different policy and procedures for administrative censure and formal warning. While there may be clear advantages in developing an ADF wide policy applicable to all members of the Australian Defence Force, the individual needs of each Service may not be met by a single policy and set of procedures.

In general, the existing policy on administrative censure and formal warning would appear to meet the requirements of procedural fairness. However, the Joint Standing Committee's recommendation that there be a separation of the roles of initiating officer and decision-maker goes to the issue of impartiality. The question of a potential conflict of interest arises where the initiating officer and decision-maker are the same officer.

Incorporation of the separation of roles would require significant changes to the present policy and procedures applicable to Commanding Officer's loggings in Navy, administrative censure in Army, and unit formal warnings in Air Force. Moreover, incorporation of a separation of roles would take these administrative action procedures outside the authority of a commander since he or she would no longer be the decision-maker. Alternatively, an initiating officer or officers below the level of commanding officer could be identified. However, the importance of the administrative action system at unit level as a mechanism of command would be reduced in effectiveness if the commander's role as sole decision-maker and ultimate authority in this important administrative process is removed.

The separation of roles within the censure and formal warning process would introduce a review mechanism within the process itself. However, a comprehensive system of review already exists in the redress of grievance provisions and option to refer a matter to the Defence Force Ombudsman. This offers adequate protection to a member against misuse of the administrative action system.

There may be advantages in developing a policy on administrative censure and formal warnings that is applicable to all members of the Australian Defence Force, and this aspect will be examined by the Australian Defence Force to evaluate its feasibility.

The Government agrees that the Australian Defence Force should consider the changes to the present single Service policies recommended by the Joint Standing Committee. Implementation of the recommendation will be undertaken by the Australian Defence Force conducting a review of present policies to determine whether a single policy governing censure and formal warning, incorporating a separation of roles, is appropriate and would improve the present arrangements.

RECOMMENDATION 57

The Committee recommends that the ADF prepare and issue revised policy for the imposition of administrative censure and formal warning.

RESPONSE

Supported subject to the outcomes of implementation of Recommendation 56

In response to the Joint Standing Committee's Recommendation 56, the Government has agreed that the Australian Defence Force examine existing policy and procedures with respect to administrative censure and formal warning.

Should that examination identify improvements to the current arrangements then a revised policy will be prepared and issued.

RECOMMENDATION 58

The Committee recommends that where a member affected by administrative censure makes a statement in extenuation/rebuttal, that statement should form part of the censure document and be taken into account during deliberations when the censure is considered.

RESPONSE

Supported

Procedural fairness and natural justice require that a person be advised of any accusation, complaint or allegation made against them, that they be advised of any action to be taken against them and that they have an opportunity to respond to the accusation, complaint or allegation, and to state why the proposed action should not proceed.

It follows that any statement made in response to an accusation, allegation or complaint must be considered by the decision-maker prior to making the decision. Therefore, the statement should become part of the documentation relevant to the censure process.

RECOMMENDATION 59

The Committee recommends the ADF incorporate specific guidance in the revised policy covering administrative censure and formal warning which requires that an individual affected by a censure or formal warning to be advised of his or her rights of appeal.

RESPONSE

Supported

The Government agrees that members who become subject to administrative action in the form of administrative censure or formal warning should be advised of their rights of review and appeal.

This issue will be included in the examination of present policy and procedures and will be included in any revised policy prepared and issued in response to the Joint Standing Committee's Recommendations 56 and 57.

**INQUIRY INTO THE SYSTEM OF
MILITARY JUSTICE PROCEDURES
IN THE AUSTRALIAN DEFENCE FORCE**

ISSUES PAPER

Background to the Inquiry

In the last two years, some investigations and inquiries conducted into disciplinary matters within the Australian Defence Force (ADF) have attracted considerable media attention and public interest.

Prominent among these was the Board of Inquiry established to examine the circumstances surrounding the collision in June 1996 of two Black Hawk helicopters near Townsville, and the subsequent disciplinary proceedings recommended by that board.¹ The announcement of a judicial review of the Board of Inquiry's findings, and media speculation on the review's recommendations to the Chief of the Defence Force (CDF), have maintained public focus on the procedures adopted for conducting military investigations. It was announced in December that the last of the disciplinary charges against three middle and lower level Army officers had been withdrawn.

A second conspicuous case arose from a RAAF Board of Inquiry appointed in October 1995 to investigate allegations of harassment, inappropriate behaviour and assault at No 92 Wing detachment in Butterworth, Malaysia. Complaints were made to the Defence Force Ombudsman concerning the conduct of this inquiry, and the Minister for Defence decided in July this year that an independent investigator should be appointed to review the Board of Inquiry report.²

In a further case, the Defence Force Ombudsman was asked to investigate and report on the handling of a complaint of sexual assault, raised by two serving members of the ADF. Two internal Air Force inquiries had already been held into the matter, causing concern about the high costs involved. Further, the Federal Court identified a number of serious flaws in the second internal investigation process. A major investigation by the Ombudsman during 1996-97 at the instigation of the CDF raised several issues relevant to the ADF's handling of serious complaints.

After examining this last case and other internal Defence Force investigations, the Ombudsman identified a number of issues requiring remedial action. The majority of these recommendations have been accepted by the CDF, and a tri-service team has been established to assist with implementation of the recommendations.

1. For example, 'QC leads Black Hawk Review', *The Australian*, 30 September 1997, p. 2; and 'Army in turmoil over Black Hawk inquiry', *Canberra Times*, 22 September 1997, p. 1.

² Senator the Hon J Newman, Minister representing the Minister for Defence, Senate Hansard, 22 September 1997, p. 6554.

Concerns were subsequently expressed in Parliament concerning the circumstances under which external reviews of particular military investigations have been considered necessary after commencement of internal ADF proceedings. These concerns culminated in a resolution in the Senate establishing an 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 authorise the Committee to examine the adequacy and appropriateness of the existing legislative framework and procedures for the conduct of military boards of inquiry, military courts of inquiry and ADF disciplinary processes.

Focus of the Inquiry

The prime focus of the Committee's inquiry will be the adequacy and appropriateness of the legislative framework under which the various hearings, inquiries and discipline procedures within the ADF are currently conducted. For example, the Committee notes that the Government intends to amend the *Defence Force Discipline Act 1982* to extend the period within which disciplinary action can be taken following loss of life or major loss of property from three to five years. The jurisdictional overlap between military and civilian courts, in terms of the boundaries between military discipline codes and civilian criminal law, is also an area worthy of the Committee's attention during its inquiry.

Issues already raised by the Ombudsman and the Judge Advocate General (JAG) in annual reports and relevant to the Committee's own inquiry will provide further avenues for examination. Among issues identified by the Ombudsman in the ADF's handling of serious incidents are:

- a tendency to investigate complaints, particularly those regarding harassment and discrimination, whether or not an investigation was the most appropriate response;
- widespread use of 'informal inquiries' with little guidance on the conduct of such inquiries, and few accountability mechanisms in place to protect the parties involved;
- numerous problems with the way terms of reference for inquiries were framed;
- in the past, little or no training or guidance for investigators;
- no procedures for monitoring and quality control of investigations, leading to some investigations 'going off the rails'; and
- principles of procedural fairness were not always adhered to during investigations.³

³

Commonwealth Ombudsman, *Annual Report 1996-97*, p. 239.

In addition to these issues, the Committee will examine recommendations previously made by the JAG, such as the appointment of a Director of Military Prosecutions, establishment of professional tribunals rather than courts martial to consider charges of professional negligence, and formal appeal mechanisms for summary proceedings in peacetime.⁴ The annual report for 1996 by the JAG indicated that the CDF had given Deputy Judge Advocate General Abadee responsibility for reviewing arrangements for the conduct of military trials. The purpose of the review was to determine whether those arrangements satisfy prevailing tests of judicial independence and impartiality, and to recommend any necessary changes. The review examined military justice systems operating in the USA, UK and Canada, as well as the situation in Australia.⁵ The Committee will consider the results of the Abadee review.

The inquiry is not intended as a forum for reviewing the judgements made in individual ADF disciplinary cases, although the circumstances of particular cases may be reviewed where they provide clear evidence of systemic failures in the conduct of ADF judicial procedures.

⁴ Rear Admiral A Rowlands, Judge Advocate General, Australian Defence Force, *Report for the period 1 January to 31 December 1995*, pp. 4-6.

⁵ Major General K P Duggan, Judge Advocate General, Australian Defence Force, *Report for the period 1 January to 31 December 1996*, pp. 4-6.