

The Senate

---

Foreign Affairs, Defence and Trade  
Legislation Committee

---

Defence Legislation Amendment (Military  
Justice Enhancements—Inspector-General  
ADF) Bill 2014

March 2015

© Commonwealth of Australia 2015

ISBN 978-1-76010-165-7

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:  
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

Printed by the Senate Printing Unit, Parliament House, Canberra

# Members of the committee

## Core members

Senator Chris Back, LP, WA (Chair)  
Senator Alex Gallacher, ALP, SA (Deputy Chair)  
Senator Anne McEwen, ALP, SA  
Senator David Fawcett, LP, SA  
Senator James McGrath, LNP, QLD  
Senator Scott Ludlam, AG, WA

## Secretariat

Mr David Sullivan, Committee Secretary  
Mr Owen Griffiths, Principal Research Officer  
Ms Shennia Spillane, Senior Research Officer  
Ms Kimberley Balaga, Research Officer  
Ms Megan Jones, Administrative Officer

Senate Foreign Affairs, Defence and Trade Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Phone: + 61 2 6277 3535  
Fax: + 61 2 6277 5818  
Email: [fadt.sen@aph.gov.au](mailto:fadt.sen@aph.gov.au)  
Internet: [http://www.aph.gov.au/senate\\_fadt](http://www.aph.gov.au/senate_fadt)



# Table of contents

<b>Members of the committee.....</b>	<b>iii</b>
<b>Chapter 1.....</b>	<b>1</b>
<b>Introduction .....</b>	<b>1</b>
Referral of the bill .....	1
Purposes of the bill .....	1
Conduct of inquiry.....	2
Structure of report.....	2
Acknowledgements .....	2
<b>Chapter 2.....</b>	<b>3</b>
<b>Overview of bill.....</b>	<b>3</b>
Provisions of the bill.....	3
<b>Chapter 3.....</b>	<b>9</b>
<b>Issues and committee view .....</b>	<b>9</b>
Background.....	9
Issues raised in submissions .....	9
Committee view.....	16
<b>Appendix 1 .....</b>	<b>19</b>
<b>Public submissions.....</b>	<b>19</b>



# Chapter 1

## Introduction

### Referral of the bill

1.1 On 3 December 2014, the Assistant Minister for Social Services, Senator the Hon Mitch Fifield, on behalf of the Minister for Defence, introduced the Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014 (the bill).<sup>1</sup> On 4 December 2014, on the recommendation of the Selection of Bills Committee, the bill was referred to the Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 3 March 2015.<sup>2</sup>

### Purposes of the bill

1.2 The Inspector-General Australian Defence Force (ADF) was established by the Chief of the Defence Force (CDF) in 2003 to provide a means for internal audit and review of the military justice system independent of the chain of command.<sup>3</sup> The Inspector-General ADF was made a statutory position in 2005.<sup>4</sup> The bill amends the *Defence Act 1903* (Defence Act) to broaden the role of Inspector-General ADF as part of wider reforms to Defence's systems of inquiry, investigation, review and audit.

1.3 The Minister's second reading speech states that the bill:

- makes it clear that the Inspector-General ADF mechanism for internal audit and review of the military justice system is independent of the ordinary chain of command;
- provides that the Minister or the Chief of the Defence Force may utilise the Inspector-General ADF as a mechanism to inquire into or investigate any other matters concerning the ADF;
- places beyond doubt that the privilege against self-incrimination for witnesses is abrogated in relation to inquiries conducted by the Inspector-General ADF and inquiry officers or assistants appointed by the Inspector-General ADF;
- places beyond doubt that the witness evidence use immunity in subsection 124(2C) applies in relation to Inspector-General ADF inquiries and Inspector-General ADF inquiry officer inquiries. Witness evidence use immunity prevents a witness's evidence given to an inquiry from being used against them in a service tribunal or civilian court;

---

1 *Journals of the Senate*, 3 December 2014, p. 1966.

2 *Journals of the Senate*, 4 December 2014, p. 1986; Selection of Bills Committee, *Report No. 16 of 2014*, 4 December 2014.

3 This followed a recommendation made in Mr James Burchett QC, *Report of an Inquiry into Military Justice in the ADF*, July 2001, Recommendation 55.

4 *Defence Legislation Amendment Act (No. 2) 2005*, Schedule 2.

- requires the Inspector-General ADF to prepare an annual report relating to the Inspector-General's functions for tabling in Parliament; and
- further strengthens the independence of the Inspector-General ADF by making it clear that, where the Inspector-General ADF is directed to conduct an inquiry or investigation by the Chief of the Defence Force, or where an Inspector-General ADF is acting on their own motion or at the request of another party, the Inspector-General ADF may cease the inquiry or investigation if the Inspector-General ADF forms a belief that the continuation of the inquiry or investigation is not otherwise warranted, having regard to all the circumstances.<sup>5</sup>

### **Conduct of inquiry**

1.4 The committee advertised the inquiry in *The Australian* newspaper and on its website. The committee also wrote to individuals and organisations likely to have an interest in the bill, drawing their attention to the inquiry and inviting them to make written submissions.

1.5 The committee received 8 submissions to the inquiry, with one received as a confidential submission. Public submissions are listed at Appendix 1, and are available on the committee's website: [www.aph.gov.au/senate\\_fadt](http://www.aph.gov.au/senate_fadt).

### **Structure of report**

1.6 Chapter 2 provides an overview of the provisions of the bill. Chapter 3 outlines issues raised in submissions and contains the committee's view and recommendations.

### **Acknowledgements**

1.7 The committee thanks all those who assisted with the inquiry, including by making submissions.



# Chapter 2

## Overview of bill

### Provisions of the bill

2.1 The provisions of the bill amend Part VIII B of the Defence Act which provide for the establishment and functions of the Inspector-General ADF (as well as administrative and other matters). The key provisions of the bill are contained in Schedule 1 which has two parts – the amendments and the application and transitional provisions. Clause 2 of the bill provides that the provisions in Schedule 1 will commence on the 28<sup>th</sup> day after Royal Assent.

### *Part 1–Amendments*

#### *Objects*

2.2 Items 1 and 2 amend existing section 110A Object of Part. The additions made to section 110A are underlined below.

#### **110A Object of Part**

The main object of this Part is to provide the Chief of the Defence Force with:

- (a) a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and
- (b) an avenue independent of the ordinary chain of command by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.

#### *Functions*

2.3 Section 110C provides for the function of the Inspector-General ADF. Item 3 repeals paragraph 110C(1)(e) and substitutes a number of other paragraphs. Item 4 repeals subsection 110C(2). Item 5 adds new subsections 4, 5 and 6. For convenience, the amendments to section 110C are extracted below. The additions to section 110C are underlined, those parts removed are struck through.

#### **110C Functions of the Inspector-General ADF**

- (1) The Inspector-General ADF has the following functions:
  - (a) to inquire into or investigate matters concerning the military justice system;
  - (b) to conduct performance reviews of the military justice system, including internal audits, at the times and in the manner the Inspector-General ADF considers appropriate;
  - (c) to advise on matters concerning the military justice system, including making recommendations for improvements;
  - (d) to promote military justice values across the Defence Force;

~~(e) to do anything incidental or conducive to the performance of any of the preceding functions.~~

(e) if directed by the Minister to do so—to inquire into or investigate a matter concerning the Defence Force;

(f) if directed by the Chief of the Defence Force to do so—to inquire into or investigate a matter concerning the Defence Force;

(g) such functions as are prescribed by the regulations;

(h) such functions as are conferred on the Inspector-General ADF by or under this Act;

(i) such functions as are conferred on the Inspector-General ADF by or under any other law of the Commonwealth;

(j) to do anything incidental or conducive to the performance of any of the above functions.

Note: Subsection (4) limits the functions that may be prescribed by regulations made for the purposes of paragraph (g).

~~(2) In addition to his or her functions under subsection (1), the Inspector-General ADF also has:~~

~~(a) the functions conferred on the Inspector-General ADF by or under this Act or any other law of the Commonwealth; and~~

~~(b) such other functions as are prescribed by the regulations.~~

(3) The function referred to in paragraph (1)(a) includes the following:

(a) carrying out preliminary assessments as to whether an inquiry or investigation should be conducted by the Inspector-General ADF;

(b) referring matters to other appropriate authorities to be dealt with.

(4) Regulations made for the purposes of paragraph (1)(g) must not prescribe a function unless the function relates to:

(a) the military justice system; or

(b) complaints made by members of the Defence Force, where the relevant complaint is about a decision, act or omission in relation to the member's service in the Defence Force; or

(c) deaths of members of the Defence Force, where the relevant death appears to have arisen out of, or in the course of, the member's service in the Defence Force.

(5) To avoid doubt, a function prescribed by regulations made for the purposes of paragraph (1)(g) may be to inquire into or investigate a matter mentioned in paragraph (4)(b) or (c).

(6) Subsection (5) does not limit paragraph (1)(g).

Note: The regulations may make provision in relation to the procedures and powers of the Inspector-General ADF in respect of the performance of the Inspector-General ADF's functions (see paragraph 124(1)(h)).

---

### *Inquiries and investigations*

2.4 Item 6 of Schedule 1 repeals section 110D which provides for when the Inspector-General ADF can conduct inquiries or investigations.

2.5 Item 7 of Schedule 1 inserts 110DA and 110DB. New section 110DA applies to Inspector-General ADF inquiries or investigations conducted into matters concerning the military justice system and inquiries or investigations conducted by the Inspector-General ADF under the regulations. It empowers the Inspector-General ADF to conduct an inquiry or investigation on his or her own initiative, at the request of a service chief or at the request of an individual.<sup>1</sup>

2.6 New section 110DB provides that the Inspector-General ADF may end an inquiry or investigation if satisfied that continuing it is not warranted in the circumstances, unless that investigation or inquiry has been directed by the Minister.<sup>2</sup>

### *Reports*

2.7 The existing section 110R requires the Inspector-General ADF to prepare such reports on the operations of the Inspector-General ADF as directed by the Chief of the Defence Force. Item 8 repeals existing section 110R and substitutes a new section 110R. New section 110R provides that as soon as practicable after the end of each financial year the Inspector-General must give the Minister, for presentation to the Parliament, a report on the operations of the Inspector-General ADF during the financial year.<sup>3</sup> This includes the operations of persons appointed as inquiry officers, inquiry assistants and Assistant Inspector-General ADF under existing section 110P.

### *Self-incrimination*

2.8 Existing section 124 deals with the creation of regulations under the Defence Act. This includes regulations for 'the procedures, powers and reporting obligations of the Inspector-General ADF in respect of the performance of the Inspector-General ADF's functions, including in relation to any matter connected with inquiries, investigations and performance reviews' (existing paragraph 124(1)(h)).

2.9 Item 9 inserts two new subsections following existing subsection 124(2A). New subsection 124(2AA) provides that regulations may be made for Inspector-General ADF investigations and inquiries that require a person appearing as a witness to answer a question even if the answer may tend to incriminate the person.

2.10 New subsection 124(2AB) provides that the regulations may make provision for requiring a person appearing as a witness before a person appointed under section 110P (Assistant Inspector-General ADF, or appointed inquiry officers or inquiry assistants) to answer questions even if the answers may tend to incriminate the person.

---

1 Explanatory memorandum (EM), p. 5.

2 EM, p. 5.

3 Minor typographical errors in the explanatory memorandum in relation to this part have been corrected. *Journals of the Senate*, 9 February 2015, p. 2058.

2.11 However, both subsections 124(2AA) and 124(2AB) are subject to existing subsection 124(2B). Items 10 and 11 of Schedule 1 amend this subsection. The amended subsection is extracted below with additions underlined and parts omitted struck through.

~~Subsection (2A) does~~ Subsections (2A), (2AA), and (2AB) do not authorise the making of a regulation containing a requirement referred to in the subsection concerned ~~that subsection~~ where the answer to the question may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.

2.12 The explanatory memorandum (EM) states:

[T]his provides that the Inspector-General ADF, a Inspector-General ADF appointed inquiry officer, Inspector-General ADF appointed inquiry assistant or Assistant Inspector-General ADF cannot require answers to questions from a person which may tend to incriminate that person in respect of an offence with which that person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.<sup>4</sup>

2.13 Item 12 of Schedule 1 inserts new subsection 124(2CA) after existing subsection 124(2C). New subsection 124(CA) provides that if a witness makes a statement or disclosure in the course of giving evidence before the Inspector-General ADF, or persons appointed under section 110P, then:

- (a) the statement or disclosure; and
- (b) the making of the statement or disclosure; and
- (c) any information, document or thing obtained as a direct or indirect consequence of the making of the statement or disclosure

are not admissible in evidence against the witness in:

- (d) any civil or criminal proceedings in any federal court or court of a State or Territory; or
- (e) proceedings before a service tribunal;

other than in proceedings by way of prosecution for giving false testimony at the hearing before the Inspector-General ADF or a person appointed under section 110P.

### ***Part 2—Application and transitional provisions***

2.14 Item 13 of Schedule 1 provides for the continued operation of 110D (which is repealed by item 6) in relation to an inquiry or investigation that started before the commencement of the item.

---

4 EM, p. 6.

2.15 Item 14 clarifies that new section 110DA, as inserted by item 7 of Schedule 1, applies in relation to an inquiry or investigation that started at or after the commencement of this item.

2.16 Item 15 provides that amended section 110R, which imposes an obligation on the Inspector-General to make an annual report applies in relation to the financial year in which this item commences and each later financial year.<sup>5</sup>

---

5 Minor typographical errors in the explanatory memorandum in relation to this part have been corrected. *Journals of the Senate*, 9 February 2015, p. 2058.



# Chapter 3

## Issues and committee view

### Background

3.1 The introduction of the bill occurs in the context of recent criticisms of the investigation, complaint and review processes within Defence. In particular, in November 2011, the then Secretary of the Department of Defence and the then Chief of the Defence Force (CDF) commissioned an internal review in response to concerns that the current systems of inquiry, investigation, review and audit within Defence were unnecessarily complex, inefficient, legalistic, and not delivering effective outcomes. The review (known as the Rethinking Systems Review) incorporated the findings of a number of previous reviews, including the HMAS SUCCESS Commission of Inquiry and aspects of the *DLA Piper Review Volume 1*, and examined structural arrangements, legislation and policy requirements.<sup>1</sup>

3.2 The current CDF, Air Chief Marshal Mark Binskin AC, outlined that following consideration of the review of systems of inquiry, investigation, review and audit in Defence, the senior leadership had decided to implement a number of reform measures. In relation to the Inspector-General ADF, these reform measures included:

- enhancing the Inspector-General ADF's independence from the ordinary chain of command in order to reinforce the integrity and credibility of this office;
- transferring responsibility for the investigation of service-related deaths to the Inspector-General ADF, in order to provide a more independent and efficient means while assuring the government and the public that Defence is responding appropriately; and
- consolidating the layers of the ADF redress of grievance process and transferring management of the process to the Inspector-General ADF to provide a quicker, more independent and expert mechanism for ADF members to seek formal review of decisions.<sup>2</sup>

### Issues raised in submissions

3.3 A range of views regarding the bill were expressed in submissions including specific issues in relation to the Inspector-General ADF, some of which were not related to the proposed amendments of the bill. These issues included:

- the functions of the Inspector-General ADF;
- the requirement to make an annual report; and
- the abrogation of privilege against self-incrimination.

---

1 Department of Defence, *Submission 17*, p. 7, Senate Foreign Affairs, Defence and Trade References Committee inquiry *Processes to support victims of abuse*, October 2014.

2 *Submission 8*, p. 2.

## ***Functions of the Inspector-General ADF***

### *Independence*

3.4 In his submission, Mr Colin Neave, the Commonwealth and Defence Force Ombudsman observed that 'the Inspector-General ADF complements the Defence Force Ombudsman's role to safeguard individual members of the Defence Force and provide assurance of Defence integrity to the public and the Parliament through independent external oversight'.<sup>3</sup>

3.5 Mr Neave recognised that one of the purposes of the bill was to clarify that the Inspector-General ADF is independent of the ordinary chain of command. However, he stressed that 'the key function provided by the Inspector-General remains one of *internal* audit and review'.<sup>4</sup> He stated:

The Bill provides that the Inspector-General ADF must conduct an inquiry or an investigation if directed to do so by the Minister for Defence or the Chief of the Defence Force. The Inspector-General ADF may decide to end an inquiry or investigation if, having regard to all the circumstances, the Inspector-General is satisfied that the inquiry or investigation is not warranted. However, the Inspector-General ADF is not able to exercise this discretion where the inquiry or investigation was commenced at the direction of the Minister.

These limitations on the Inspector-General's independence mean that it is important that the statutorily independent *external* review mechanism of the Defence Force Ombudsman be maintained.<sup>5</sup>

3.6 Mr Neave also cautioned that the bill will enable regulations to be made that would provide the Inspector-General ADF with co-extensive jurisdiction with the Defence Force Ombudsman over service-related complaints and own motion investigations into service-related matters. He argued:

Any proposed regulations would need to be carefully considered and subject to consultation with the Defence Force Ombudsman to ensure the effect of the regulations on the Defence Force Ombudsman's role and their interaction with the *Ombudsman Act 1976* are properly understood.

For example, if regulations were proposed that would make the Inspector-General ADF the decision maker in redress of grievance matters, the Defence Force Ombudsman's ability to decline to investigate certain Defence related complaints could be affected. This is clearly not what is intended by the Bill, but highlights the importance of early and detailed consultation in relation to any proposed regulations.<sup>6</sup>

---

3 *Submission 6*, p. 2.

4 *Submission 6*, p. 1 [emphasis in original].

5 *Submission 6*, p. 2 [emphasis in original].

6 *Submission 6*, p. 2.



3.7 Other submissions also raised criticisms regarding the role and functions of the Inspector-General ADF.<sup>7</sup> For example, Major David McBride considered that in its current form the position of Inspector-General ADF did not achieve its 'stated goals'. He considered the position was open to abuse as there are no adequate safeguards to ensure the Inspector-General ADF acts in an independent manner.<sup>8</sup>

#### *Definition of 'military justice system'*

3.8 Defence's website describes the 'military justice system' as 'a generic term which covers functions such as discipline in the Australian Defence Force, administrative action to support ADF policy, inquiries to establish facts relevant to operation and command of the ADF, and the provisions for review and management of complaints'.<sup>9</sup> An issue raised by the Centre for Military and Security Law at the ANU College of Law was there is no legislative definition provided to explain precisely what is encompassed by the term 'military justice system'. It stated:

While the Bill goes a long way towards rectifying identified shortfalls that affect the [Inspector-General ADF's] operations, it seems to us that one key aspect that is missing is a clear statutory definition of what is encompassed by the term 'military justice system'. Providing clarity on this point would further enhance the [Inspector-General ADF's] statutory independence.<sup>10</sup>

#### *Relationship to Defence inquiries*

3.9 Under the Defence regulations, appointed inquiry officers have the same protection and immunity as a Justice of the High Court in the exercising of their duties.<sup>11</sup> In his submission, Colonel Michael Goodyer highlighted ambiguity in the powers and functions of the Inspector-General ADF in reviewing the operations of inquiry officers. He argued:

This doubt needs to be clarified so that any Inquiry officer tasked to undertake a particular inquiry is fully informed of the protections afforded to him/her under the Act and, if appropriate, of the fact that they may be subject to investigations by the [Inspector-General ADF] (if indeed that is the case at law).<sup>12</sup>

#### *Redress of grievance process*

3.10 The redress of grievance process is one of the formal mechanisms for ADF members to seek internal review of decisions or actions from their commanding officers. The Minister's second reading speech emphasised that the amendments of the

---

7 For example, Mr Michael Wunderlich, *Submission 4*, p. 1; Colonel Michael Goodyer, *Submission 5*, p. 2.

8 *Submission 3*, p. 1.

9 Department of Defence, 'Military justice system', available at <http://www.defence.gov.au/mjs/mjs.htm> (accessed 16 February 2015).

10 *Submission 7*, p. 2.

11 Regulations 61, 78, Defence (Inquiry) Regulations 1985.

12 Colonel Michael Goodyer, *Submission 5*, p. 2.

bill will facilitate regulatory reform to '[r]eplace the existing multi-layered, sometimes opaque, often complex, [ADF] redress of grievance process with a single layer of formal internal review incorporating involvement from the member's chain of command, overseen by the Inspector General [ADF]'. It noted that a member who was dissatisfied with the outcome of this internal review could still seek external review, such as from the Defence Force Ombudsman.<sup>13</sup>

3.11 Mr Neave, the Defence Force Ombudsman, supported 'the establishment of a single internal review mechanism within Defence' and anticipated that 'this change will lead to more consistent and efficient outcomes'.<sup>14</sup>

3.12 In his submission, the CDF highlighted that the bill was part of reforms to '[c]onsolidate the layers of the ADF redress of grievance process and transfer management of the process to the Inspector-General ADF to provide a quicker, more independent and expert mechanism for ADF members to seek formal review of decisions'.<sup>15</sup> Mr Geoff Earley AM, the Inspector-General ADF, also stated:

The transfer of responsibility for the review of commanding officers' redress of grievance decisions to [Inspector-General ADF] will also ensure that review outcomes are more consistent across the [ADF] and will enhance perceptions of the independence of those outcomes. [Inspector-General ADF's] formal, legislated involvement in these reviews as an agency outside the chain of command will enhance perceptions of the fairness of the review process for grievances presented for final decision by the relevant Service Chief. It will also reduce the propensity for some complainants to seek multiple internal reviews.<sup>16</sup>

3.13 He also noted that the bill, if enacted, would enable regulations to remove provisions that allow commissioned and warranted Australian Defence Force officers to seek a second review by Chief of the Defence Force of redress of grievance decisions after an unfavourable outcome from a Service Chief.<sup>17</sup>

#### *Service-related deaths*

3.14 The Minister's second reading speech indicated that efficiencies are also intended to be achieved through facilitating the role of the Inspector-General ADF in investigating and reviewing service-related deaths. It described the current arrangements whereby service-related deaths must be investigated through a CDF Commission of Inquiry as 'inefficient and costly'. It noted the intention was that, following the passage of the bill, the regulations will be amended so that there is no automatic requirement for a statutory inquiry for all service-related deaths:

---

13 *Senate Hansard*, 3 December 2014, p. 10062.

14 *Submission 6*, p. 1.

15 *Submission 8*, p. 2.

16 *Submission 2*, p. 2.

17 *Submission 2*, p. 2.

---

Instead, service-related deaths will be referred to the Inspector-General [ADF] for review/inquiry. The Inspector-General [ADF] will determine in each case the process for review, or inquiry, into each death and may decide to conduct a public hearing, an inquiry in private, or a desk-top review only. Utilising the Inspector-General [ADF] in this role will provide assurance that the [ADF] is responding appropriately to service-related deaths and should significantly reduce the costs associated with such inquiries, while retaining credible and independent oversight of these sensitive matters.<sup>18</sup>

3.15 The Inspector-General ADF, Mr Earley, noted that the bill consolidates 'arrangements which were effected administratively in July last year to transfer responsibility for inquiries into [s]ervice-related deaths' to his office. He argued that the transfer would result in more efficient inquiry processes. Mr Earley stated:

One of the inherent problems of the Commission of Inquiry (COI) system has been that each COI has been established and conducted on an *ad hoc* basis. Each COI has been the subject of a separate legal appointment and arrangements for its administration have been arrived at independently of other COIs...

While some variation in COI arrangements has no doubt been necessary depending on differences in the matters under inquiry, the outcome has been that lessons learned about inquiry processes in one COI have not always been shared with others, and COI participants have effectively had to relearn and understand an often entirely new set of arrangements for the conduct of each COI. The application of [Inspector-General ADF's] inquiry experience, expertise and structural inquiry arrangements to the investigation of Service-related deaths will enable arrangements for inquiries into such deaths to be more consistent, and therefore inquiries to be more efficient.<sup>19</sup>

### ***Annual report requirement***

3.16 Currently, the Inspector-General must prepare and report on his operations as directed by the CDF.<sup>20</sup> When the position was created in the Defence Act, the explanatory memorandum to the amending legislation stated that a formal annual report was not required as Inspector-General ADF reports to the CDF and contributes to the Defence annual report.<sup>21</sup>

3.17 The Inspector-General ADF also noted that the annual report requirement in the bill was intended to enhance perceptions of his office's independence. He argued the amendment was consistent with the recommendations of previous inquiries into reforms to Australia's military justice system. In its forth progress report into Australia's military justice system, the then Senate Standing Committee on Foreign Affairs, Defence and Trade considered the independence and impartiality of the office

---

18 *Senate Hansard*, 3 December 2014, p. 10062.

19 *Submission 2*, p. 2. Also see Chief of the Defence Force, *Submission 8*, p. 2.

20 Section 110R, *Defence Act 1903*.

21 Explanatory memorandum, *Defence Legislation Amendment Act (No. 2) 2005*, p 19.

of the Inspector-General ADF needed to be strengthened and that there was strong justification for further legislative change. The committee recommended an amendment to require the Inspector-General ADF to prepare an annual report for the Minister to present to the Parliament. It considered this would allow the Inspector-General ADF 'the opportunity to make objective and frank assessments of the health of Australia's military justice system'.<sup>22</sup>

3.18 The Centre for Military and Security Law strongly supported the requirement that the Inspector-General ADF make an annual report to the Minister for tabling in the Parliament. It described that the annual report requirement as a significant step in enhancing the transparency of the operation of the ADF's military justice system.<sup>23</sup>

3.19 In contrast, Mr Michael Wunderlich noted that the Inspector-General ADF's annual reports were available through freedom of information requests. He considered that '[e]nsuring that the Minister has a copy of the [Inspector-General ADF] report, and that it is tabled, is laudable, but still only window dressing, until it is sold as credible to its client base'.<sup>24</sup> Mr Wunderlich also emphasised the importance of effective oversight of Defence activities through the Senate estimates process. He stated:

Many questions have been asked in Senate Estimates over the last twenty years and, and in my opinion, answered minimally by Defence on many occasions.

Would it be appropriate, if not advisable, for the [Inspector-General ADF] to assist the Minister and the process of the Senate that the [Inspector-General ADF] review the questions supplied in Senate Estimates and the answers supplied by Defence and to intercede where deemed necessary.<sup>25</sup>

### ***Power to compel evidence***

3.20 Currently, the Defence Act empowers regulations to be made 'requiring a person appearing as a witness before a court of inquiry, a board of inquiry, a Chief of the Defence Force commission of inquiry, an inquiry officer or an inquiry assistant to answer a question notwithstanding that the answer to the question may tend to incriminate the person'.<sup>26</sup> The CDF's submission outlined that consistent with the broader role provided under the bill, the Inspector-General ADF would be 'empowered in a similar manner to current Boards of Inquiry in terms of taking evidence from witnesses'.<sup>27</sup>

---

22 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system*, Fourth progress report, September 2008, p. 78.

23 *Submission 7*, p. 3.

24 *Submission 4*, p. 1.

25 *Submission 4*, p. 1.

26 Subsection 124(2A), *Defence Act 1903*.

27 *Submission 8*, p. 2.

3.21 The Centre for Military and Security Law supported the increased evidence gathering powers for the Inspector-General ADF under the bill. It noted:

The power to compel 'a person' to provide evidence already exists under the Defence (Inquiry) Regulations with the result that currently a military officer delegated the power to appoint a board of inquiry by the CDF or a Service Chief has greater powers in relation to compellability of witnesses than those available to the statutory appointment of IGADF. The amendments in the Bill will rectify that situation and bring the powers of the IGADF in relation to compellability of witnesses into line with those that already exist for a board of inquiry. These amendments are therefore strongly supported.<sup>28</sup>

3.22 The Centre also highlighted that the increasingly 'joint' nature of ADF operations and military service raised issues regarding how inquiries were conducted. It noted that it was now 'quite normal for personnel from all three Services to be working together in circumstances where there are also public servants and civilian contractors performing similar functions and/or working in the same workplace'.<sup>29</sup> The Centre commented 'an ability to comprehensively investigate [complaints] in a manner that is as efficient as possible is essential for efficient operation of the Defence Force'.<sup>30</sup>

3.23 The EM to the bill stresses that while the bill makes it clear that regulations can be prescribed that abrogate the privilege against self-incrimination for witnesses appearing before the Inspector-General ADF:

Evidence given by a witness under any such regulatory abrogation of the privilege against self-incrimination attracts a statutory bar on that evidence being used against the witness giving it, excepting use of the evidence for proceedings for giving false evidence to the inquiry.

3.24 Further, the witness evidence use immunity in existing subsection 124(2C) applies in relation to witnesses who appear before the Inspector-General ADF or inquiry officers appointed by the Inspector-General ADF.<sup>31</sup>

#### *Scrutiny of Bills Committee*

3.25 The Scrutiny of Bills Committee considered the bill and raised two issues in relation to the amendments in section 124 of the Defence Act regarding the privilege against self-incrimination. It stated:

[T]he committee has recognised that the privilege against self-incrimination may, in limited circumstances, be legitimately overridden, it has also regularly insisted that the result is the removal of a privilege that represents a serious loss of personal liberty. As such, the committee's expectation is that explanatory material provides a detailed justification as to why the

---

28 *Submission 7*, p. 3.

29 *Submission 7*, p. 2.

30 *Submission 7*, p. 3.

31 EM, p.2.

public benefit in removing the privilege is considered to outweigh this significant loss of liberty. Although the presence of a use and derivative use immunity lessens the harm occasioned by this loss of liberty it does not remove it and the committee therefore expects a clear explanation of the necessity of overriding the privilege even where these immunities are provided.<sup>32</sup>

3.26 The Scrutiny of Bills Committee also questioned why it was appropriate for the 'abrogation of the privilege against self-incrimination—a matter of considerable importance—to be dealt with in the regulations'.<sup>33</sup>

### **Committee view**

3.27 The committee is broadly supportive of the amendments in the bill, which are an important component in the ongoing reforms to processes for inquiries, complaints and reviews in Australia's military justice system. In particular, the annual report requirement will provide the Minister, the Parliament and the public with a more direct means of understanding the operations of the office of the Inspector-General ADF. The obligation will also broaden scrutiny of the operations of the Inspector-General ADF through the Senate estimates process. This is appropriate given the additional functions and responsibilities for the Inspector-General ADF outlined in the bill. The measure will enhance the transparency and accountability of the Inspector-General ADF and is likely to increase public confidence in his/her functions.

3.28 The bill will facilitate the Inspector-General ADF's role in reforms to establish a single layer of formal internal review for redress of grievance processes. The redress of grievance process has been the subject of a large number of reviews and inquiries, including by this committee.<sup>34</sup> The committee welcomes reforms to simplify and streamline processes in this area.

3.29 The committee holds some reservations in relation to the transfer of responsibilities to the Inspector-General ADF for investigating service-related deaths. The position of the Inspector-General ADF, as a statutory officer, independent from the chain of command, is well-positioned to conduct these inquiries. This reform will also facilitate the development of expertise within the office of the Inspector-General ADF in conducting this specific type of investigation. Nonetheless, investigations into service-related deaths are particularly sensitive and it appears the Inspector-General ADF will have a broad discretion in the conduct of investigations. Previous inquiries have highlighted the concerns of stakeholders (such as bereaved family members) regarding the independence and competence of Defence inquiries into service-related

---

32 Senate Scrutiny of Bills Committee, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 6.

33 Senate Scrutiny of Bills Committee, *Alert Digest No. 1 of 2015*, 11 February 2015, p. 7.

34 For example, Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005.

deaths.<sup>35</sup> While this transfer of responsibility appears to be a broadly beneficial reform, in the view of the committee, should the bill pass, the Inspector-General ADF's enhanced role should be the subject of independent review after an appropriate period to ensure it is functioning effectively.

3.30 The committee acknowledges the legitimate concerns raised by the Scrutiny of Bills Committee in relation to the abrogation of the privilege against self-incrimination of witness giving evidence before the Inspector-General ADF or persons appointed under section 110P. However, as highlighted by the Centre for Military and Security Law, these evidence-gathering powers are necessary in order to conduct effective investigations, already exist within the Defence legislation and regulations for other inquiry bodies and incorporate appropriate protections for witnesses. Nonetheless, in the view of the committee, there is scope for a revised explanatory memorandum to provide a more detailed explanation of the reasons for the abrogation of the privilege against self-incrimination. In particular, it is not clear why the wording of proposed new subsection 124(2CA) (dealing with witnesses before the Inspector-General ADF) differs from existing subsection 124(2C) (dealing with witnesses before boards of inquiry etc).

3.31 The committee notes the suggestion made by the Centre for Military and Security Law that a definition of 'military justice system' be included in the Defence Act. The committee recognises this is a difficult area of legislative drafting and that the inclusion of a specific definition could unintentionally operate to restrict the scope of the Inspector-General ADF's operations. As the Centre has acknowledged, this term already exists within section 110A of the Defence Act. Given the absence of specific problems arising from this definitional issue at the current time, the committee considers the existing situation is preferable.

3.32 The committee notes the concerns raised by Colonel Goodyer in relation to the relationship between the role and functions of the Inspector-General ADF and boards of inquiry and inquiry officers. In the view of the committee, this is a topic that should be clarified by Defence, and if necessary, clear advice should be provided to appointed inquiry officers regarding the potential review of their activities by the Inspector-General ADF.

3.33 The Defence Force Ombudsman has raised legitimate concerns in relation to the need for close consultation in relation to any regulations which may impact the activities of his office. The committee expects that Defence will undertake early and detailed consultation in relation to these regulations with the Defence Force Ombudsman and all other relevant stakeholders.

3.34 A minor issue with the drafting of the bill is that it repeals existing subsection 110C(2) of the Defence Act but does not replace it. This appears to leave an

---

35 For example, Senate Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system*, Fourth progress report, September 2008, pp 43-46; Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, pp 198-211.

unnecessary gap in the numbering of the subsections of section 110C. The committee notes that minor typographical errors in the bill's EM have been promptly corrected.<sup>36</sup>

### **Recommendation 1**

**3.35** The committee recommends that a revised explanatory memorandum be issued for the bill which includes a detailed explanation of the rationale for the provisions dealing with the abrogation of the privilege against self-incrimination for witnesses giving evidence before the Inspector-General ADF.

### **Recommendation 2**

**3.36** The committee recommends that Defence closely consults with the Defence Force Ombudsman in relation to any regulations made in relation to the bill.

### **Recommendation 3**

**3.37** The committee recommends that the Defence Legislation Amendment (Military Justice Enhancements—Inspector-General ADF) Bill 2014 be passed.

**Senator Chris Back**  
**Chair**

---

36 *Journals of the Senate*, 9 February 2015, p. 2058.



# **Appendix 1**

## **Public submissions**

- 1 Confidential
- 2 Inspector-General Australian Defence Force
- 3 Major David McBride
- 4 Mr Michael Wunderlich
- 5 Colonel Michael Goodyer
- 6 Commonwealth Ombudsman
- 7 Centre for Military and Security Law, Australian National University
- 8 Air Chief Marshal Mark Binskin AC, Chief of the Defence Force

