

Chapter 8

The administrative system—investigations

The inquiry process

8.1 The previous chapter examined the process of reporting wrongdoing or making a complaint about inappropriate conduct. The receipt of a complaint or report triggers further administrative action which generally involves some form of investigation. This chapter examines the inquiry stage of the administrative system. It describes the types of administrative inquiries and then focuses on the routine inquiry and the investigating officer inquiry. It considers the criticism levelled at the inquiry process and assesses its overall effectiveness.

8.2 The inquiry process is one of the major components of the administrative system. Administrative inquiries are fact-finding undertakings to help commanders make decisions in response to incidents that may affect the ADF.¹ They are not judicial procedures; they do not involve courts or tribunals. Their purpose is not to investigate whether ADF members have committed an offence under the DFDA or civilian criminal laws. The Department of Defence explained:

Adverse findings or recommendations about a member that are of an administrative character are incidental to the primary purpose of an inquiry—that is, to find the facts as to why an incident occurred.

8.3 Administrative inquiries can take a number of forms but are always preceded by a brief initial inquiry designed to provide a quick overview of the matters under consideration.

Quick assessment

8.4 Following the notification of an incident or complaint, a quick assessment must be undertaken. The Administrative Inquiries Manual makes clear that it is mandatory to conduct a quick assessment before the commanding officer takes any further action.² This preliminary assessment is not an inquiry under the Defence (Inquiry) Regulations but rather derives its authority from 'the inherent powers of military rank and command'.³ Quick assessments are intended to establish whether any immediate corrective action needs to be taken to reduce the risk of any further harm or damage. They also provide the means for determining the most appropriate course to take in dealing with the report or complaint.

1 *Submission P16*, p. 24.

2 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para 2.3.

3 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para 2.1.

Figure 6.1—Administrative inquiries as part of the ADF's administrative system



Army News, Issue 1093, 25 March 2004.

8.5 When appointing a person to conduct a quick assessment, the commanding officer does not need to use Instruments of Appointment or draw up terms of reference. An oral briefing should suffice and 'an outline of that brief should be documented'.⁴

8.6 Based on the results of the quick assessment, a commander may decide that alternative conflict resolution methods such as conciliation or mediation may be a better and more constructive means of resolving a problem than holding a formal inquiry. These alternative dispute resolution methods are suitable for minor workplace complaints (see paras 6.5–6.9). On the other hand, the assessment may show that, because of the seriousness of the incident, a formal inquiry such as an investigating officer inquiry is required.

8.7 The CO is required to record the decisions taken in respect of an incident or complaint together with a short summary of reasons for the decision. This report is to be retained on the appropriate unit file.

8.8 With regard to preliminary processes following a sudden death or accident, Lieutenant General Peter Leahy explained some of the current procedures:

The first thing we ask for in sudden deaths or other very serious accidents is a quick assessment. Rather than prepare terms of reference, we want to know right now whether there is anything we should be doing that might stop something from happening again. Under the Defence (Inquiry) Regulation, the terms of reference are drawn up and an investigating officer is appointed and he will take statements and evidence and talk to witnesses. But what we are seeing is that the two ways are separate things. The first is a commander's quick assessment of what happened and what we can do right now to stop it; the second is under the Defence (Inquiry) Regulation.⁵

8.9 The quick assessment phase drew little comment from witnesses. It should be noted, however, that Mr Geoffrey Earley, Inspector-General Australian Defence Force, expressed concern that:

There is some evidence—not a lot—that, because it is easy and quick, a quick assessment may be used, if we are not careful, as the actual inquiry. It was not intended to be that way but, again, it is understandable in some cases why that might happen. We need to make sure that does not develop.⁶

8.10 The experience of one witness touched on this matter of the scope and intention of the quick assessment. In his case, the quick assessment 'went beyond a mere scoping exercise and made findings of fact and recommendations like a routine inquiry'. He observed that, 'a Routine Inquiry would have given you an opportunity to

4 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 1.12 and 2.4.

5 *Committee Hansard*, 1 March 2004, p. 41.

6 *Committee Hansard*, 5 August 2004, p. 100.

respond to the allegations made against you, whereas the so-called quick assessment did not. It was not a quick assessment at all, and did not lead to any further inquiry'.⁷ Another witness maintained that, in his case, the mandatory quick assessment before the appointment of the investigating officer was not carried out.⁸

8.11 The committee notes and endorses Mr Earley's concerns and suggests that the ADF underline the function and role of the quick assessment in its manual.

Recommendation 26

8.12 The committee recommends that the Defence (Inquiries) Manual include at paragraph 2.4 a statement that quick assessments while mandatory are not to replace administrative inquiries.

8.13 As the following section illustrates, there are a number of options available to the commanding officer if he or she decides that a formal inquiry is needed.

Types of administrative inquiries

8.14 If the commanding officer decides, after a quick assessment has taken place, that an inquiry is needed, he or she must determine the appropriate type of inquiry. Inquiries take various forms according to the seriousness, magnitude and complexity of the circumstances surrounding the incident. The following inquiries are ranked in ascending order of their significance depending on the importance and likely consequences to the ADF or to broader national interests:

- a Routine Inquiry—conducted with as little formality as possible, and is frequently employed in response to a redress of grievance issue at unit level and examines less serious or complex matters, such as 'minor loss or damage to Service property, harassment or personnel management issues';⁹
- an Investigating Officer—used by commanders to investigate a wide range of significant matters concerning the ADF which arise under their command or control but do not require the standing or status of a Board of Inquiry;
- a Board of Inquiry—appointed by a senior commander to inquire into matters concerning the administration or aspects of the command control of the ADF;
- a Combined Board of Inquiry—established to inquire into matters concerning the ADF and the armed forces of another country; and

7 Confidential *Submission C25C*, Enclosure to IGADF submission.

8 Confidential *Submission C39*, Attachment.

9 *Submission P16*, pp. 24-5 and Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 1.1–1.22.

- a General Court of Inquiry—appointed by the Minister, has extensive powers, is chaired by a judge or senior lawyer and its members are expected to have greater breadth and depth of experience. It is appropriate in cases of very serious and complex matters such as matters of national significance.

8.15 To date, a General Court of Inquiry and a Combined Board of Inquiry have not been used and will not be discussed in detail in this report.¹⁰ Chapter 12 will look at the Board of Inquiry. This chapter examines the Routine and the Investigating Officer inquiries.

Routine inquiry

8.16 Routine Inquiries are intended to deal with less serious and less complex matters and are thus conducted on a relatively informal basis free from the constraints of the requirements under the Defence (Inquiry) Regulations.¹¹ A CO may appoint any member of the Defence Force who is an officer, warrant officer or senior non-commissioned officer to conduct a Routine Inquiry.¹²

8.17 The Administrative Inquiries Manual stresses the importance of inquiries complying with 'applicable standards of procedural fairness and administrative law'.¹³ Although it recognises that the informality of a Routine Inquiry offers advantages, it nonetheless sets down principles that should be observed during this process. They require the inquiry to be conducted without bias and without the investigator prejudging either a complainant or the person who is the subject of the complaint.

8.18 Furthermore, routine inquiries are not to be conducted without informing a person of an allegation or complaint that has been made against him or her. Such a person is to have adequate opportunity to respond to any allegation or complaint. He or she should be provided with all material relevant to the allegation and have the right to have any information provided by them considered by the officer conducting the inquiry. Witnesses before a Routine Inquiry may seek legal advice but they are not entitled to legal representation.¹⁴ It should be noted that inquiries are held in private.

8.19 A Routine Inquiry requires a written report to the commanding officer. There are no specific reporting requirements and the reporting will be at the discretion of the commanding officer. If the investigating officer has the authority to make

10 *Submission P16*, pp. 24-5.

11 Defence (Inquiry) Regulations, regulation 69 and 70A.

12 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 4.1.

13 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 4.1.

14 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 4.28.

recommendations, the report should include recommendations that are based on the findings and which the investigating officer thinks fit to make.¹⁵

8.20 The commanding officer considers the findings and recommendations contained in the report. He or she is not bound by these recommendations and may decide which of the recommendations will be implemented.¹⁶ As soon as possible after any decision based on the report is made, the commanding officer is to provide complainants and respondents who gave evidence to the inquiry with written notification of the results of the inquiry with regard to matters relevant to them.¹⁷ The reports of Routine Inquiries are to be retained on the appropriate unit file.

Officer Investigation

8.21 A commanding officer, or an officer holding an appointment superior to that of a commanding officer may appoint an investigating officer to inquire into a complaint or incident concerning the ADF which is under his or her command.¹⁸ The purpose of the inquiry is to establish the facts and circumstances surrounding an incident or complaint so that an informed decision can be made about action that should be taken. An investigating officer is not to conduct a criminal or disciplinary investigation nor determine that an offence has or has not been committed.¹⁹

8.22 He or she is not authorised to 'pass judgement'. Lieutenant General Leahy told the committee that an inquiry is conducted so that steps can be taken immediately to find out what happened and to put in place actions and procedures that would prevent it happening again.²⁰ He underlined the point that the task of an investigating officer is not to apportion blame and hold people accountable but to establish what happened.

8.23 The regulations require that, where the investigating officer is satisfied that all information relevant to the inquiry that 'is practicable to obtain has been obtained, he or she shall prepare a report setting out his or her findings'.

8.24 Recommendations coming out of an inquiry may then lead to either an administrative or legal process that may apportion blame. A person with the

15 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 4.35 and 4.43.

16 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 4.38–4.41.

17 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 4.44.

18 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 5.3.

19 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, paras 6.3–6.4.

20 *Committee Hansard*, 5 August 2004, p. 21.

appropriate responsibility and authority will then determine a person's innocence or guilt. Lieutenant General Leahy explained:

It might be that at some DFDA hearing or some other form of hearing later, where people have the responsibility and the authority to judge whether it was innocent or guilty by hearing all of the facts from both defence and prosecution and by considering the law, that is where judgments are made and blame is apportioned.

Again he stressed that the investigating officer 'tells us what happened'.²¹

The importance of a well-conducted investigation

8.25 The committee recognises the central importance of the inquiry process to the overall effectiveness of the administrative system. Any shortcomings or failings during this stage have the potential to set the administrative proceedings on a long and troubled course that could drag through the system for years. The integrity of the inquiry process and its ability to protect the fundamental rights of those involved in the process are crucial to its credibility and its effectiveness. The Burchett Report observed that:

...if an investigation is conducted carelessly or incompetently, so as to miss the real point, or if it is conducted in such a manner that, although its actual conclusions are realistic, the persons most concerned are left with a feeling that they have not been treated fairly, no decision dependent upon the investigation is likely to be received with general satisfaction...the person it is important to convince that all arguments have been fairly and fully considered is the party who loses.²²

8.26 The Defence Force Ombudsman also underlined the importance of getting the investigation right. He made the observation that 'if the initial handling, investigation or whatever of a complaint is defective then it establishes a bad platform which is reflected at every subsequent stage of the process...'²³ Mr Neil James, Executive Director, Australian Defence Association, strongly endorsed this view. In his words, 'an ounce of prevention is worth a pound of cure'.²⁴

The effectiveness and fairness of administrative inquiries

8.27 The report now considers whether administrative inquiries are fair and proper processes that adequately protect the interests of all parties involved in the inquiry, and, at the same time, effectively gather and analyse the evidence and produce

21 *Committee Hansard*, 5 August 2004, p. 21.

22 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 116.

23 *Committee Hansard*, 9 June 2004, p. 10.

24 *Committee Hansard*, 9 June 2004, p. 32.

recommendations designed to remedy identified problems. It details some of the safeguards built into the system to ensure that basic principles of procedural fairness are observed. It then considers concerns raised in evidence about the adequacy of administrative inquiries.

8.28 The notion of procedural fairness derives from the doctrine of natural justice which relies on fundamental principles intended to ensure the fair treatment of persons. Article 10 of the Universal Declaration of Human Rights proclaims that 'Everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. Article 11, in part, states that 'Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has all the guarantees necessary for his defence'. Although the right to a fair trial has long been established as a fundamental right, its recognition in the Universal Declaration has set a common standard for all peoples and nations. It has provided inspiration for and found expression in a number of international instruments and is now enshrined in Article 14 of the International Covenant on Civil and Political Rights.

8.29 Administrative inquiries are deemed to be different from penal proceedings. One of the most important distinctions between a disciplinary and administrative inquiry is that the investigating officer may make recommendations but cannot determine guilt or innocence or impose a penalty. Hence, adherence to the principles underpinning the right to a fair hearing do not apply with the same force to administrative inquiries. Notably, investigating officer inquiries are not held in public, a person who is subject to adverse comment does not have the right to call or examine people giving evidence, nor does he or she have the right to be present during the taking of evidence. Also members of the ADF must, unless they have a reasonable excuse for declining to do so, answer all questions put to them by the investigating officer and produce any documents or articles.²⁵

8.30 It should be noted that the recommendations coming out of an administrative inquiry may form the basis upon which adverse administrative action may follow. Moreover, adverse administrative action may result in severe consequences for an individual including discharge from the ADF. Administrative action is not merely about warnings, fines and extra duties. Thus the fundamental principles underpinning the notion of a fair trial offer a sound and sure guide on important matters that should be observed during an administrative inquiry.

8.31 The Burchett Report was concerned about ensuring that procedural fairness was observed in administrative inquiries.²⁶ It recommended that 'General policy

25 Administrative Inquiries Manual, ANNEX C to Chapter 6, para. 19. Their evidence is not to be taken on oath. Annex E to chapter 6, para. 4.

26 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 27.

guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith'.²⁷

8.32 In keeping with the principles of natural justice and procedural fairness, the fair hearing and no bias rules apply to administrative inquiries. Indeed, the Administrative Inquiries Manual notes:

It is important that ADF inquiries comply with applicable standards of procedural fairness and administrative law. The due process aspects of Natural Justice must be observed throughout the inquiry process.²⁸

8.33 The following section discusses the rules underpinning natural justice and their application to administrative inquiries.

Procedural fairness—right to know allegations or adverse comment

8.34 One of the main safeguards to ensure a fair outcome in an investigation process relies on the right of persons who are the subject of evidence that reflects adversely on them to put their case. To be in a position to defend their interests, they must have full knowledge of the allegation made against them and the evidence that supports such an allegation. Without access to such information, a person is ill-equipped to test the validity of the evidence before the investigating officer and thus is not in a fair position to rebut allegations or evidence damaging to his or her interests. Matters such as the right to legal advice, to adequate time and facilities to prepare a defence, and the opportunity to present a case are also important considerations in ensuring that an inquiry is both fair and proper.

8.35 The ADF Manual makes clear that before an inquiry can proceed the person against whom allegations or complaints have been made must be made aware of them except where to do so may result in the destruction or removal of evidence.²⁹ Also any member against whom an allegation or complaint has been made is entitled to know the substance of it, have adequate notice of any adverse evidence and have a reasonable opportunity to respond to any allegation or complaint.³⁰

8.36 The Manual is unclear about the timing involved in advising a member of allegations made against him or her. It does, however, make clear that members affected by the report of an investigating officer do not have an automatic right to

27 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 38.

28 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 1.37.

29 *ibid.*

30 *ibid.*, para. 6.34.

access the report. The report of an inquiry conducted under the Defence (Inquiry) Regulations can only be released with Ministerial approval.³¹

8.37 Some witnesses gave evidence that they were not accorded the fundamental right to know the allegations being made and were denied access to material central to the accusations made against them.³² A number of submitters maintain that investigations concerning them were conducted without their knowledge.³³ One member wrote:

At no time during or after the investigation did the investigating officer inform me, as required under the **Fair Hearing Rule**, of any adverse evidence or allegations or complaints.³⁴

8.38 Many have had to rely on the Freedom of Information (FOI) Act to obtain relevant information. One witness, the subject of anonymous allegations, told the committee that 'the only reason I know where I am at the moment is freedom of information... because it is the only vehicle through which I have been able to find out what is going on.'³⁵ He explained:

...I have not been allowed to call witnesses, been properly informed of the existence of key documents relied upon by Defence or been given the opportunity to adequately challenge and redress the injustices perpetrated against my family and me.³⁶

8.39 He informed the committee that the Army failed to provide him with the information he requested under the Freedom of Information Act until the investigation was complete and the Minister approved the release of information.³⁷ In other evidence, Mr Williams related an incident where, 'The first victim was not allowed to stay in the hearing room to hear the evidence given by the sergeant, but the sergeant was present in the room when the young victim was recounting his side of events. The victim told us that the tone of the proceedings was that he was the one at fault.'³⁸

31 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, Annex F to chapter 6, para 8.

32 See for example Ms Jayne Fitzpatrick, *P35*, p.1.

33 Confidential *Submission C15*; Confidential *Submission C37*; Confidential *Submission C39*, p. 1.

34 Confidential *Submission C39*, p. 1.

35 In camera *Committee Hansard*, 10 June 2004, p. 85.

36 In camera *Committee Hansard*, 10 June 2004, p. 82.

37 Confidential *Submission C37*, para. 21.

38 *Committee Hansard*, 28 April 2004, pp. 35–8.

Committee view

8.40 The committee believes that there is no excuse for failing to inform a person alleged to have committed a wrongdoing of that allegation or not providing that person with all relevant material. It notes that the Manual makes clear that investigating officers should observe this principle. Even so, the committee would like to see stronger guarantees in place to ensure that the rights of people subject to adverse reflections are protected. It would also like to see prompt corrective action from an independent body unconnected with the initial inquiry available to people who believe that they have been denied procedural fairness.

Communication and provision of information—Complainants

8.41 Although procedural fairness dictates that a person who is the subject of adverse comment has the right to know the substance of the allegation and the evidence supporting the allegations, there are many other people involved in an inquiry process who believe they also have a right to information, particularly the complainant.

8.42 The Burchett Report referred to the lack of transparency of the outcome of an administrative inquiry and the lack of feedback to complainants or persons affected by the offending conduct. It concluded that 'strong guidelines should be laid down to ensure that persons with a real interest, such as victims and complainants, are not left in the dark as to what was done about an alleged breach of discipline'.³⁹ It also found that at least some of the long running complaints that have plagued the ADF for years might have been avoided had the complainant, as a victim, been fully enlightened about action taken and the reasons for it at an earlier stage.⁴⁰

8.43 The current manual takes particular note of the attention that should be given to the complainant. It requires that where there is a complainant, the investigating officer should notify that person of the inquiry and the procedures to be followed. It makes the point that an interview with the complainant is important because it helps to clarify the allegations and assists the investigating officer to better understand the nature of the complaint by obtaining specific details about the relevant matters.

8.44 Defence Instructions also require that the complainant be provided with 'meaningful advice of the progress of the investigation into the complaint at appropriate milestones':

39 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 15.

40 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 105.

When advised of the latest action taken in relation to the complaint, the member is also informed of when he or she may expect to receive further advice. The commitment to contact the member is to be by a specific date or time, rather than a general undertaking to simply keep the member informed. The member may request at any time to be advised of the progress of the complaint.⁴¹

8.45 In some instances, it would appear that Defence Instructions were ignored and complainants had trouble in obtaining information about the progress of their complaint.⁴² Indeed, some witnesses underlined the same shortcomings identified in the Burchett Report. Again and again, the committee heard stories about the problems that members of the ADF or their relatives experienced in understanding the military justice system and navigating their way through what appeared to many an unfathomable maze.⁴³ Their difficulty in trying to explain to the committee the administrative processes involved in their particular cases indicates the complexity of the system. One of their main difficulties was obtaining relevant information and 'meaningful advice' from the investigating officer.

8.46 One witness, who alleged she had been sexually harassed in the workplace and consequently the subject of victimisation and ostracism due to submitting a formal complaint, stated that she had not received progress reports at the stipulated intervals. Furthermore she did not receive a copy of the Quick Assessment which was 'conducted without my knowledge.'⁴⁴ Another ADF member, who had reported the use of illegal drugs in his unit, observed that 'we were never kept informed as to what the investigative procedure was and how they were going to go about it'.⁴⁵

8.47 Some members who had lodged complaints also felt that they had not been adequately consulted about their grievance. One witness who submitted a complaint informed the committee that she had not been interviewed during the quick assessment despite making clear that she wanted to be 'continuously informed of processes and procedures being undertaken'. Another complainant also noted that he had not been interviewed by the investigating officer or given the opportunity to respond to statements.⁴⁶

Committee view

8.48 Complainants should be confident that their grievance has been taken seriously and properly investigated. Any deficiency in these areas may sour their

41 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex E, para. 11.

42 Confidential *Submission C1*.

43 See for example, Ms Jayne Fitzpatrick, *Submission P35*.

44 Confidential *Submission C1*.

45 In camera *Committee Transcript*, 29 April 2004, p. 20. Confidential *Submission C1*.

46 Confidential *Submission C25*, para. 12.

perceptions of the administrative processes. Without doubt, the evidence shows that many people are disappointed with this aspect of administrative inquiries and that the ADF must improve the way it communicates with complainants.

Confidentiality

8.49 In 1998, the Defence Force Ombudsman questioned whether the ADF pays sufficient attention to the need for confidentiality and privacy to be respected when dealing with member's complaints. She found 'some suggestion that information relating to an incident had been provided to, or sought from, individuals who did not have a right to know. She observed that, while the guidance was clear on this matter, it was not 'always adhered to'.⁴⁷ Six years on, the committee heard of a number of instances where allegations still under investigation became publicly known.⁴⁸

8.50 The committee believes that observing the right to privacy is an important aspect of the administrative system that the ADF should improve.

Conflicts of interest and the independence of the inquiry

8.51 The credibility of any inquiry process rests heavily on the actual and perceived impartiality of those conducting the inquiry. The *Administrative Inquiries Manual* recognises the importance of upholding the no bias rule. It states unequivocally that the person or persons selected to conduct an investigating officer inquiry:

...must be free from bias and conflict of interest. Subject to these constraints and providing that they are not directly responsible in the chain of command for the personnel or activities under inquiry, a member of the same unit may be selected.⁴⁹

8.52 The manual explains that a commanding officer, who by definition is likely to be involved in the implementation of recommendations with respect to members under their command, is not to be appointed to investigate the conduct of any member

47 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, paras 8.54–8.56.

48 Confidential *Submissions C15, C37 and C39*.

49 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 5.10. This advice is offered more than once in the Manual, for example para. 1.24(b) reads, 'Personnel selected to participate in an inquiry must be free, to the maximum extent feasible, from any suggestion of bias or conflict of interest involving any issue or witness. Where practicable, an inquiry should be conducted by personnel who are not in the immediate chain of command of the personnel under inquiry. However, a member of a unit in the direct chain of command of the appointing authority may be selected provided they have no direct or indirect involvement in the matters under inquiry and are not likely to be involved in the implementation of the recommendations.'

under their command.⁵⁰ It directs investigating officers to 'avoid being improperly influenced by particular witnesses' and advises that, 'regardless of personal feelings, an Investigating Officer must keep an open mind at all times'.⁵¹

8.53 The manual also provides specific advice on inquiries into unacceptable behaviour. It recognises that such matters require particular skills and approaches. It suggests that maturity and sensitivity are necessary but most notably that the inquiry should be seen to be and actually be free from bias. It states:

...where it is practical to do so, consideration should be given to appointing an officer from a unit other than that to which the personnel under inquiry belong. If a suitably qualified officer can not be identified, the Appointing Officer should consult their superior authority.⁵²

8.54 It reinforces this directive by adding that one of the principal criteria to be taken into account when selecting personnel to inquire into allegations of unacceptable behaviour is 'that personnel who are direct supervisors, personnel who have a close working relationship or a friendship with any of the parties or witnesses should not be involved'.⁵³

8.55 Despite this guidance, one of the most persistent concerns raised by witnesses involved conflicts of interest and the perceived unfairness of the investigation process. Any perception that an ADF inquiry lacks objectivity and impartiality undermines the integrity of the whole military justice system. Previous reports have also identified the apparent lack of independence of the investigating officer as a source of criticism.

8.56 Lieutenant General Leahy assumed that when he gave an investigating officer the appointing authority and the terms of reference that the officer would 'answer that impartially'.⁵⁴ He accepted that 'in nearly every instance the investigating officer will know of, or perhaps has been associated with, the person that he is investigating.' Having said that, Lieutenant General Leahy offered the following assurance:

We do many of these investigations. I am not aware of anyone who has called into question the objectivity of the individual, the investigating officer, to say that he is [not] impartial.

...It is not something that is of primary concern to me, because I expect impartiality from my officers. If the officer who is assessed feels that impartiality is not present, he has very clearly open to him a whole range of further redresses.⁵⁵

50 *ibid.*, para. 5.10 and footnote 4 on p. 5–2 of the manual.

51 *ibid.*, para. 6.36.

52 *ibid.*, para. 5.11.

53 *ibid.*, para. 1.15.

54 *Committee Hansard*, 5 August 2004, p. 8.

55 *ibid.*

8.57 He reiterated his conviction:

Officers know each other. But I also take it implicitly that if I give a job to an officer he is going to carry it out impartially and properly and will not be prejudiced by his knowledge of the other officer. And, if he is, he will come to me and say, 'I don't think I'm the right guy to be doing this. Get someone else.'⁵⁶

8.58 When asked what could be done if adherence to this standard did not occur, he replied that the complainant:

... can go to the next level using the redress process to say, 'That bloke is dodgy. He and I had a spat in Timor three years ago and I don't think he should be making those judgments.'⁵⁷

8.59 Evidence before the committee clearly shows that many do not share Lieutenant General Leahy's confidence. The belief that ADF officers will acknowledge a potential conflict of interest and act appropriately and that complainants have the wherewithal to challenge the appointment of an investigating officer on the grounds of a conflict of interest is admirable. It does not, however, necessarily reflect the reality of people's experiences.

8.60 An environment where leaders in the chain of command naturally want to protect themselves and their careers by not having attention drawn to problems under their command creates a situation where conflicts of interest are bound to emerge where investigations are conducted 'in-house'.⁵⁸ One witness argued that a system that self-manages its discipline without outside accountability is seriously flawed. He was of the view that:

...subordinates will always be inclined to agree with those more senior than them. Members of the military will never be able to properly investigate other members of the military. I strongly believe that the intensely hierarchical nature and relatively small size of the services makes it impossible for each one to investigate itself.⁵⁹

8.61 Another stated his belief that 'the practice by members of the Chain of Command keeping things in-house to avoid damage to its reputation and career prospects is commonplace in the military'.⁶⁰

8.62 Consistent with this view, another former ADF member stated:

The bottom line is really quite easy to state: the Defence Force—be it Navy, Army or Air Force—cannot investigate itself on the one hand and defend

56 *ibid.*, p. 26.

57 *ibid.*, p. 26.

58 Confidential *Submission C43*.

59 Confidential *Submission C8*, p. 2.

60 Confidential *Submission C43*, para. 3.

itself on the other. This simply cannot be done fairly, without bias, thoroughly or properly. Do I feel that cover-ups are occurring? Again the answer is yes. I have no doubt whatsoever in my mind that this is the case. Whilst the Defence Force continues to investigate itself, this will continue to be the case.⁶¹

8.63 These general observations are drawn from personal experiences with the administrative system and are supported by a number of witnesses who conveyed to the committee the details of their particular case.⁶² Mr Nigel Southam asserted that his CO was not impartial. In his redress of grievance lodged with his commanding officer, Mr Southam made allegations of mistreatment of himself and others under the CO's command. He maintained:

In this case, he [the CO] personally decided to keep things 'in house' so that he could control the investigation himself and determine the outcomes to suit his purposes. This led to his personal bias in all aspects of this complex case and he became too personally involved, as did his RSM who laid the charges...he was protecting a newly formed 1MP Bn as the first ever CO1 MP Bn and his intention was to ensure that it worked without airing any negative issues to his superiors.⁶³

8.64 He informed the committee that, when he was told by his CO that the CO would hear his case, he 'put up a stink through my lawyer and indicated that he was biased'. As a consequence, 'the CO pulled out and let the CO1 Int Battalion take it over'.⁶⁴ Members do not always have the support, knowledge or fortitude to take such a stand. Even so, Mr Southam suffered a psychological breakdown which he attributed to the ineffective procedures in pursuing his complaints and with continued harassment.⁶⁵ He told the Committee :

These [procedures in pursuing his complaints] have caused me to be medically discharged as a result of psychological issues, and I have attempted suicide along the way after some three years of trying to find some resolutions in relation to these submissions.⁶⁶

8.65 The committee notes that in his efforts to pursue his case, Mr Southam made a submission to the committee, attended and gave evidence at a public hearing and remained in regular contact with the committee during its inquiry. The committee was advised on 12 August 2004 that Mr Southam had died suddenly in a road accident.

61 In camera *Committee Hansard*, 29 April 2004, p. 4.

62 For example, Confidential *Submissions C25A* and *C29*.

63 *Submission P19*, pp. 3, 4.

64 *Committee Hansard*, 9 June 2004, p. 69.

65 *Submission P19*, p. 4.

66 *Committee Hansard*, 9 June 2004, p. 664.

8.66 Another witness who was advised to use the available process to submit a complaint argued that this would have entailed addressing the grievance directly to the person against whom the grievance was made. He suggested that 'The resulting "Caesar looking at Caesar" scenario would have been meaningless, with a predictable non-productive outcome.'⁶⁷ Legal advice obtained by another complainant suggested that, 'although the person appointed as the investigating officer ought to have been aware of a reasonable apprehension of bias, he failed to refuse the appointment'.⁶⁸ Similarly, Ms Jayne Fitzpatrick noted:

Internal unit investigations achieve little where the complaint is against a senior member of the unit. My complaints expanded to include the CO and Chief Clerk in regard to their inappropriate behaviour. It became a farcical situation when the CO was investigating himself and the RSM was calling members to his office to write their statements about his behaviour...⁶⁹

8.67 She joined the many other witnesses who called for independent investigations. In her mind such investigations 'may lend credibility and allow for a two way passage of information more readily than the closed door policy of the military justice system'.⁷⁰

8.68 Mr Nigel Danson was also looking for greater independence and impartiality in the investigation processes. He complained about unacceptable treatment by various supervisors and senior officers, which included belittlement and continual harassment, while serving with the Air Force in East Timor. In his submission he claimed that he 'only ever wanted the members to be held responsible for their actions'. He came to the conclusion, however, that 'justice will never happen due to the rank of who the complaints were against and the current procedures for these investigations'.⁷¹ He held the view that:

The only way I can see the problem of Officers investigating other Officers of the same mustering and rank, but returning a fair and legal decision is to totally remove the investigation process from the same branch of each Defence Force.⁷²

8.69 He suggested further that a civilian representative be included in the investigation chain of command that could report direct to the Defence Department to present an objective point of view and show accountability.⁷³

67 Confidential *Submission C51*.

68 Confidential *Submission C39*, Attachment.

69 *Submissions P35* and *P3*.

70 *ibid*.

71 *Submission P11*, p. 2.

72 *Submission P11*, p. 2. See also Michael Pembroke Prowse, *Submission P12*, p. 3.

73 *Submission P11*, p. 2.

8.70 The above accounts represent only a fraction of the total number of witnesses who voiced their concern about the potential lack of independence and the perceived conflict of interest that exists where the military investigates itself.⁷⁴

8.71 This perception that there is real pressure on Service personnel to put other priorities before that of securing a fair and just investigation leaves the military justice system open to criticism. The many witnesses who expressed concerns about the lack of independence speak with one voice in calling for an independent adjudicator so that a neutral and unbiased investigation can take place free from third party interference.⁷⁵

8.72 The JSCFADT reached similar conclusions about the potential for conflict of interests. It recommended that 'Investigating Officers 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.'⁷⁶

8.73 In response to this recommendation, the government agreed in part and, as noted above, the Manual now offers guidance on this matter. The government was of the view, however, that it would not be possible to implement the second part of the recommendation that requires the investigating officer not to be acquainted with the individuals under investigation on the grounds that this would be impractical.⁷⁷

8.74 It should be noted that a number of witnesses agreed that, in straightforward cases, the administrative system performs well. For example one witness stated:

...in minor cases, such as a drunken soldier being late for work, the system probably operates reasonably.

He noted, however, that:

Where the power relationship is in any way challenged at the higher level—in instances of loyal opposition, for example—the soldier has no protection.⁷⁸

74 See also Mrs Satatas, *Committee Hansard*, 28 April 2004, pp. 1–3; Mr David Richards, *Committee Hansard*, 9 June 2004, p. 35.

75 See also Ms Sreaton, *Submission P31*, pp. 1, 3 and 4. She refers to her husband's redress of grievance dealing with the events that took place on board HMAS *Kanimbla* in regards to the Anthrax Vaccination program. In her view the process of her husband's redress of grievance system was seriously flawed and the system 'should not be held within the Defence force but held by an independent body that way the outcomes will be true and final'. Ms Jayne Fitzpatrick *Submission P35*; *Submission P38*, p. 39; and Confidential *Submission C50*.

76 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence(Inquiry) Regulations 1985, p. 117.

77 Government Response to the Report on Military Justice Procedures in the Australian Defence Force, pp. [11–12].

78 In camera *Committee Hansard*, 10 June 2004, p. 31.

Committee view

8.75 The committee makes no judgement about whether the independence of the investigating officer was compromised in any of the incidents related above. It is clear, however, that the present arrangement certainly allows, at the least, a perception of bias to undermine the integrity of the administrative inquiry process. It believes that the ADF must do more to address this problem and to eliminate this perception.

8.76 The committee notes the steps taken by the ADF following the recommendations made by the JSCFADT. It believes that stronger measures are necessary. Guidance offered in a Defence manual will not convince people that such advice will effectively counter service loyalty and/or self interest especially where the language is not sufficiently direct.

8.77 In particular, the committee recommends that stronger measures be taken to ensure the actual and perceived independence of the investigating officer and appointing officer. The committee is firmly of the belief that there are circumstances where a person should not be appointed as an investigating officer or where circumstances arise during the inquiry that should require him or her to withdraw automatically as the investigating officer of an inquiry. It suggests that the ADF revise and strengthen the language in their Manuals to ensure that due process is guaranteed to all ADF members involved in an investigation. For example, sub para 5.15(b) should read 'that personnel who are direct supervisors, personnel who have a close working relationship or friendship with any of the parties or witnesses must not be involved in an investigating officer inquiry'.

Recommendation 27

8.78 The committee recommends that the language in the Administrative Inquiries Manual be amended so that it is more direct and clear in its advice on the selection of an investigating officer.

8.79 Mindful that the meaning conveyed in the Manual about the importance of appointing an impartial investigating officer is clear, the committee is concerned that strengthening the language may still not be an adequate safeguard to ensure the independence of an investigating officer. The Manual is intended to provide advice and guidance.⁷⁹ It therefore recommends further that the guidance offered in the Manual be drafted as regulations to be inserted in Part 6 of the Defence (Inquiry) Regulations 1985.

8.80 There are also a range of options available to help remove the perception of conflict of interest by making the system more accountable and the appointment of investigating officers more transparent.

79 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual* Foreword, para. 2.

Recommendation 28

8.81 The committee recommends that the following proposals be considered to enhance transparency and accountability in the appointment of investigating officers:

- **Before an inquiry commences, the investigating officer be required to produce a written statement of independence which discloses professional and personal relationships with those subject to the inquiry and with the complainant. The statement would also disclose any circumstances which would make it difficult for the investigating officer to act impartially. This statement to be provided to the appointing authority, the complainant and other persons known to be involved in the inquiry.**
- **A provision to be included in the Manual that would allow a person involved in the inquiry process to lodge with the investigating officer and the appointing officer an objection to the investigating officer on the grounds of a conflict of interest and for these objections to be acknowledged and included in the investigating officer's report.**
- **The investigating officer be required to make known to the appointing authority any potential conflict of interest that emerges during the course of the inquiry and to withdraw from the investigation.**
- **The investigating officer's report to include his or her statement of independence and any record of objections raised about his or her appointment and for this section of the report to be made available to all participants in the inquiry.**

8.82 Having clearly enunciated the measures that an investigating officer must take to ensure that any person subject to an investigation is afforded procedural fairness is only the first step. There must be an independent oversight body with the responsibility and authority to ensure that the measures are enforced. The proposed Australian Defence Force Administrative Review Board should provide this necessary oversight (see recommendation 29, para 11.67).

Competence of the Investigating officer

8.83 A fundamental principle underpinning the right to a fair hearing is that everyone is entitled for such a hearing to be held by a competent, independent and impartial body established by due process. The committee believes that, although an administrative inquiry is not a judicial process, it should nonetheless guarantee that any inquiry will be conducted by a competent body.

8.84 Lieutenant General Leahy looked to the training and education of officers as an indication of the level of competency attained by investigating officers. He stressed that the training is inherent in the upbringing of an officer:

The training is as an investigating officer, his duties and responsibilities are through the Royal Military College conducting lower level investigations as a young officer at the staff college and at other colleges that he attends and,

again, at the precommand course what needs to be done as an investigating officer.

...a user's guide is always available to these officers, and we expect that they use that guide.⁸⁰

8.85 Similarly, Air Marshal Angus Houston explained:

...those posted to command positions in the Air Force undergo specialised training in the roles and responsibilities of command. This training includes the military justice system, its procedures and its application to our people. To support them in fulfilling their command obligations, they are also provided with specialist administrative and legal support to ensure they carry out their command responsibilities within the framework of both discipline and administrative law.⁸¹

Clearly, the service chiefs believe that investigating officers are well trained and competent.

8.86 Despite the training process for officers in undertaking inquiries, many witnesses held an opposing view on the competency and level of training of investigating officers.⁸²

8.87 In 1998 the Commonwealth Ombudsman in her review of the practices and procedures of ADF investigations, found a number of commonly occurring problems in ADF investigations, particularly administrative investigations of personnel-related issues. They included:

- inadequate planning of investigations;
- failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed;
- pursuit of irrelevant questioning techniques and failure to put contradictory evidence to witnesses for a response;
- failure to record evidence properly, and possibly, preparation of witnesses and unauthorised questioning of witnesses;
- failure to analyse evidence objectively, and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made; and
- inadequate record keeping.⁸³

80 *Committee Hansard*, 5 August 2004, p. 15.

81 *Committee Hansard*, 1 March 2004, p. 44.

82 See for example, Ms Jayne Fitzpatrick, *Submission P35*, p. 3 and confidential attachment to *Submission P40*.

8.88 The ADF took note of the Ombudsman's findings and formed a working party to develop an ADF-wide training strategy and guidance on Defence Inquiry Regulations and to set about drafting a new inquiries and investigation manual.⁸⁴

8.89 Six years later, however, the Defence Force Ombudsman was again highly critical of the poor standard of administrative investigations. He informed the committee that his office had seen instances in which investigations had been undertaken by people with inadequate training and, in some cases, the investigation was not as professional as it should have been.⁸⁵ He noted in particular the following deficiencies which, he said, in large measure reflected the poor training and lack of experience and expertise in investigations identified six years earlier:

- investigations of serious allegations being carried out by officers with apparently inadequate training in investigations and approaches inappropriate for the allegations being investigated;
- an investigation being thorough but conclusions and recommendations not being drawn together logically from the evidence for the decision-maker;
- an investigation taking an inordinate length of time with changes in investigation officer and failure to address the substance of the complaint;
- investigations resulting in recommendations which appear never to have been considered by anyone with the appropriate authority;
- an investigation where the members of the public are questioned with little apparent thought for the potential consequences; and
- investigations which have taken so long it renders any outcome favourable to the member virtually meaningless.⁸⁶

8.90 A number of witnesses who described their experiences of an investigation process concur with the Ombudsman's general observations. Two submissions, in particular, dealing with allegedly fraudulent activity, indicate a lack of thoroughness

83 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, January 1998, paras 37 and 5.54.

84 In her report, the Ombudsman noted that the ADF had formed a team, known as the Ombudsman Implementation Team which had developed 'a comprehensive draft manual intended for release in 1998 which incorporated many of the recommendations. Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, January 1998, statement following para 61.

85 *Committee Hansard*, 9 June 2004, pp. 1–4; *Submission P28*, p. [3].

86 *Submission P28*, p. [3].

on the part of the investigating officer, especially the failure to ask the most basic questions, to interview key witnesses, and to establish relevant facts. They maintained that there was unprofessional, even unethical, conduct in pursuing and conveying information, and scant regard for confidentiality or privacy matters.⁸⁷ Legal advice obtained by another member contended that, among a raft of failings, the investigating officer did not comply with certain mandatory procedures imposed on an investigating officer, including the failure to obtain all evidence that was practicable to obtain.⁸⁸ It also advised that the investigation was in breach of legislation such as the Freedom of Information Act, the Privacy Act and the Defence (Inquiry) Regulations.

8.91 Group Captain Behm, who had been appointed the investigating officer for a number of inquiries, suggested that the majority of investigating officers may not have appropriate training.⁸⁹ In his own assessment, he maintained that he had very limited experience as an investigating officer. With regard to his first investigation, he stated 'my legal assistant at the time gave me a lot of hands-on skill and training. It was basically learning on the job'.⁹⁰

8.92 Mr Earley, IGADF, also identified a lack of understanding of procedural fairness in the conduct of investigations. He stated that the awareness of procedural fairness obligations in administrative inquiries was 'probably less than desirable, and we need to concentrate a bit more on that'.⁹¹

8.93 The ADF has taken note of the Burchett Report recommendation that a register of suitable persons to act as investigating officers under the *Defence (Inquiry) Regulations* be developed.⁹² In August 2004, Mr Earley told the committee that, as well as the establishment of a Register of Inquiry Officers, the ADF was trying to improve the training of investigating officers. He explained further:

The initial course will happen next month for 25 people. The intention is to run it about four times a year. Over a period of time—and it will not happen overnight—we would expect the general standard of people conducting administrative inquiries to be substantially improved as a result of that.⁹³

8.94 The committee takes account of Mr Earley's view that the new training course together with revisions to the manual should improve the level of competency in

87 Mr Geoff Lewis, *Submission P55*, pp. 3–4 and *Confidential Submission C37*, para. 15.

88 *Confidential Submission C39*. See also *Submission P9A*, p. 2.

89 *Committee Hansard*, 22 April 2004, pp. 4–5.

90 *Committee Hansard*, 22 April 2004, p. 5.

91 *Committee Hansard*, 5 August 2004, p. 99.

92 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S. Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 118.

93 *Committee Hansard*, 5 August 2004, p. 99.

investigating officers.⁹⁴ Even so, it notes that in 1998, following the Ombudsman's own motion inquiry, the ADF undertook to develop a training program and to produce a new investigation manual. Clearly, those initiatives have not worked. In light of the failure of past initiatives, the committee believes that a close watch is needed to ensure that the proposed training and other initiatives produce the desired results. The committee's proposed Australian Defence Force Administrative Review Board should have an active role in monitoring the effectiveness of these initiatives (see recommendation 29, para 11.67).

Committee view

8.95 Undoubtedly, the investigating officer is in a position of great influence in the management and direction of an inquiry. He or she determines whether a particular fact or piece of evidence is relevant to the inquiry and the weight that should be assigned to it. The investigating officer has the responsibility to test the veracity of evidence and ensure that all relevant material has been considered.⁹⁵ Furthermore, keeping in mind that it is the investigating officer who will be possession of the information, the onus falls on him or her to ensure that all parties are treated fairly, their privacy respected, and that all people involved in the proceedings are afforded procedural fairness.

8.96 The importance of having an impartial, well-trained, competent and experienced investigating officer is heightened when considering the degree of discretion held by that person and the lack of transparency and accountability of the administrative inquiry process—particularly, the closed nature of its proceedings and the limited distribution of its report. Indeed, one of the main problems with in camera proceedings is that the absence of public scrutiny does not encourage witnesses to come forward to present evidence truthfully and does not allow questioning of the evidence gathering, the assessment of that evidence and the findings. Any steps taken to open the window on administrative proceedings, while still respecting the privacy of people involved in the inquiry, would be welcome. But more importantly, the qualifications and training of investigators must be of a standard to ensure that they are able to conduct a proper and fair investigation. This is clearly not the case at the moment. The establishment of a pool of highly qualified investigators must be one of the ADF's most important military justice priorities.

8.97 The IGADF is currently developing a training program designed to improve the competence of investigating officers. The committee welcomes this initiative and has recommended that its proposed Australian Defence Force Administrative Review Board, an independent review body for military grievances and complaints, further develop and implement the program (see recommendation 29, para 11.67).

94 *Committee Hansard*, 5 August 2004, p. 100.

95 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, Annex E to Chapter 6, para. 2.

Assistance to investigating officers

8.98 Group Captain Behm was from the school of opinion that appreciated the importance of having investigating officers who have had 'operational experience and wide experience in their military discipline'.⁹⁶ He concluded:

It is very important for an investigating officer to have a background in administration, operational things or human resource management. I am not saying that an investigating officer necessarily needs to be trained as an investigator. I think those sorts of things, if he is not trained as an investigator, presuppose that the legal support that the investigating officer gets will cover those issues.⁹⁷

8.99 As noted by Group Captain Behm, the matter of competency in conducting an investigation also relies on the provision of necessary expert advice to the investigating officer. As an officer who had been appointed an investigating officer for a number of inquiries, he expressed concern about the availability of legal advice for the investigator. He held that there:

...is a disconnect between the right of an appointing authority to appoint an investigating officer and determine the methodology of that inquiry and the power of the Defence Legal Service to refuse to exercise the financial delegation to pay any legal officer appointed by Command under the defence inquiry regulations, as it did in this case. It is my view that there is potential for the Defence Legal Service to undermine the decision of a commander from running an inquiry as he sees fit just by refusing to provide or pay the legal advisor.⁹⁸

8.100 From personal experience, he cited a case where the Defence Legal Service (TDLs) denied the appointing authority the legal assistance he required. The appointing officer was advised that the tasks outlined 'were administrative rather than legal in nature and tasked for the investigating officer to undertake'. He argued:

The Defence Legal Service was prepared to make a legal officer available on an ad hoc basis, to answer over the phone any legal questions I may have had. It saw no need for the legal officer to be on hand or to participate in the interview of key witnesses. The Defence Legal Service approach presupposes that I can identify that I have a legal issue and that I know what legal question to ask. The ad hoc legal advisor would not be apprised of the issues being investigated or the evidence collected and would be required to give legal advice in a vacuum. The Defence Legal Service approach does not allow for the strategic management of an inquiry.

8.101 He concluded:

96 *Committee Hansard*, 22 April 2004, p. 13.

97 *ibid.*, p. 13.

98 *Committee Hansard*, 22 April 2004, pp. 2–3.

The ultimate result was that I, as an investigating officer, was not provided with legal advice which was independent of Command and there was interference by Command in the conduct of my inquiries.⁹⁹

8.102 He recommended that consideration be given to the provision of legal support to appointing officers and investigating officers pursuant to the Defence (Inquiry) Regulations, and that appointing officers have the authority to determine the level of legal support to be made available to investigating officers of the TDLS.¹⁰⁰

8.103 The committee notes this criticism of TDLS and acknowledges the important role that appointing authorities should have in determining whether legal assistance should be provided. The provision of legal assistance is a matter of procedural fairness and should be assessed objectively and with natural justice as a primary consideration.

Delays

8.104 Any disruption to an inquiry has the potential to affect the quality of evidence gathering as well as to cause unnecessary hardship for both the complainant and persons subject to allegations. A prolonged inquiry adds to the ordeal of those wanting information about a sudden death or an accident or those seeking redress of a complaint. Also, while waiting for the result of an inquiry, those facing the prospect of adverse administrative action may have their reputation tarnished, their career prospects and health damaged or suffer financial loss. This has been the case in many instances presented to the committee.

8.105 As a precaution against delay, the appointing officer, in planning an inquiry, is to determine the time expected to complete the inquiry including setting a specific date for submitting the final report. He or she must monitor the progress. The Administrative Inquiries Manual stipulates that:

A progress report will demonstrate that the scope of the inquiry is being kept under constant review and will advise the Appointing Officer of any difficulties encountered—will explain why the inquiry could not be completed in the time allocated and justify a specific extension of time for the completion of the inquiry and final report.¹⁰¹

8.106 Even so, one of the most persistent criticisms levelled at the investigation phase was the length of time taken to complete the process.¹⁰² Hold-ups may occur at the initial stage of an administrative inquiry—the quick assessment. According to the

99 *Committee Hansard*, 22 April 2004, pp. 2–3.

100 *Submission P25*, p. 2.

101 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 6.16.

102 See Mrs Satatas, described the process as very slow and that a long time elapsed before an investigation was started, *Committee Hansard*, 28 April 2004, p. 12. Unnecessary delays also cited in Confidential *Submissions C2, C8; C29 and C37*.

Australian Peacekeeper & Peacemaker Veterans' Association (APPVA), the military justice system is far too slow in undertaking inquiries into whether administrative action or disciplinary action should be taken against an individual. It noted that a number of APPVA members have reported waiting long periods of up to eighteen months, for decisions to be made.¹⁰³

8.107 Lieutenant General Leahy conceded that delays have dogged the system for many years. He explained:

Delay is not always the result of institutional mismanagement or bureaucratic bungling, nor should it be assumed as such. Most service police investigations and administrative inquiries in the Army are conducted efficiently, expeditiously and to the satisfaction of all parties involved. When there is delay, this is often the result of complexity and the volume of work asked of our military justice team. Our desire to ensure the processes are fair and just sometimes adds to that delay. But we cannot afford to deny natural justice to anyone in the name of haste.¹⁰⁴

8.108 The experience of many witnesses does not marry with this observation. Some witnesses saw delay as yet another tactic to frustrate the inquiry process in the hope that the complainant would go away. Mr Dean Wirth, who initially made a report in regard to a harassment complaint in October 2002, had not received any formal resolution by March 2004. He was of the view that he had been directly obstructed in obtaining a resolution to this situation:

...I am of the opinion that those who are supposed to deal with this have taken the attitude that out of sight out of mind, and that they knew I was discharging due to this harassment. So they have played the waiting game until I discharged, and now they are using the good old red tape excuse to delay even more.¹⁰⁵

8.109 Mr Southam was informed that the investigation into his complaint, initially dated 1 October 2001, might be completed sometime in April 2004—'over 2½ years'.¹⁰⁶

8.110 Often delays formed only one part of a baffling pattern of obfuscation and stalling which left witnesses confused and frustrated. Based on personal experiences, Mr David Down, who claimed he was subjected to harassment and sexual assault while in the Navy, noted that:

...eventually the victims get out either by being discharged as unsuitable or dishonourably. Due to the affect that the events have on their personality and performance, or in the extreme by suicide. This leaves the perpetrators

103 *Submission P42*.

104 *Committee Hansard*, 1 March 2004, pp. 29–30.

105 *Submission P41*, p. 1.

106 *Submission P19*, p. 4.

to continue their career and evil ways which perpetuates the cycle of violence.¹⁰⁷

8.111 In support of this assessment, another witness who had been through the strain of pursuing a complaint understood how a person's resolve is worn down by stress and subtle pressure and how he or she would give up as a result of having been 'delayed to death by the military justice system.'¹⁰⁸ Another witness who had experienced the difficulties—delay, lack of information, and confusion about the procedure—surmised:

Imagine an ordinary soldier: most of these kids cannot handle all this kind of stuff ... The diggers are just overwhelmed by this.¹⁰⁹

8.112 Those subject to allegations may also endure long periods of uncertainty and anxiety. One witness, after four years of being the subject of an investigation, has yet to be formally advised of the outcome. To his mind, the delay clearly rests with the Army which:

...has at great time and expense afforded itself every opportunity to bring a case against me. It has had lawyers repeatedly review decisions and has employed a dysfunctional process that contravenes the fundamental human rights of justice delayed is justice denied.¹¹⁰

Committee view

8.113 Delays lead to disappointment which often fuels a growing resentment especially for those already feeling aggrieved. Often this dissatisfaction taints future proceedings. Protracted investigations may also cause unnecessary distress to those involved in the process and have a detrimental effect on their mental health. The committee notes Lieutenant General Leahy's concern that 'the ADF cannot afford to deny natural justice to anyone in the name of haste'. The committee cannot accept, however, that the nature and length of delays chronicled in this report are due solely to the requirement to adhere to the principles of procedural fairness. Missing or misplaced documentation, poor record keeping, recourse to the Freedom of Information legislation, conflicts of interest, lack of support in processing a complaint, investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry all contribute to unnecessary delays. Steps must be taken to correct this problem of delay.

8.114 With this objective in view, the committee recommends that all complaints lodged with a CO and being investigated within the chain of command be referred to

107 *Submission P61*, p. 4.

108 *Confidential Submission C43*.

109 *In camera Committee Transcript*, 10 June 2004, p. 96.

110 *In camera Committee Hansard*, 10 June 2004, p. 82.

the proposed Australian Defence Force Administrative Review Board if the matter is not resolved 60 days from lodgement (see recommendation 29, para. 11.67).

Reprisals for providing evidence

8.115 The last chapter noted that, in some cases, the threat of reprisal or actual retaliation deters members from lodging a complaint (paras 7.39–7.59). The committee heard reports of the same type of behaviour occurring should a person decide to lodge a complaint and/or provide evidence during an investigation.¹¹¹ One witness told the committee of repeated unacceptable behaviour involving public humiliation and ostracism toward her on account of her pursuing a complaint. She submitted that the unfair treatment was allowed to go unchecked despite investigations.¹¹² In her formal complaint, she recorded that:

Part of my chain of command...did not make any corrective actions to alleviate the victimisation and harassment I was experiencing, despite being advised of the severity of the issues and my health problems on a number of occasions.¹¹³

8.116 She noted that this lack of action was a failure to adhere or abide by DI(G) PERS 35–3 which states:

Any measure aimed at resolution must include steps to ensure there is no repeat of the behaviour or victimisation of either party. Regular follow-up action must be undertaken by the chain of command to ensure that the behaviour has not been repeated and/or victimisation has not resulted.¹¹⁴

8.117 The committee also heard allegations from a case officer assigned to assist a complainant who was also subject to victimisation. He alleged:

I have been unfairly treated and harassed by staff...for protecting and supporting a whistleblower. I have been subject to unpleasant comments and incidents and accused of being a troublemaker by staff including my peers for associating with [the whistleblower]. My Commanding Officer ...stated that 'overwhelming evidence indicated that I was a problem...and that staff are out to get me.'¹¹⁵

8.118 An alarming case of intimidation and physical abuse was also reported to the committee by a member who had given evidence before a Defence inquiry.¹¹⁶ This

111 Confidential *Submissions C29, C43*, para. 5 and *C50*. See also *Submission 61*, p. 2. in which Mr David Down stated that he declined to give evidence in a case against a Chief Coxswain who was alleged to have molested a junior sailor because 'of the shame of the other incidents [he had also claimed to have been assaulted] and my fear and anxiety of the consequences'.

112 Confidential *Submission C1*, p. 1.

113 Confidential *Submission C1*, p. 1 and Attachment—Formal Complaint, October 2001.

114 *ibid.*

115 Confidential *Submission C2*, pp. 2–3.

116 Confidential *Submission C36*.

evidence builds on that cited by the committee in the previous chapter and highlights the extent of the problem. It further underlines the need for the ADF to take a strong stand against this type of conduct.

8.119 Defence Regulations and Instructions clearly spell out the procedures to be followed to ensure the impartiality, fairness and timeliness of inquiries. One witness who complained about a number of process deficiencies following the lodgement of her complaints acknowledged that, while there are well-developed policies and procedures in place, 'The RAN...appear unable to manage real events or follow their own directions'.¹¹⁷

8.120 Evidence before the committee supports this observation, which applies across the three services, and highlights the need for ADF to go much further than reviewing and up dating its manuals and instructions. Enforcement of the guidelines must be a priority.

Conclusion

8.121 The report has clearly identified serious shortcomings in administrative inquiries that include:

- lapses in adherence to the principles of procedural fairness—particularly the right to know the allegation and the evidence supporting the allegation—even to the extent that investigations were carried out without the knowledge of the person subject to the inquiry;
- breaches of confidentiality;
- conflicts of interest that call into question the independence and fairness of the investigation process and rob the system of its integrity;
- poorly conducted investigations that lack thoroughness due to factors such as inept gathering of evidence, inadequately trained and or unprofessional investigators, and flawed analysis;
- delays; and
- failure in some cases to protect, or prevent reprisals against, those pursuing a complaint or giving evidence before an administrative inquiry.

8.122 The committee is concerned that there appears to be no mechanism in place to ensure that the requirements set down in Defence regulations and instructions are rigorously enforced. Furthermore, evidence suggests that the ADF has had little success in removing the perception that administrative inquiries lack impartiality and independence. The committee believes that its proposed Australian Defence Force Administrative Review Board will provide the necessary oversight to ensure that any failure by investigating officers to observe the guidelines set out in the various ADF manuals will be brought to light and corrected. It would also provide the necessary

117 Confidential *Submission C1*.

appeal or review process to improve investigating officer inquiries which would now be restricted to non-notifiable incidents. It would turn the spot light on the shortcomings in such investigations and not only correct individual investigating officer failings but more broadly act as an incentive for investigating officers to apply themselves more assiduously to their responsibilities. More importantly, however, this statutorily independent review board would for the first time effectively combat the perception that administrative investigations lack impartiality. A full discussion of the details of this proposed board are presented in chapter 11.

8.123 This chapter was primarily concerned with presenting a general understanding of the strengths and weaknesses of investigations under the current ADF's administrative system. There is a particular subset of inquiries that come under this general category of routine and investigating officer inquiries that have distinct features. They deal with serious accidents and sudden deaths and are considered in the following chapter.

