

**Senate Foreign Affairs, Defence and Trade  
References Committee**

**SUBMISSION COVER SHEET**

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**Inquiry Title:** Effectiveness of Australia's Military Justice System

**Submission No:** P64

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**Submitter:** Colonel John A. Harvey

**Organisation:**

**Address:**

**Phone:**

**Fax:**

**Email:**

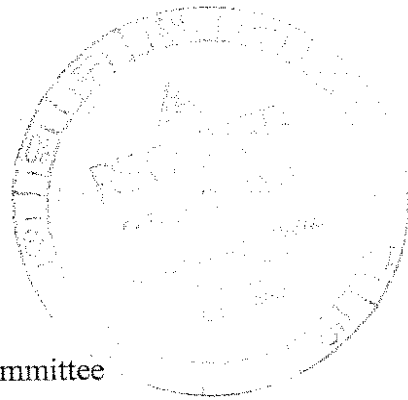
**Name/Contact:** Colonel John A. Harvey

**Date Authorised:**

JOHN A. HARVEY

28 June 2004

The Secretary  
Senate Foreign Affairs, Defence and Trade References Committee  
Suite S 1.57  
Parliament House  
CANBERRA ACT 2600



INQUIRY TITLE: Effectiveness of Australia's Military Justice System

### Introduction

1. Last week the evidence given by Mr James Grant Clark to the above inquiry on Wednesday, 9 June 2004 was brought my attention. I seek to make a late submission to the Inquiry to:

- a. correct specific misrepresentations made by Mr Clark;
- b. correct a general impression given by Mr Clark; and
- c. suggest future changes to policy concerning Inquiries within the ADF.

2. I am a Colonel in the Army Reserve, having transferred to the Reserve from the Australian Regular Army in November 2000. I am currently employed as the Special Adviser to the Director General The Defence Legal Service (TDLS). Prior to November 2000 I had been a legal officer in the Australian Regular Army for 25 years and, apart from one year, had been involved in administrative law issues within Army and then the ADF from 1986 until 1999. I was the Director Army Legal Services from December 1989 until 1999 and the Director of Administrative Law within the Defence Legal Office from July 1997 until 1999. I was the officer responsible for the development and clearance of the ADF policy concerning Administrative Inquiries, *ADFP 202 - Administrative Inquiries Manual*, now *ADFP 06.1.4*.

### Misrepresentations made by Mr Clark

3. The transcript of the Inquiry hearings on Wednesday, 9 June 2004 included, on page FAD&T 87, the following evidence from Mr Clark:

*Once again, that had its own problems. Kim Morrison, who was the next of kin, was also a corporal in the Army. She was visited by a full colonel from the Defence Legal Service in June 2002. So she is a corporal in the Army and a red hat colonel flies across to visit her in Perth and says: 'You don't really want to have a board of inquiry, do you? They're very expensive. Why don't we have an investigating officer, and they'll clear it up in a fortnight?' That colonel had a duty to tell that corporal who was grieving, who had lost her husband, who had seen the Everest board of inquiry start and conclude and whose husband's death was three months before that - that she should seek independent legal advice, that the investigating officer cannot force people to answer questions and that you do not have the transparency.*

*What would I do if I were a corporal and a full colonel flew all the way to Perth to see me, gave me that advice and that was all he told me? I would say, 'Well, sir, if that's what you say, we'll have an investigation.' Apparently, when she spoke to one of her mates some weeks later she said: 'I'm not going to get what I want. I'm not going to find out how he died. I want a board of inquiry.' The defence reaction was: 'We'll blame the victim. You're a troublemaker.'*

4. I believe I am the person being referred to in Mr Clark's evidence. In February 2001 I had been appointed as senior counsel assisting a board of inquiry appointed to inquire into the circumstances surrounding the death of Sapper Andrew Jon Morrison in Yosemite National Park, California.
5. I did fly over to Perth and speak to Corporal Kim Morrison, the widow of the deceased Sapper Morrison on one occasion; however, I did so in November 2001, not June 2002, and did so in order to brief her on the circumstances surrounding the death of her husband.
6. I conducted this briefing on 13 November 2001 in the presence of Carol Jacobs, a social worker from the Defence Community Organisation, Perth and during this interview provided her with copies of statements by Douglas C. Roe, Special Agent for the National Park Service and case agent on the Andrew J. Morrison fatality investigation and John T. Dill, Assistant Search and Rescue Manager, National Park Service.
7. Although the briefing was planned to last an hour, it went considerably longer. Kim Morrison asked many questions concerning the likely cause of death and discussions were quite broad ranging. I explained that the Report from the National Park Service would, in effect, be as close as we would get to a coroner's inquest into the death of her husband but that, nevertheless there would be an Army board of inquiry to inquire into circumstances leading up to the death to establish if there was anything that the Army could learn in order to prevent a recurrence of the death.
8. In addition to briefing Kim Morrison I briefed the parents and sister of the deceased in Gosford on 20 November 2001 in the presence of MAJ Rasmussen and W02 Dally from the Defence Community Organisation, Liverpool. I provided the same material to them that I provided to Kim Morrison.
9. I subsequently contacted Kim Morrison by telephone on several occasions explaining why there was a delay in the commencement of the hearings of the board of inquiry. This was due to the fact that the Appointing Authority of the board of inquiry had directed the President to delay the commencement of the hearing of the board of inquiry until persons who may be affected by the inquiry were available to attend as it would be unfair to conduct those hearings without giving those persons an opportunity to be present.
10. I also explained that notwithstanding the delay in the hearing of the board of inquiry, the President of the board of inquiry had briefed the Deputy Chief of Army on what he considered to be shortcomings in Army Risk Management policies and procedures identified as a result of the scoping exercise undertaken as a preliminary step to the conduct of the board of inquiry hearings. I further explained that a report on deficiencies in Army Risk Management was prepared and action was being taken to remedy some of the shortcomings in that area that had been identified during the scoping for the board of inquiry into Sapper Morrison's death.

11. When one of the persons likely to be affected by the board of inquiry returned to Australia two other persons likely to be affected by the board of inquiry continued to be unavailable because they were affected persons before the Everest board of inquiry.

12. The Everest board of inquiry hearings extended further and further and it became apparent that a number of the issues associated with the events leading up to the climbing activity in which Sapper Morrison died were likely to be covered by the evidence given before the Everest board of inquiry. After discussing these matters with the then Director General, The Defence Legal Service I concluded that an inquiry by an Investigating Officer was a viable option because the US National Park Service Report gave the Army most of the detail required to satisfy *what happened* and *why did it happen* and that the other major issue in an inquiry - *what are we going to do to prevent a recurrence* - could be handled by an Investigating Officer extracting relevant material from the Everest board of inquiry evidence and report, thereby avoiding the need to take that evidence again.

13. On 8 April 2002, the Director General, The Defence Legal Service provided the Appointing Authority with a verbal brief on the option of an inquiry by an Investigating Officer rather than a board of inquiry and the Appointing Authority agreed to this course, subject to certain conditions, including agreement by the family of the deceased.

14. On 8 April 2002, I spoke by telephone to Kim Morrison and subsequently to Sapper Morrison's father and explained that there was an alternative option to conducting a board of inquiry. I explained that the US National Park Service report gave us most of the what and why and that a lot of evidence given at the Everest board of inquiry would be applicable in the case of the inquiry into the death of Sapper Morrison as the inquiry establishes what we are going to do to prevent a recurrence. I further explained that a board of inquiry may take months and, if the Everest board of inquiry was an example, it may not be finished until next year. I stated that by contrast, an Investigating Officer should be able to complete a report by the end of June 2002. I asked them to think about the options overnight and that I would contact them the next day.

15. Kim Morrison rang me on my mobile, before I had an opportunity to ring her, and indicated that it was pointless to take all that evidence again and, therefore, agreed to the inquiry being conducted by an Investigating Officer. On 9 April 2002 I rang Sapper Morrison's father and he stated he was happy for the inquiry to be conducted by an Investigating Officer, and that 'the full inquiry was just a waste of time and money'.

#### **General Impression given by Mr Clark**

16. In his evidence before the Inquiry Mr Clark gave the general impression that an inquiry within the Australian Defence Force (ADF) took the place of a coronial inquest. The transcript of the Inquiry hearings on Wednesday, 9 June 2004 included, on page FAD&T 79, the following evidence by Mr Clark:

*If consistently over the years it is demonstrated that defence cannot do it, it is time to consider seriously taking it into the public domain and having, for example, the appointment of a Commonwealth coroner. That is just an example. You could use a state coroner or a territory coroner.*

17. The purpose of any inquiry in the ADF is to determine the facts and circumstances surrounding an incident so that an informed decision may be taken about the action required including, where appropriate, action to avoid a recurrence – *ADFP 06.1.4 paragraph 1.8*. Where an incident in Australia results in death, an inquiry by the ADF does not replace or in any way usurp the role or responsibility of the State or Territory Coroner to conduct an investigation or coronial inquest. The fact that a coroner will often accept the proceedings of a board of inquiry and decide not to conduct a further inquest is an indication that of the quality of some boards of inquiry.

### **Future Changes to Policy concerning Inquiries**

18. There remains a general misunderstanding of the distinction between inquiries in the ADF, the purpose of which is set out above, and Disciplinary proceedings, which are similar to criminal proceedings in civilian courts.

19. In recent years board of inquiry hearings have taken far longer than in the past and greater emphasis seems to have been given to ‘defending’ the actions of persons who may be affected by the inquiry rather than in establishing what action needs to be taken to avoid a recurrence. The proceedings have become adversarial when this is clearly not envisaged by the *Defence (Inquiry) Regulations* where the rules of evidence do not apply.

20. While I believe that the tax free nature of the sessional fee of \$1,200 per day paid to reserve legal officers representing persons affected by a board of inquiry is no incentive to conclude the proceeding quickly, I believe that another reason for board of inquiry hearings lasting far longer than in the past is because the ADF has failed to focus on establishing what action needs to be taken to avoid a recurrence.

21. If a quick assessment of an incident identifies that an offence may have been committed, ADF police or civilian police should investigate the incident. If the incident involves a death, the State or Territory Coroner retains the primary responsibility for investigating the cause of death. In these circumstances, if the ADF is to conduct an inquiry, that inquiry should occur after the Coroner’s inquest and should focus on what action needs to be taken to avoid a recurrence.

22. The ADF has had the Defence Act, 1903 amended to extend protection to witnesses in any inquiry under the Defence (Inquiry) Regulations against civil or criminal proceedings or proceedings before a service tribunal. However, the last 10 years has seen the increased use of adverse administrative action against members and, under the legislation, witnesses are not protected against adverse administrative action.

23. *Defence Act, 1903 sub-section 124 (2C)* provides:

*(2C) A statement or disclosure made by a witness in the course of giving evidence before a court of inquiry, a board of inquiry, an investigating officer or an inquiry assistant is not admissible in evidence against that witness in:*

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

*otherwise than in proceedings by way of a prosecution for giving false testimony at the hearing before the court of inquiry, the board of inquiry, the investigating officer or the inquiry assistant.*

24. Adverse administrative action may take the form of a warning, a formal censure, reduction in rank or even termination of enlistment or appointment. While not a punishment under the *Defence Force Discipline Act 1982*, adverse administrative action is widely regarded by ADF members as a form of 'punishment'.

25. In my view, board of inquiry hearings have been taking so long in recent times because, in addition to the reserve legal officers appearing for persons affected by the inquiry having no incentive to conclude the proceedings quickly, those legal officers are endeavouring to ensure that their client is not held responsible for the incident, thereby ensuring that no adverse administrative action is taken against their client after the inquiry is concluded.

26. In my view, if an ADF member is suspected of having committed an act or omission for which the member should be liable for 'punishment' that member should be given the protection afforded by Commonwealth, including the *Defence Force Discipline Act 1982*, State or Territory laws concerning the interviewing of suspects.

27. The ADF needs to change policy to ensure:

- a. Wide promulgation of the fact that State and Territory Coroners retain the primary responsibility to investigate deaths in Australia.
- b. The primary purpose of any inquiry in Australia under the *Defence (Inquiry) Regulations* is to establish what action needs to be taken to avoid a recurrence of the incident.
- c. Adverse administrative action, such as censure, reduction in rank or termination of enlistment or appointment, following any inquiry in Australia under the *Defence (Inquiry) Regulations* should be prohibited.

JOHN A. HARVEY  
Colonel