Senate Foreign Affairs, Defence and Trade References Committee

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: **P69**

Date Received: 5.08.04

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MEDIATOR

5 August 2004

The Secretary
Senate Foreign Affairs, Defence and Trade References Committee
Suite S1.57
Parliament House
CANBERRA ACT 2600

By Facsimile to (02) 6277 5818 – 35 pages in total.

Dear Sir/Madam,

Re: Sufficiency/Shortcomings of the Defence (Inquiry) Regulations 1985

I am a Barrister at the private Bar in Queensland. I have had some experience in Royal Commissions/Boards of Inquiry. I am also a Lieutenant Commander in the Royal Australian Naval Reserve.

Late last year I prepared a paper on the sufficiency/shortcomings of the Defence (Inquiry) Regulations 1985. It is enclosed for your consideration. I submit my paper for your consideration with the caveat that it was prepared prior to the December 2003 amendments to the immunities contained in section 124(2C) of the Defence Act, which addresses, at least in part, one of my identified criticisms (refer: footnote 1 of the Paper).

I advocate a complete redrafting/review of the legislative framework for Defence Inquiries.

As an additional observation, the Defence (Inquiry) Regulations 1985 do not have application to investigations into Cadets. To my knowledge and concern, there is no legislative framework/authority in relation to such matters.

My submission is made as a private citizen/ Barrister practising at the private Bar. I hope it may be of assistance to all involved in the Inquiry process.

Yours faithfully,

ADAM JOHNSON
Chambers

MILITARY INQUIRIES UNDER THE DEFENCE *(INQUIRY) REGULATIONS* 1985[1]

Introduction

The topic of military justice (as a general term) - and military inquiries conducted under the *Defence (Inquiry) Regulations* 1985 (hereafter the "*Defence (Inquiry) Regulations* " or the *Defence (Inquiry) Regulations* 1985") in particular, has attracted much recent focus and attention from Senate Committees, the Commonwealth Ombudsman and other bodies in recent times. Most of the focus and attention upon military inquiries has been concentrated from the period of 1999 onwards when the Senate convened an inquiry into "*Military Justice In The Australian Defence Force*"; in 2001 when the Senate again conducted an inquiry entitled "*Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion*"; in 2001 "*A Report Of An Inquiry Into Military Justice In The Australian Defence Force*" conducted by Mr J.C.S. Burchett QC and the most recently convened inquiry by the Senate in 2003 into "*The Effectiveness Of Australia's Military Justice System*".

All of the above inquiries, dating from 1999 onwards, arose some considerable time after the *Defence (Inquiry) Regulations* were themselves enacted and came into force in 1985.

Commissions of Inquiry, or Royal Commissions, have been a feature of the executive arm of government for some time. However, during the mid to late 1980s, Royal Commissions and/or Commissions of Inquiry came into much prominence and became a regular feature in the legal landscape as a result of

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[1] Please note – this paper was written PRIOR to the enactment of the DEFENCE LEGISLATION AMENDMENT ACT 2003 NO. 135, 2003

investigations into wide-scale corruption by criminals and tainted police which were beyond the investigative capacity of normal government resources in the form of police services. The mid to late 1980s also saw the introduction of permanent Commissions of Inquiry, such as the Criminal Justice Commission in Queensland, and ICAC in New South Wales, to name but two, constituted with extraordinary coercive powers to fulfil their remit in the form of a standing or permanent corruption watchdog.

The period of the late 1980s to the 1990s produced much activity in relation to Commissions of Inquiry, resulting in many procedural and legislative reforms to the investigative inquiry frameworks, both statutory (in the form of constituting Acts) and procedural (in terms of accepted practice and/or as a result of case law). Furthermore, by reason of regularity of operations by the many standing Commissions of Inquiry and many ad hoc Royal Commissions/Commissions of Inquiry, issues relating to the conduct of such inquiries, whether permanent or otherwise, have come to prominence.

It has been some considerable time since the *Defence (Inquiry) Regulations* 1985 were enacted. Since that time, the body of jurisprudence and/or practice in relation to Commissions of Inquiry has grown considerably. Changes in legislative frameworks for such inquiries have also developed, become more sophisticated and have kept pace with current and/or efficient procedural practices of various permanent commissions.

In stark contrast, only minor changes have been made to practice / procedural issues relating to the *Defence (Inquiry) Regulations* 1985. This Paper will examine issues which may deserve attention, either by promulgation of procedures, or indeed, by legislative changes to update the *Defence (Inquiry) Regulations* 1985.

In addition to the current (recent – from 1999 onwards) Senate attention to Military Inquiries, the Department of Defence has itself, a "Centenary of Federation Defence Legislative Review Project". The remit of the Centenary of Federation Defence Legislative Review Project includes, but is not limited to, an examination

of the plethora of Defence portfolio legislation, itself a disparate jigsaw of applicable defence and miscellaneous legislation, consisting of a large collection of Acts, regulations, legislative instruments, defence instructions, and other instruments from which the Department of Defence derives its powers and obligations.

Thus, it is submitted it is timely for issues relevance to Military Inquiries to be examined in the context of current reviews or inquiries and the wide ranging review of defence legislation.

Historical perspective

It is often useful to undertake a short historical perspective in order to provide the context by which the *Defence (Inquiry) Regulations* 1985 were, themselves, brought into existence.

The journey begins some considerable time before the promulgation of the *Defence (Inquiry) Regulations* 1985 - which had an extraordinary germination period.

In 1950, after a fatal incident involving the heavy landing ship HMAS Tarakan, the then Prime Minister Robert G. Menzies, himself a lawyer, ascertained that there was not at that time any statutory framework or means then in existence to enable the convening of a Court of Inquiry presided over by a Federal judge into the accident. In January 1950 the Prime Minister Mr Menzies, therefore ordered the preparation of necessary regulations to allow such a Court of Inquiry and other means of inquiry, to be available when required.[2]

A first draft of the regulations drawn pursuant to the Prime Minister's direction, were forwarded by the Parliamentary Draftsman to the then Department of the

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2 Tom Frame, "Where Fate Calls – the HMAS Voyager Tragedy" – Chap. 4, p.44

Navy on 15 February 1950[3]. The then Navy Minister and the Naval Board voiced their opposition to the enactment of a statutory framework providing for inquiries and commented:

> *"No Court of Inquiry such as is now proposed, has been found necessary in the Royal Navy, where they have had practically a decade of experience to each year of the RAN's existence. Surely, it is unusual to introduce a new law without some indication of the necessity for it or inadequacy of the existing regulations.*[4]

The Naval Board were affronted by the suggestion of a need for such a framework on the basis it represented an implied vote of no confidence in their capacity to competently or properly attend to such matters. Nonetheless, suggested amendments on security and operational grounds were made to the draft. By all accounts, a re-drafted regulation was forwarded to the Naval Board on 28 February 1950 by the then Solicitor-General. The matter was not progressed beyond 15 March 1950 when the then Secretary of the Navy Department wrote directly to the Parliamentary Draftsman (and not to the Solicitor-General) informing him that "the Minister for the Navy has decided not to proceed with the regulations".[5]

Thus the issue of an appropriate statutory framework for the conduct of military (in this case, naval) inquiries remained in abeyance, contrary to the Prime Minister's own direction, until the loss of HMAS Voyager on 11 February 1964 when the issue was brought back into sharp focus.

On the night of the loss of HMAS Voyager, Prime Minister Menzies was informed of the disaster and was under the impression that the regulations he directed to be prepared in 1950 had indeed been promulgated. He thereafter made public statements based upon his (mistaken) understanding as to the applicable available legal framework for investigation of the disaster, as part of the government

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3 ibid

4 Comment on Discussion Paper "Regulations to Provide for a Naval Court of Inquiry" by the Second Naval Member dated 17 February 1950.

5 Secretary of the Navy, Letter No. 9685, 15 March 1950 (Navy Office File 584/201/881) referring to Parliamentary Draftsman Memo No. 50/155, 1 March 1950

response to the disaster. The then Prime Minister in his own mind had determined the form of Court of Inquiry to investigate the disaster and gave directions to the Navy Department to make the necessary arrangements (on his understanding that his directions had been implemented). In the course of implementing the Prime Minister's 1964 direction, the Navy Department officers realised the Court of Inquiry the Prime Minister had decided upon was not provided for by any existing legislation or regulation. Thereafter the Naval Board then advised the Prime Minister that its predecessors had not carried out his instructions some fourteen years previously.

Tom Frame observed[6]:

> *"The Naval Board was obviously unable to comply with Menzies' instructions. The passing of a regulation to establish a Naval Court did not require the involvement of Parliament, but it was affected by many other difficulties and constraints. Foremost, were the shortage of draftsman in the Attorney-General's Department, and the well-known slowness of the Navy Department in drafting any regulations.*
>
> *.... the Prime Minister realised immediately the expectation his public statement had created. To have the Naval Court of Inquiry regulations promulgated would have taken much longer than he was prepared to wait. He could not convene a Marine Court of Inquiry under the Commonwealth Navigation Act as this act specifically excluded naval ships. Even the Royal Commissions Act presented a problem in that it would need to be altered to allow for the (expert or naval) assessors Menzies had mentioned in his statement. Such an amendment would have required the recall of Parliament.*
>
> *...the whole incident had become an administrative mess. Ultimately, the Prime Minster had to settle for a Royal Commission, which was announced to the press two days later on 13 February 1964"*

History will recall that the HMAS Voyager disaster resulted in an unprecedented (and as yet not repeated) situation in which two Royal Commissions were convened into the disaster – the first Royal Commission being convened in 1964 and another Royal Commission being convened in 1967.

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[6] Tom Frame, "Where Fate Calls – the HMAS Voyager Tragedy" – Chap. 4

Despite the calamitous events of the Royal Commissions of 1964 and later in 1967, it was not until 1985 that the statutory framework for the constitution of military inquiries originally ordered by Prime Minister Menzies in 1950, came into existence. More recently, the Senate Inquiry *"Military Justice In The Australian Defence Force" 1999* noted [7] that *"military inquiries are provided for under the Defence (Inquiry) Regulations which were framed in the aftermath of the sinking of HMAS Voyager"*.

The promulgation of the *Defence (Inquiry) Regulation 1985*, on the part of the then Navy Department and later the amalgamated Department of Defence, was/is an effort of which Sir Humphrey Appleby in the "Yes Minister" series, would be proud.

The regulations came into force on 3 July 1985 providing a *"framework to expeditiously and properly investigate matters that have the potential to detract from the operational capability of the ADF"*[8].

Subsequent Review and Amendment of the *Defence (Inquiry) Regulations* 1985

The Senate Inquiry *"Military Justice In The Australian Defence Force" 1999* noted[9]:

> *"Military inquiries are primarily concerned with determining facts; they are not employed to investigate disciplinary or criminal matters, nor empowered to impose punishment. Rather, military inquiries provide an internal management tool to enable corrective action to be taken by the Commander."*

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[7] Senate Inquiry *"Military Justice In The Australian Defence Force" 1999*, Report and Findings, paragraph 1.6

[8] Senate Inquiry *"Military Justice In The Australian Defence Force" 1999, paragraph 1.6*

[9] Senate Inquiry *"Military Justice In The Australian Defence Force" 1999, paragraph 1.6*

The Senate Inquiry *"Military Justice In The Australian Defence Force" 1999* also took concurrent investigations, reports and other miscellaneous developments in the area, principally, the Ombudsman Report, into account. A then existing outcome of the Ombudsman Report was the Australian Defence Force Publication 202, *"Administrative Inquiries and Investigations in the ADF"*. This publication was later re-titled "ADFP 202 - *Administrative Inquiries Manual"*. The manual represented a quantum leap in the guidance and assistance to those conducting inquiries under the *Defence (Inquiry) Regulations* 1985, many of whom were not lawyers and were lay members. The manual provided much needed guidance as to procedural matters, which included matters fundamental to administrative law, amongst other things. Furthermore, many of the matters traversed during the Senate Inquiry *"Military Justice In The Australian Defence Force"* were resolved by amendments and subsequent promulgation of ADFP 202 –*Administrative Inquiries Manual.*

As a matter of history, the Senate again focussed its attention upon aspects of the *Defence (Inquiry) Regulations* 1985 in 2001 during the *"Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion"* inquiry, and the *"Report Of An Inquiry Into Military Justice In The Australian Defence Force - Being An Investigating Officer's Inquiry Pursuant To The Defence (Inquiry) Regulation 1985* conducted By Retired Federal Court Judge, Mr JCS Burchett QC in 2001 (hereafter the "Burchett Inquiry"). The regulations themselves were amended in 2001 to provide for the appointment of a person other than a military officer (my emphasis) to be an Investigating Officer pursuant to the *Defence (Inquiry) Regulations* 1985. Amendments also provided for the appointment of "Inquiry Assistants" to assist the investigating officer, each of whom had different powers (including coercive powers) under the regulation. Further, as a consequence of some recommendations made by the Burchett Inquiry, the regulations were again amended to establish a Military Inspector-General in respect of military justice in relation to both disciplinary and inquiry related matters. The Military Inspector-General concept is something akin to a permanent inquiry such as the Criminal

Justice Commission and/or ICAC, though is an internal entity within the Department of Defence. The Military Inspector-General is something of a permanent investigating officer employed in a watchdog or oversight role. No other amendments, other than the above ad hoc amendments were made to the *Defence (Inquiry) Regulations* 1985.

The Senate has announced an inquiry into the "*Effectiveness of Australia's Military Justice System*" commencing February 2004. Interestingly, it will also examine HOW such various Military Inquiries were conducted. The Terms of Reference are as follows:

> *"Terms of reference*
>
> *(1) The following matters be referred to the Foreign Affairs, Defence and Trade References Committee for inquiry and report:*
>
> *(a) the effectiveness of the Australian military justice system in providing impartial, rigorous and fair outcomes, and mechanisms to improve the transparency and public accountability of military justice procedures; and*
>
> *(b) the handling by the Australian Defence Force (ADF) of:*
>
> *(i) inquiries into the reasons for peacetime deaths in the ADF (whether occurring by suicide or accident), including the quality of investigations, the process for their instigation, and implementation of findings,*
>
> *(ii) allegations that ADF personnel, cadets, trainees, civilian employees or former personnel have been mistreated,*
>
> *(iii) inquiries into whether administrative action or disciplinary action should be taken against any member of the ADF, and*
>
> *(iv) allegations of drug abuse by ADF members.*
>
> *(2) Without limiting the scope of its inquiry, the committee shall consider the process and handling of the following investigations by the ADF into:*
>
> *(a) the death of Private Jeremy Williams;*
>
> *(b) the reasons for the fatal fire on the HMAS Westralia;*
>
> *(c) the death of Air Cadet Eleanore Tibble;*
>
> *(d) allegations about misconduct by members of the Special Air Service in East Timor; and*
>
> *(e) the disappearance at sea of Acting Leading Seaman Gurr in 2002.*
>
> *(3) The Committee shall also examine the impact of Government initiatives to improve the military justice system, including the Inspector General of the ADF and the proposed office of Director of Military Prosecutions."*

Apart from the attention received from the most recent Senate inquiries from 1999 onwards, and the amendments in relation to investigating officers being expanded to being civilians, inquiry assistants and the creation of the office of the Military Inspector-General, the *Defence (Inquiry) Regulations* themselves have not been substantively reviewed in detail since their inception in 1985.

The regulations themselves are reminiscent of an earlier model of statutory framework of Commissions of Inquiry (based mainly on the *Royal Commissions Act* 1902 (Commonwealth) applied mutatis mutandis) which pre -dated the considerable development of procedure, law and practice relating to various large and long-standing Commissions of Inquiry of the late 1980's and early 1990s. These developments, discussed below, do not appear to have been incorporated into amendments of the *Defence (Inquiry) Regulations* 1985.

Legislative criticisms

Form

The first criticism of the *Defence (Inquiry) Regulations* framework relating to the composition, conduct and statutory powers of military inquiries, is that the current arrangements are contained mainly in regulation form and that some key provisions appear almost as an afterthought, in the "twilight section", or last section of the *Defence Act* 1903. The main provisions of the statutory framework of military inquiries is contained in a regulation, itself subordinate to Acts of Parliament of the Commonwealth, with some key provisions appaering outside the regulation in s.124 of the *Defence Act* which relates to the power to make regulations. It is submitted such an approach is messy, incoherent and undesirable.

Section 124(1)(gc)[10] provides:

> *"The appointment, procedures and powers of courts of inquiry, boards of inquiry and investigating officers"*

The protection for witnesses before an Investigating Officer's Inquiry is contained in the *Defence (Inquiry) Regulations* 1985 only[11], whereas the protections in respect of witnesses before Boards, Courts or Combined Courts or Boards of Inquiry are contained in section 124(2C) of the *Defence Act* 1903[12]. Arguably, the grant of immunity of a witness in regulation 74B[13] is not a matter germane to the *appointment, procedures and powers* of an Inquiry -as it is not the Inquiry that grants the immunity. It is therefore submitted regulation 74B is ultra vires the power in section 124(1)(gc)[14] and could be ineffective. This is possibly the reason why the immunity in section 124(2C)[15] (relation to Courts/Boards of Inquiry as opposed to Investigating Officer's Inquiries) is contained in the Act and not the regulation. Moreover, the supremacy of Statute over regulation (eg other Commonwealth statutes) further erodes the effectiveness of the immunity in regulation 74B[16] in its application to Investigating Officer's Inquiries.

Primary legislation (as opposed to subordinate legislation) relating to Commissions of Inquiry and the more recent permanent Commissions of Inquiry

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10 Section 124(1(gc) *Defence Act* 1903

11 Regulation 74B –*Defence (Inquiry) Regulations* 1985 - *"A statement or disclosure made by a member of the Defence Force while giving evidence before an Investigating Officer or an Inquiry Assistant, is not admissible in evidence against that person in proceedings before a Service Tribunal"*

12 *Section 124(2C) Defence Act 1903"A statement or disclosure made by a witness in the course of giving evidence before a court of inquiry or a board of inquiry is not admissible in evidence against t hat 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 or the board of inquiry"

13 Regulation 74B –*Defence (Inquiry) Regulations* 1985

14 Section 124(1(gc) *Defence Act* 1903

15 Section 124(2C) *Defence Act* 1903

16 Regulation 74B –*Defence (Inquiry) Regulations* 1985

(such as the CJC or ICAC) contain substantive coercive powers, immunities, rights, obligations and responsibilities of both the Commission and those appearing before them. As many of the matters contain significant intrusions to liberty and indeed are inconsistent with and override common law, they are encapsulated in statutory form in an Act of Parliament. Such an approach is necessary as where established common law rights or doctrines exist, general words or provisions of a statute will not override, repeal or abrogate the common law in the absence of an express legislative intention. Ordinarily consequential matters implementing administrative minutia, forms and other inconsequential details (as opposed to containing the basis for a coercive power or immunities) are often contained in regulation form.

In the case of the *Defence (Inquiry) Regulations* 1985, all of the substantive matters are contained in regulation form, save for the immunity provision protecting disclosures made to Boards of Inquiry and Courts of Inquiry. It is submitted the framework for conducting Military Inquiries should be contained in its own Act of Parliament.

Protection and Immunities

Apart from the general criticism as to the manner in which the statutory framework for the conduct of military inquiries has been framed, there are inconsistencies between the types of immunities available to witnesses appearing before the various types/vehicles/levels of inquiry proposed by the *Defence (Inquiry) Regulations*.

The three types of Inquiry available under the *Defence (Inquiry) Regulations* 1985 are:

1. General Court of Inquiry (including a Combined General Court of Inquiry when allied nations are involved) – these are employed to inquire into matters of exceptional gravity with potential major ramifications to the ADF – though the Regulations were not then in force, an example is the type of inquiry into the collision between HMAS MELBOURNE and USS FRANK E. EVANS;

2. Board of Inquiry (BOI) – used to inquire into matters of significance to the ADF; or

3. Investigating Officer inquiries – used for general inquiries into other matters.

Investigating Officer inquiries (the lowest level of inquiry under the Defence (Inquiry) Regulations) offer no protection against self-incrimination.

Regulation 74 of the *Defence (Inquiry) Regulations* 1985 provides that an ADF Member appearing as a witness *"before an Investigating Officer on Inquiry Assistant, must not, without reasonable excuse, refuse or fail to answer a question...."*

Regulation 74B[17] provides that *"A statement or disclosure made by a member of the Defence Force while giving evidence before an Investigating Officer or an Inquiry Assistant, is not admissible in evidence against that person in proceedings before a Service Tribunal"*

The protection or immunity is restricted only to Service Tribunals, such that any disclosure may be admissible as evidence against the person making the disclosure in civil or criminal proceedings, or in relation to administrative processes or proceedings (that is to say, administrative action by the Department of Defence or other agencies). Thus, any disclosure is admissible against the maker of the

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[17] Regulation 74B *Defence (Inquiry) Regulations* 1985

statement in every forum save that of a Defence Force Discipline Act offence proceeding. The Senate observed:

> *A statement or disclosure made by a witness to an Investigating Officer cannot be used in any DFDA proceedings but may be admissible as evidence in civil or criminal proceedings and may be used as evidence by external review agencies, such as the Ombudsman."*[18]

The limitation and/or shortcomings of the regulation 74B protection or immunity in relation to Investigating Officers' inquiries was brought into sharp focus and recognised in *X v. McDermott*[19].

X v. McDermott examined the interplay between Regulation 74 which compelled the disclosure of information in the absence of a reasonable excuse and Regulation 74A which provided immunity only in respect of service proceedings, but not civil or criminal proceedings. *X v. McDermott* held that it was a reasonable excuse for a member to refuse to comply with a direction from an Investigating Officer to disclose matters which might tend to incriminate that person in civil or criminal proceedings. Justice Shepherd stated[20], that:

> *"In my opinion, the provisions of s.124(2A) reflect an understanding or a relief on the part of the legislature that, in the absence of the sub-section, a witness giving evidence to an Investigating Officer would be entitled to rely on the privilege (against self-incrimination). The sub-section proceeds on the footing that it is not to be the case in relation to Courts and Boards of Inquiry. Its silence about the position that is to apply in the case of investigations by Investigating Officers, can scarcely have been oversight. It would seem to have been deliberate. ...."*

Thus, in an appearance before an Investigating Officer, on the basis of the accepted jurisprudence *in X v. McDermott*[21], where a disclosure would tend to incriminate the witness in civil or criminal proceedings, that person may (still) rely upon the common law right to silence. But when a witness maintains his or her silence, this

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[18] Senate Inquiry *"Military Justice In The Australian Defence Force" 1999 paragraph 2.59*

[19] *X v McDermott* (1994) 51 FCR 1

[20] *X v McDermott* (1994) 51 FCR 1 paragraph 46

[21] *X v McDermott* (1994) 51 FCR 1

can be a major impediment to the Investigating Officer fulfilling his or her obligations in investigating matters in order to arrive at the truth.

Conversely, in relation to General Courts of Inquiry and Boards of Inquiry convened pursuant to the *Defence (Inquiry) Regulations* 1985, protection or immunity for disclosures made by a witness is wider than that as offered before an Investigating Officer[22]. However, a witness is compelled to provide the information[23].

Section 124(2C)[24] provides that any statement or disclosure made by a witness is not admissible in any service tribunal (*Defence Force Discipline Act* 1985 proceedings), civil or criminal proceedings against that witness. However, it must be recognised that such a statement or disclosure can be used in administrative proceedings including as evidence by external review agencies (such as the Ombudsman)[25]. Thus, the protection afforded, though much greater in scope, is not of itself complete. Arguably, disclosures made by a witness may be used against that witness in administrative processes, such as the termination notice process pursuant to the *Defence Personnel Regulations 2002*, where, for example an ADF member discloses to a Board of Inquiry the partaking and/or use of drugs or alcohol at sea by that member or another member. Though the matter has not been tested by a court, a result based on the reasoning in *X v. McDermott* [26]in relation to exposure to administrative processes of an adverse nature against the member, would allow a member to invoke the privilege against self-incrimination.

Thus, a failing of the statutory framework relating to three forms of inquiries is that between them they offer insufficient and/or inconsistent protection and/or immunity from adverse action by the disclosure of potentially self-incriminating

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[22] Section 124(2C) *Defence Act* 1903

[23] Section 124(2A) and (2B) *Defence Act* 1903; Regulation 32 *Defence (Inquiry) Regulations* 1985

[24] Section 124(2C) *Defence Act* 1903

[25] This was also observed in the report of the Senate Inquiry "*Military Justice In The Australian Defence Force*" 1999 paragraphs 2.39 and 2.40 of

[26] *X v McDermott* (1994) 51 FCR 1

statements. His has not, as yet, been remedied despite considerable time and scope for amendment.

Other jurisdictions, Commissions of Inquiry and/or permanent Commissions of Inquiry, have much more appropriate immunities and/or protections applying to disclosures before those bodies. For example the Crime and Misconduct Commission (formerly the Criminal Justice Commission (CJC)) possesses the following powers under its Act:

> *"CRIME AND MISCONDUCT ACT 2001 - SECT 197*
>
> ***197 Restriction on use of privileged answers, documents, things or statements disclosed or produced under compulsion***
>
> *(1) This section applies if—*
>
> *(a) before answering a question put to the person by the commission or a commission officer or producing a document or thing or a written statement of information to the commission or a commission officer, the person claims that answering the question or producing the document, thing or statement might tend to incriminate the person; and*
>
> *(b) apart from this Act, the person would not be required to answer the question or produce the document, thing or statement in a proceeding if the person claimed the answer or production would tend to incriminate the person; and*
>
> *(c) the person is required to answer the question or produce the document, thing or statement.*
>
> *(2) The answer, document, thing or statement given or produced is not admissible in evidence against the person in any* ***civil, criminal or administrative proceeding****.(my emphasis)*
>
> *(3) However, the answer, document, thing or statement is admissible in a civil, criminal or administrative proceeding--*
>
> *(a) with the person's consent; or*
>
> *(b) if the proceeding is about--*
>
> *(i) the falsity or misleading nature of the answer, document, thing or statement; or*
>
> *(ii) an offence against this Act; or*
>
> *(iii) a contempt of a person conducting the hearing.*
>
> *(4) Also, the document is admissible in a civil proceeding about a right or liability conferred or imposed by the document.*
>
> *(5) In a commission hearing, the presiding officer may order that all answers or a class of answer given by a person or that all documents or things or a class of document or thing produced by a person is to be regarded as having been given or produced on objection by the person.*

(6) If the presiding officer makes an order under subsection (5), the person is taken to have objected to the giving of each answer, or to the producing of each document or thing, the subject of the order.

However, given that the purpose of inquiries is to ascertain the truth in relation to a particular event, and in so doing, require, by application of coercive powers, witnesses to disclose matters potentially adverse to their interests, in return for protection and/or immunity in relation to the disclosures of information which may be against their interests, it is essential to the efficient operation of such a regimen of fact finding that the immunities be consistent and wide enough so as to permit full cooperation with the inquiry. It is submitted, that there should be no reason why the protection and/or immunities to witnesses appearing before an Investigating Officer should be different to those offered to witnesses appearing before a more sophisticated form of inquiry, be it Board of Inquiry, combined Board of Inquiry, or general Court of Inquiry.

Furthermore, it is submitted more modern practice should be adopted by framing the immunities and/or protections offered to witnesses, such that any disclosure made by a witness should not *"be admissible in any Service Tribunal (Defence Force Discipline Act proceeding), civil proceeding, criminal proceeding, or administrative process or proceeding against the witness" (my drafting).*

Any evidence, including derivative evidence, should not be admissible against that witness in Service Tribunal (*Defence Force Discipline Act* 1985) proceedings, civil proceedings, criminal proceedings, or administrative processes or proceedings. "Derivative evidence" discussed below, can be defined as any information, document or other evidence obtained as a direct or indirect result of the evidence or disclosure made by the witness – made to the relevant Inquiry.

Legislative changes – mode of operation of modern Inquiries

The practices and procedures of Commissions of Inquiry have developed particularly over the last ten to fifteen years. By empirical observation, most pieces

of legislation relating to Commissions of Inquiry were enacted prior to the advent of permanent Commissions of Inquiry, particularly those that had a permanent remit to investigating crime and/or official misconduct by public authorities and the like. Previous iterations of the various *Commissions of Inquiry Act* drafting simply comprehend persons being compulsorily required to attend hearings, give evidence at those hearings and obtain protection for evidence which would otherwise not be compellable due to self incrimination, but only for evidence or disclosures made during a hearing. The *Royal Commissions Act* 1902 (Commonwealth) is a good example still in existence[27]:

> (1) *The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:*
>
> *(a) a statement or disclosure made by the person in the course of giving evidence before a Commission* (my emphasis)

Nowadays however, the practice is different. The modern practice adopted in Commissions of Inquiries, is that Counsel Assisting or authorised persons of a particular Commission of Inquiry will seek to have a preliminary conference with potential witnesses to ascertain the scope and breadth of that witness's proposed evidence before a formal sitting of the particular Commission of Inquiry or Board of Inquiry. More often than not it is also the modern practice to have a potential witness assist the particular Commission of Inquiry by reducing all of the information they would otherwise disclose in a full hearing into affidavit form. This leads to a considerable saving of time in terms of the leading of the "evidence-in-chief" of the particular witness prior to making that witness available for cross-examination by potentially adversely affected parties. Hallett observed [28]: *"It is always desirable for an inquiry to have access to as much relevant documentary material as possible before commencing oral examinations".*

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[27] *Royal Commissions Act* 1902 (Commonwealth) – section 6DD(1)(a). See also section 6A.

[28] L.A. Hallett *"Royal Commissions and Boards of Inquiry – some legal and procedural aspects"* 1982, Law Book Company Ltd, Sydney, at page 96 and 97.

Having a preliminary conference with a proposed witness and/or having that witness encapsulate his or her evidence into affidavit form provides those assisting an inquiry with the opportunity to consider whether the evidence proposed to be admitted in a hearing from the proposed witness may potentially adversely affect other parties, such that those other parties ought be given notice of the witness's proposed evidence and the opportunity to cross-examine. If the modern day practices are not adopted, a witness will give his/her evidence with those assisting an inquiry being left in the position with little prior knowledge or detail of the matters to be traversed by that witness, such that the witness may give evidence of matters which take all parties, including Counsel Assisting, by surprise at the hearing. Such a position may, or may not, necessitate an immediate adjournment, or even worse the witness being required by recall, such that potentially adversely affected parties are able to be contacted and given the opportunity to cross-examine, pursuant to the requirements of natural justice.

The Modern Day Essential Question: *Protected Disclosures*. The essential question then becomes whether a disclosure which may contain self-incriminatory statements made by a potential witness to authorised officers of a Commission of Inquiry or Board of Inquiry, in circumstances other than a hearing of the Inquiry[29], attracts the statutory protections or immunities afforded by the various Commissions of Inquiries legislation[30] . The essential point becomes the admissibility of such evidence (information or documents) – that is to say whether they are "protected disclosures"? (my term).

Mr Wayne Martin QC of the West Australian Bar, who recently appeared as Counsel Assisting in the HIH Royal Commission stated:

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29 recall *Royal Commissions Act* 1902 (Commonwealth) – section 6DD(1)(a) "... .a statement or disclosure made by the person in the course of giving evidence before a Commission"

30 for example *Royal Commissions Act* 1902 (Commonwealth) – section 6DD; *Defence Act* 1903 (Commonwealth) - Section 124(2C); But cf *Crime and Misconduct Act* 2001 (Qld) – section 197; *Commissions of Inquiry Act* 1950 (Qld) – section 14A and *Independent Commission Against Corruption Act* 1988 (NSW) – section 26.

> *"In relation to witnesses, unless they are prepared to cooperate and provide information voluntarily, there is usually little alternative to compelling them to attend the formal hearing process. However, even when witnesses are cooperative, there is often a concern that the provision of information, otherwise than under compulsion, might amount to an abandonment of the privilege that might otherwise attach to the provision of the information under compulsion (such as the privilege that attends the giving of evidence in a Royal Commission). One device that can be utilised to overcome this concern is to invite the prospective witness to record the information that they would provide in writing and then compel the production of the document, which, being provided under compulsion, would have all the privileges that attach to compulsory production. It must be said, however, that this is something of an artifice, and for my part, I would have thought it desirable to regularise this process by extending any privilege that attends compulsory provision of information to all information voluntarily provided."*[31]

If the suggested "artifice" is examined closely, I would submit the course of action proposed would not necessarily meet the desired objective of being a protected disclosure if acting for a potential witness whose evidence may be self incriminatory. The reasoning for such a proposition is as follows: In the absence of a specific provision as suggested by Mr Martin QC[32] that all information provided be covered by the privilege[33], most *Commissions of Inquiry* legislation merely provide that a potential witness can be coerced into divulging matters that would otherwise be subject to a privilege, with the protection that any information so obtained by coercion cannot be relied upon in any civil or criminal proceedings for evidence before a hearing of the Inquiry. The most important point to note here is that it is only during a hearing of the relevant Commission of Inquiry when the disclosure is made that the protections afforded by the statute apply. It follows a *protected disclosure* is only made when one is actually giving evidence before a Commission of Inquiry when compelled to do so. Any disclosures of information

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31 Paper by Wayne Martin QC, West Australian Bar – 2003 Administrative Law Form "Administrative Law: Problem Areas – Reflections on Practice" – Canberra, 3 and 4 July 2003

32 *"... I would have thought it desirable to regularise this process by extending any privilege that attends compulsory provision of information to all information voluntarily provided"* - Paper by Wayne Martin QC, West Australian Bar – 2003 Administrative Law Form "Administrative Law: Problem Areas – Reflections on Practice" – Canberra, 3 and 4 July 2003

33 such as the *Crime and Misconduct Act* 2001 (Qld) – section 197 and *Independent Commission Against Corruption Act* 1988 (NSW) – section 26.

otherwise than during a hearing (in the absence of specific provisions otherwise[34]) would not, it is submitted, amount to a *"protected disclosure"*.

To use Mr Martin QC's example again, in circumstances where legal professional privilege would not apply (ie that the affidavit or statement is made without the assistance of a lawyer for the witness) - if a witness made an affidavit, statement or disclosure on paper by which that witness disclosed information in his or her possession of a self incriminatory nature, then the making of that document and the disclosure of information in it could/would amount to an "unprotected disclosure". The simple act or requirement of compulsion *in relation to production/siezure of the document (affidavit, statement or paperwriting)* does not magically transform the disclosure or document into a protected disclosure as the mere fact of subpoena or compulsorily acquiring the document does not change the character of the document itself. The document, once made, could arguably be seized by way of a search or subpoenaed by another body (such as a court) in relation to a matter involving a witness, or indeed, a matter involving a third party. Thus, any disclosures made in the way suggested are fraught with some uncertainty and certain dangers, in the absence of specific provisions extending the protections afforded by the relevant *Commissions of Inquiry Act* to such disclosures and/or means of disclosure. Hallett[35] maintains a similar view that in the absence of clear statutory protection, preliminary statements (oral or in writing) are not protected. He opines[36]:

> *".... Because it is a common and necessary practice for statements to be taken from persons who might be called as witnesses, it is submitted this is a serious omission"*

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34 Ibid.

35 L.A. Hallett *"Royal Commissions and Boards of Inquiry – some legal and procedural aspects"* 1982, Law Book Company Ltd, Sydney, at page 134.

36 ibid

Of course, if the document was subject to legal professional privilege, the protected status of the disclosure would be maintained.

In an effort to overcome the real challenges raised by the above position, in Queensland the *Commissions of Inquiry Act* 1950 (Queensland) was amended by the *Criminal Justice Legislation Amendment Act* 1996 (Queensland) during the convening of the Connolly-Ryan Inquiry, to allow authorised persons of the commission, as the commission (not the Commissioners themselves – mainly the Counsel Assisting team, and their assistants) to interview proposed witnesses at Commission premises (and thereby take a transcript of the interview) during an event other than a formal hearing before the Commissioners themselves (Messrs Connolly and Ryan). The amendments also allowed proposed witnesses to be directed by authorised inquiry staff to produce a paperwriting (affidavit or otherwise) within the statutory framework of the *Commissions of Inquiry Act* 1950. The amendments inserted, inter alia sections 5(1)(c) and (d) as follows:

> *"(1) A chairperson may, by writing under the chairperson's hand: .....*
>
> *(c) require any person to attend at a specified time and place to give information to, and answer questions asked by, a person authorised in writing by the chairperson; and*
>
> *(d) require any person to give to the commission within a specified time and in a specified way written information verified as specified." (my emphasis)*[37]

The result of the amendments was to provide for much flexibility, such that any oral (by commission interviews) or written (upon direction by the commission) disclosures made in the were protected disclosures, and that any evidence obtained thereby was protected by s.14A of the *Commissions of Inquiry Act* which provided that any such information could not be used against that witness in civil or criminal proceedings.

Section 5(1)(c)[38] became euphemistically known as the "fireside chat" provision-as the less formal, but no doubt very useful, preliminary interviews with proposed

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[37] *Commissions of Inquiry Act* 1950 (Qld) – section 5(1)(c) and (d)

witnesses which allowed Commission staff to readily identify the breadth and scope of a particular proposed witness's evidence so that proper administrative arrangements, including those to comply with the rules relating to natural justice, could occur prior to the witness giving evidence at a formal hearing and taking everyone by surprise by any disclosures by having the Commission, Counsel Assisting and other Counsel "flying blind" whilst the witness was giving evidence. Similarly, the s.5(1)(d) provisions were a proper means for the witness to make a protected disclosure to provide information to the Commission of Inquiry. Ordinarily, this would be provided in affidavit form and would thus be able to be tendered to the Commission during formal hearings as that witness's evidence-in-chief. Cross-examination of that witness would then necessarily follow. However, prior to cross-examination, contents or extracts of any affidavit material containing information of relevant to other witnesses could be provided to the Counsel or legal advisers of those other potentially affected witnesses.

The above represents a proper means of encapsulating current and sensible practice, rather than "an artifice".

Most permanent Royal Commissions have similar provisions. The Crime and Misconduct Commission (Queensland) possesses the following powers[39]:

> ***Section 72 Power to require information or documents***
>
> *s.72(2) The chairperson may, by notice given to a person holding an appointment in a unit of public administration, require the person, within the reasonable time and in the way stated in the notice, **to give an identified commission officer** .(my emphasis) --*
>
> *(a) **an oral or written statement of information** .(my emphasis) of a stated type relevant to a crime investigation that is in the possession of the unit; or*
>
> *(b) a stated document or other stated thing, or a copy of a stated document, relevant to a crime investigation that is in the unit's possession; or*
>
> *(c) all documents of a stated type, or copies of documents of the stated type, containing information relevant to a crime investigation that are in the unit's possession.*

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[38] ibid

[39] *Crime and Misconduct Act* 2001 (Qld) – sections 72 and 197.

197 Restriction on use of privileged answers, documents, things or statements disclosed or produced under compulsion

s.197(1) This section applies if–

(a) before answering a question put to the person by the commission or a commission officer or producing a document or thing or a written statement of information to the commission or a commission officer, the person claims that answering the question or producing the document, thing or statement might tend to incriminate the person; and

(b) apart from this Act, the person would not be required to answer the question or produce the document, thing or statement in a proceeding if the person claimed the answer or production would tend to incriminate the person; and

(c) the person is required to answer the question or produce the document, thing or statement.

(2) The answer, document, thing or statement given or produced is not admissible in evidence against the person in any ***civil, criminal or administrative proceeding****.(my emphasis)*

(3) However, the answer, document, thing or statement is admissible in a civil, criminal or administrative proceeding--

(a) with the person's consent; or

(b) if the proceeding is about--

(i) the falsity or misleading nature of the answer, document, thing or statement; or

(ii) an offence against this Act; or

(iii) a contempt of a person conducting the hearing.

(4) Also, the document is admissible in a civil proceeding about a right or liability conferred or imposed by the document.

(5) In a commission hearing, the presiding officer may order that all answers or a class of answer given by a person or that all documents or things or a class of document or thing produced by a person is to be regarded as having been given or produced on objection by the person.

(6) If the presiding officer makes an order under subsection (5), the person is taken to have objected to the giving of each answer, or to the producing of each document or thing, the subject of the order.

The Independent Commission Against Corruption (NSW) possesses the following powers[40]:

s.21 Power to obtain information

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[40] *Independent Commission Against Corruption Act* 1988 (NSW) – sections 21, 22 and 26.

(1) For the purposes of an investigation, the Commission may, by notice in writing served on a public authority or public official, require the authority or official to produce a statement of information.

(2) A notice under this section must specify or describe the information concerned, must fix a time and date for compliance and must specify the person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) to whom the production is to be made.

s.22 Power to obtain documents etc

(1) For the purposes of an investigation, the Commission may, by notice in writing served on a person (whether or not a public authority or public official), require the person:

(a) to attend, at a time and place specified in the notice, before a person (being the Commissioner, an Assistant Commissioner or any other officer of the Commission) specified in the notice, and

(b) to produce at that time and place to the person so specified a document or other thing specified in the notice.

s.26 Self-incrimination

(1) This section applies where, under section 21 or 22, the Commission requires any person:

(a) to produce any statement of information, or

(b) to produce any document or other thing.

(2) If the statement, document or other thing tends to incriminate the person and the person objects to production at the time, neither the fact of the requirement nor the statement, document or thing itself (if produced) may be used in any proceedings against the person (except proceedings for an offence against this Act).

However, the *Defence (Inquiry) Regulations* do not have any similar provisions. It appears the *Defence (Inquiry) Regulations* are a typical "Commissions of Inquiry" statutory framework reminiscent of the "old style drafting"[41]. The *"serious omission"* identified by Hallett[42] in 1982 (prior to the promulgation of the *Defence (Inquiry) Regulations* 1985, remains.

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41 *Royal Commissions Act* 1902 (Commonwealth) – section 6DD(1)(a). See also section 6A

42 L.A. Hallett *"Royal Commissions and Boards of Inquiry – some legal and procedural aspects"* 1982, Law Book Company Ltd, Sydney, at page 134.

As such, in order to efficiently and sensibly run an inquiry, be it a Board of Inquiry or otherwise, one must rely upon the above "artifice" identified by Mr Wayne Martic QC[43]. The artifice, as submitted above, has shortcomings.

It is submitted the *Defence (Inquiry) Regulations* 1985 should be amended to include powers to facilitate current or modern inquiry practices and procedures to incorporate, particularly for large Boards of Inquiry, the need for "fireside chats" or preliminary conferences with witnesses and the provision of often complex evidence in affidavit form.

Perceived bias

Mr Wayne Martin QC observed[44]:

> *"Within the hearing itself, while there are increasing numbers of tribunals and inquiries in which the process of adducing the data or questioning witnesses is undertaken by the Tribunal itself, but there are obvious potential dangers in this course. One of the most obvious is the perception that the manner in which the questions are posed, or the data produced, might be perceived as indicating a pre-conceived view or attitude towards the issues to be addressed, thereby potentially infringing another aspect of procedural fairness."*

This potential danger where the "Tribunal" itself undertakes the investigation and questioning is a very real issue with the lowest form of inquiry provided for by the *Defence (Inquiry) Regulations* 1985- namely that of the Investigating Officer. To some extent, this has been mitigated by the amendments relating to Investigative Assistants.

However, as so was clearly illustrated in *Carruthers v. Connolly and Ors* [45]either actual bias or perceived bias is required. The test was described as:

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43 Paper by Wayne Martin QC, West Australian Bar – 2003 Administrative Law Form "Administrative Law: Problem Areas – Reflections on Practice" – Canberra, 3 and 4 July 2003

44 Paper by Wayne Martin QC, West Australian Bar – 2003 Administrative Law Form "Administrative Law: Problem Areas – Reflections on Practice" – Canberra, 3 and 4 July 2003

45 [1998] 1 QdR 339 at 371

"The relevant test for bias, compendiously stated, is whether the circumstances are such as would give rise, in the mind of a party or in the mind of a fair-minded and informed member of the public, to a reasonable apprehension of a prejudiced mind or a lack of impartiality on the part of the decision-maker. This objective is applicable not only in the proceedings of courts but also in various quasi judicial tribunals, administrative tribunals, and commissions of inquiry. The application of such principles to commissions of inquiry may be seen in such cases as Mahon v Air New Zealand Ltd; Ainsworth v Criminal Justice Commission; Re Royal Commission on Thomas Case; R v Carter and The Attorney-General; Bradshaw v Kyle; and Gaisford v Hunt and the Commonwealth

In applying the principles different expectations of conduct will exist according to the function being performed by the person or entity who exercises the relevant public power. For example a degree of intervention that is unacceptable in a judge may be acceptable in a commissioner. The commissioner has an inquisitorial function while the role of a judge is essentially to adjudge an adversarial contest. But the expectation that the person exercising the power will bring an impartial and unprejudiced mind to the resolution of the question entrusted to that person is not to be diluted. Condemnation by a biased tribunal is an unacceptable abuse, just as exoneration by a biased tribunal may be considered worthless."

Perceived bias can be inferred from the line of questioning, attitudes exhibited during questioning, tone, voice and demeanour of the Investigating Tribunal or Investigating Officer etc. Moreover, Investigating Officer's inquiries are often conducted without either the Investigating Officer himself/herself, and indeed the witnesses appearing before the Investigating Officer, having legal representation. The issue of either the Investigating Officer and/or those parties being questioned by the Investigating Officer having legal representation is a matter that is important to the question of whether natural justice has been accorded. The presence of a Legal Officer with an Investigating Officer during all or crucial questioning periods of particular witnesses, can be matters which produce the possibility of an accusation of bias, be it actual or perceived, being made in respect of the Investigating Officer's inquiry.

Further, the presence of a Legal Officer representing a particular party before an Investigating Officer is a matter than reduce the risk of the Investigating Officer's Inquiry being challenged for want of procedural fairness, and/or for offending the rule against bias, actual or perceived. In *X. v. McDermott*, Justice Shepherd stated:

> *"It was said that the Investigating Officer did not propose to allow the applicant to be represented by Counsel at the hearing before him. That, of course, is entirely a matter for the Investigating Officer. But reflection on his part, and on the part of those responsible for his appointment, may suggest that it may be wise for the Investigating Officer to be assisted by a person who is legally qualified and to allow legal representation of the applicant by an appropriate legal practitioner, so long as the assistance provided by the practitioner is given in a constructive way."*[46]

Given the low threshold required to challenge an inquiry, or indeed an Investigating Officer, for bias (actual or perceived), it is submitted that the inquiry regulations should be amended to provide that the Investigating Officer have legal representation present during hearings for such times as may be necessary in the circumstances, and further that witnesses be allowed to have legal representation present.

Parties affected

This is an area that is not promulgated in the *Defence (Inquiry) Regulations* or in the ADFP 202 Administrative Inquiries Manual in any meaningful way.

In *Kioa v. West* it was stated:

> *Procedural fairness, as it relates to inquiries, requires that anyone whose interest might be affected by the conduct or findings of the inquiry be afforded an opportunity to be heard. In the absence of an unequivocal contrary statutory intention, if the exercise of power by the Commissioner could deprive an individual of a right, interest or legitimate expectation in a direct and immediate manner, then that individual ought to have appropriate input into the proceedings.*[47]

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46 *X v McDermott* (1994) 51 FCR 1 p.27

47 *Kioa v West* (1985) 159 CLR 550 at 584; *Annetts v McCann* (1990) 170 CLR 596 at 597

Section 32 of the *Independent Commission against Corruption Act* 1988 (NSW) expressly grants a right of appearance to any individual substantially and directly interested in any subject matter of an inquiry or hearing. It provides :

"32 Right of appearance of affected person

If it is shown to the satisfaction of the Commission that any person is substantially and directly interested in any subject-matter of a hearing, the Commission may authorise the person to appear at the hearing or a specified part of the hearing."

The *Defence (Inquiry) Regulation* contains no such provision.

The level of involvement or input into the proceedings varies with the nature of the particular Inquiry and its capacity to affect the interests of witnesses. However, as a general proposition, individuals, the subject of any allegations, should be confronted with these allegations and given an opportunity respond to them. In some circumstances, it could be argued that there is a duty on the part of those conducting the inquiry to "actively seek out" any person adversely affected.[48]

In circumstances involving possible adverse findings, the requirements of procedural fairness require that notice of possible adverse findings are to be delivered to the witness before a report is made and that the notice of possible adverse findings should identify clearly the issues involved together with an adequate time for response.

The following academic review illustrates this dilemma. In a recent Board of Inquiry[49], dealing with an application for a right of appearance for potentially adversely affected witnesses, the President of the Board ruled/ stated:

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48 *Independent Commission Against Corruption, A Fact Finder, A 20 Step Guide to Conducting an Inquiry in your Organisation, May 2002 (ICAC) at p.31*

49 *F1-11 Deseal Reseal Board of Inquiry*

""The breadth of the Board's inquiries will extend over a range of issues and an extensive period of time. The material made available to the Board so far in the form of a discussion paper points to ongoing failings at a managerial level to implement a safe system of work and co-ordinate processes within a complex organisation. The incidence of reported workplace transgressions are numerous and it appears consistent.... over a period of some 27 years. The Board's investigation has lead to a preliminary view that much of that which requires close scrutiny concerns systemic issues. At this point it is considered that given [that] any transgressions ... have occurred over a period of 27 years there would be little utility in closely examining all of them particularly as many persons have now left the Service. Such detailed examination would not assist the Tribunal as it understands the issues at this point in considering remedial action, finding out what happened and meeting the other requirements of the Terms of Reference..."[50]

In Hallett[51] the position is described as follows:

"It appears that leave will only be granted where a witness or other person is likely to be the subject of some allegations which a person of good fame and repute would resist (my emphasis). A typical example is where there is a possibility that an adverse finding will be made by the inquiry about that person.

... when an individual or group is likely to be in any way prejudiced by the report of an inquiry then, it is submitted, that person should be given the opportunity of ensuring that an enquiry is conducted in such a way that so far as is possible, a balanced factual picture will emerge."

Section 4A of the New Zealand Commissions of Inquiry Act 1908 provided that:

"Any person interested in the inquiry shall, if he satisfied the Commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at that inquiry as if he had been joined as a party to the inquiry."

The President had determined that the Board was to undertake a fact finding exercise involving ten major (or paradigm) issues that looked at systemic issues rather than culpability of individuals involved. However, it is submitted such a view is simplistic – because in undertaking its stated task of trying to ascertain whether systemic issues existed, the Board would have to look at matters which allegedly involved, for example, alleged omissions by certain persons in positions of authority – the fact of whether those alleged omissions occurred would involve, in Hallett's words *"some*

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[50] F111 Deseal Reseal Final Submissions of Counsel Assisting, para 23, 28 March 2001 reproduced at http://www.defence.gov.au/raaf/organisation/info_on/units/f111/final_submission.htm

[51] L.A. Hallett *"Royal Commissions and Boards of Inquiry – some legal and procedural aspects"* 1982, Law Book Company Ltd, Sydney, at page 198-199.

allegations which a person of good fame and repute would resist (my emphasis) – and that such persons

"should be given the opportunity of ensuring that an enquiry is conducted in such a way that so far as is possible, a balanced factual picture will emerge."

There is no evidence or reference in the Final Report to any such persons being "sought out" as suggested by the ICAC Manual[52], nor given an opportunity to put a different factual picture as to whether or not, in fact, a systemic issue existed.

The contents of the Final Report give the appearance that only if allegations were made directly (in an adversarial sense), then that respondent would have locus standi to appear. The position, it is submitted is wider than that as posited. The threshold is, as expressed by Hallett above, quite a low one. The ambiguity can be resolved by legislative amendment.

Derivative Evidence

The Senate Inquiry *"Military Justice In The Australian Defence Force" 1999*[53] *observed:*

> *"2.1 The 'generic term* Military Justice *Procedures usefully describes the broad concepts of discipline and inquiry which are integral to the command and administration of the Australian Defence Force'. Whilst in some respects the two systems of military inquiry and military discipline are related, and both inquiry and disciplinary action may result from a single incident, their purposes are quite different.*
>
> *2.2 Military inquiries are used to investigate a wide variety of matters related to Defence and are essentially fact finding in focus and intent. They are not employed to investigate criminal or disciplinary matters and are not primarily directed at fault attribution. At all levels, inquiries are conducted to determine facts as a basis for further action, although it is possible that the facts unearthed by an investigation may point to the need to undertake separate disciplinary action.*
>
> *2.3 In contrast, the primary objective of the military discipline system is to assist in the maintenance of discipline in the Defence Force. The nature of military service demands teamwork, mutual support and personal reliability underpinned by both individual and collective discipline. Compliance with orders and*

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[52] *Independent Commission Against Corruption, A Fact Finder, A 20 Step Guide to Conducting an Inquiry in your Organisation, May 2002 (ICAC) at p.31*

[53] Senate Inquiry *"Military Justice In The Australian Defence Force" 1999*, Report and Findings, paragraph 2.1, 2.2 and 2.3

authority, sometimes in situations in which life or death rests upon that compliance, is essential to the effectiveness of the ADF. The DFDA provides a formal discipline system for the investigation of service offences, trial of offenders by service tribunals and the punitive action against guilty parties.

...

2.6 A military inquiry may be used to inquire into any matter affecting the Defence Force. The purpose of a military inquiry is to investigate the facts associated with a particular incident and inform the decision maker of the findings and recommendations. Such inquiries are not primarily focused on the attribution of fault, rather they provide an internal management tool to allow corrective action to be taken by the decision maker. Military inquiries are not empowered to implement findings and recommendations stemming from the inquiry; this remains a command decision"

Despite the clear delineation identified by the Senate report above, between Military inquiries as a fact finding vehicle, and discipline matters (and perhaps adverse administrative actions as an option in response to DFDA issues) as distinct procedures, there has been a disturbing tendency to use or allow the results of a *Defence (Inquiry) Regulation* investigation (such as a Board of Inquiry or Investigating Officer's Inquiry report) to be released to Service Police for the purpose of DFDA action. The *Defence Force Discipline Act* 1982 (DFDA) has its own regime and powers of investigation.[54]. Service Police sometimes wish to rely upon the fruits of a coercive investigative process of an inquiry, rather than the specific DFDA applicable regime of investigation.

Difficulties encountered with the issue of derivative evidence and its subsequent admissibility have been highlighted in *Hamilton v. Oades*[55] and the earlier case of *Sorby v. Commonweath*[56]. Complications as to the issue of a fair trial are likely to be encountered when access or use of evidence obtained by a coercive means is used to derive or locate other evidence[57] such that

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[54] *Defence Force Discipline Act* 1982 –section 101A onwards

[55] (1989) 166 CLR 486 at 489 per Mason C.J.

[56] (1983) 152 CLR 281 AT 312 per Murphy J.

[57] see Ganin v. NSWCC (1993)32 NSWLR 423 at 432 per Kirby P.

> *An answer compelled from a witness, although not itself available to be used, could point investigators in a direction allowing them to obatin admissible evidence against that person. In such a way, in truth, the accused person will have been forced to "testify against himself" and in effect "to confess guilt", contrary to the requirements of this fundamental human right (referring to Art 14(3) ICCPR.).*

Thus the issue of admissibility in DFDA proceedings of derivative evidence (identified earlier in this paper) may become a live issue. Derivative evidence, is any information, document or other evidence obtained as a direct or indirect result of the evidence or disclosure made by the witness made to a relevant Inquiry.

An example where the is a prohibition on the use of derivative evidence in subsequent criminal matters is contained in the *Coroners Act* 2003 (Qld):

> *s.39 Incriminating evidence*
>
> *(1) This section applies if a witness refuses to give oral evidence at an inquest because the evidence would tend to incriminate the person.*
>
> *(2) The coroner may require the witness to give evidence that would tend to incriminate the witness if the coroner is satisfied that it is in the public interest for the witness to do so.*
>
> *(3) The evidence is not admissible against the witness in any other proceeding, other than a proceeding for perjury.*
>
> *(4) Derivative evidence is not admissible against the witness in a criminal proceeding.*
>
> *(5) In this section –*
>
> *"derivative evidence" means any information, document or other evidence obtained as a direct or indirect result of the evidence given by the witness.*

In order to properly maintain the separation of roles of the Inquiries and DFDA matters, it is submitted the *Defence (Inquiry) Regulations* 1985 should be amended to provide that any evidence, including derivative evidence, should not be admissible against that witness in Service Tribunal (*Defence Force Discipline Act* 1985) proceedings, civil proceedings, criminal proceedings, or administrative processes or proceedings.

Conclusion

It is submitted there is considerable scope for revision of the framework for the conduct of Military Inquiries. It is submitted the Defence (Inquiry) Regulations 1985 are themselves outmoded.

Significant issues as to the manner in which the Military Inquiry framework itself is framed, together with inconsistencies and shortcomings in immunities and use of evidence are real issues that have not been properly addressed. Issues as to the mode of Inquiry, scope for potential bias, potential for failure to accord procedural fairness to affected parties and issues of representation are matters in which the present framework of the *Defence (Inquiry) Regulations* remain silent. Moreover, on a practical or pragmatic level, the means by which Inquiries are to be conducted on a procedural level have not kept pace with developments.

A.B. JOHNSON
Lieutenant Commander ADC(Hon) RANR

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