

Military Inquiries

The Requirement for Military Inquiries

- 3.1 The ADF asserts that the military inquiry system plays an important role in ensuring the effective and efficient administration of the ADF.¹ Under the current legislative framework of the Defence Act, responsibility for the effective and efficient administration of the ADF lies with the CDF, the Secretary and the Service Chiefs who are all answerable to the Minister. In practical terms, this responsibility is delegated through the command chain and the ADF 'requires its leaders and managers, at all levels, to accept responsibility for and demonstrate that their command and administration is: effective in meeting the role of the ADF in peace and war; efficient in how this is done, in terms of audit and financial management; compliant, to the maximum extent feasible, with safe operating, professional and technical standards and all other applicable national laws; conforms to current standards of administrative decision making; and conforms to standards for the provision of a working environment based on equity and one which is free of harassment.'²
- 3.2 When deficiencies are identified, in either systems or personnel, the facts must be determined to allow the commander to make informed decisions regarding corrective action. This process must be conducted without delay, in all cases of deficiency but particularly where matters of 'safety or effective conduct of operations are concerned'.³ The military inquiry

1 Department of Defence, Submission, p. 579.

2 *ibid*, p. 578.

3 *ibid*, p. 579.

system provides a formal means by which to effect this process and to do so quickly.

- 3.3 The Committee was firmly convinced that the need for the inquiry process is real. When an incident occurs, facts need to be established, the professional behaviour, judgements and decisions involved in the incident must be examined and, where possible, causes must be identified. Moreover the inquiry process needs to ensure that lessons are learnt and corrective action, taken on the basis of sound information, is effected to prevent the recurrence of the incident or the circumstances that allowed the incident to occur. Where necessary such corrective action should include the referral of possible offences for action under the military discipline system.

Who Should Conduct Military Inquiries?

Current Arrangements

- 3.4 In their current form military inquiries are fundamentally an internal management tool that assist commanders with the discharge of their responsibilities for command and administration of the ADF. Inquiries can range from simple investigations resulting in localised corrective action and no public concern to major activities investigating the loss of life or significant materiel losses. In the latter case corrective action is likely to be required at a high level and public interest can be expected to be keen. In all cases, a principal tenet of the inquiry process must be that investigation and necessary corrective action are taken as quickly as possible. This tenet applies equally across the whole spectrum of conflict in which the ADF can be expected to operate.⁴
- 3.5 Under current legislative provisions⁵ the ADF have the authority to conduct a military inquiry, sanctioned under D(I)R, into any incident an Appointing Authority⁶ deems worthy of investigation. ADF personnel to conduct the inquiry can be easily identified, the inquiry conducted and the

4 The spectrum of conflict describes the range of conflicts which may occur between the extremes of total peace and total war (See *The Fundamentals of Land Warfare*, 1999, pp. 2-9).

5 Defence (Inquiry) Regulations.

6 For inquiries by Investigating Officer, the appointment of the investigator is made by an Appointing Officer (See paragraph 2.53 of this report) whereas a BOI is appointed by an Appointing Authority (See paragraph 2.32 of this report). Throughout this report the term Appointing Authority is used to identify the authority responsible for appointing the investigative body.

commander can quickly be in a position to take any necessary corrective action. When required, an inquiry can seek specialist assistance from non ADF persons or organisations and, where the required corrective action is outside the authority of the Appointing Authority, the matter can be readily referred up the chain of command for consideration and any appropriate action.

- 3.6 Notwithstanding the freedom of the ADF to initiate a military inquiry, under D(I)R the Minister always has the right to appoint a General Court of Inquiry that is entirely external to the ADF. In addition, for ‘cases of alleged fraud, corruption or similar occurrences where the public interest requires that matters be removed entirely from the command and management chain and placed in the hands of the Inspector General or other appropriately independent authority this is discretely done.’⁷
- 3.7 A strong focus of the evidence taken by the Committee regarding military inquiries addressed the issue of who should conduct the inquiry. Specifically the conduct of internal BOIs was represented in some submissions as a case of the ADF investigating itself; the inference being that BOIs do not offer sufficient independence, especially in cases involving death for which the ADF might bear some responsibility.⁸ In addition, the issue of independence regarding the involvement of the chain of command in the inquiry process was questioned.

External Inquiry Authority

- 3.8 At the BOI level, the argument regarding the ADF investigating itself appears misdirected given that the purpose of a military inquiry is to inform the commander so that necessary corrective action is taken. Notwithstanding, an alternative to the current internal conduct of military inquiries would be to charge an external authority with responsibility for the conduct of the inquiry. This would certainly address perceptions of the lack of independence of the current process but it is unlikely any external authority could provide the responsiveness necessary to meet the ADF’s operational need: a problem which would doubtless be exacerbated during times of conflict. In addition, the decision to call in an external inquiry authority would not be an option willingly embraced by commanders, particularly during times of conflict.
- 3.9 Under current arrangements a commander at any level can use the inquiry process to determine the facts and resolve problems which fall within the

7 Department of Defence, Submission, p. 579.

8 Mackelmann, Transcript, p. 224; Ellis, Transcript, p. 173; Brooks, Transcript, p. 362.

bounds of his or her authority. The involvement of an external body, not to provide advice but to conduct the inquiry, would not be a decision readily taken by commanders within the ADF particularly where the matter under investigation was considered a less significant issue. However, on issues of significant gravity the need to demonstrate the independence of the inquiry may outweigh all other concerns. In such cases the jurisdiction of external authorities could be mandated to remove the decision to defer to external inquiry authorities from the ADF.

- 3.10 The principle factors militating against use of an external authority to conduct a military inquiry are the need for timeliness and understanding of the military culture. An external party involved in a recent inquiry observed that a panel of military personnel selected from the appropriate Service brings a high level of knowledge of the Service involved, its procedures and equipment. This permitted the issues of concern to the Service to be quickly identified, and minimised the time lost in familiarisation with both military and technical matters.⁹ Further evidence presented to the Committee suggests that where a military matter is dealt with by an external authority, military nuances may not be appreciated or significant time may be lost in familiarisation with both military and technical matters.¹⁰
- 3.11 The Committee did not dispute the need for the ADF to conduct a process of internal review, to enable procedural failures, equipment faults or other shortcomings to be quickly identified and addressed. Moreover, it was agreed that such processes need to be responsive, enabling timely corrective action and allowing normal ADF operations to resume in safety. The Committee accepted that ‘although several high priority inquiries have recently come to public and Parliamentary attention, the vast majority of inquiries are conducted routinely and without incident.’¹¹ In addition, the Committee agreed that in the majority of cases ‘solutions to problems in large and complex organisations such as the ADF [are] optimally sought by the intervention of those responsible for implementing the solution.’¹²
- 3.12 The Committee concluded that the current arrangements for conduct of internal inquiries meet the needs of the ADF for a rapid review of potential hazards. Moreover, the Committee accepted that the factors militating against use of an external authority to conduct a military

9 Australian Defence Industries, Submission, p. 1120.

10 *ibid.*

11 Department of Defence, Submission, p. 580.

12 *ibid.*, p. 579.

inquiry are sufficient to justify the retention of the current practice for matters not involving loss of life. However, in cases involving the accidental death of an ADF member the Committee was of the view that the need to demonstrate the independence of the inquiry outweighs concerns about the conduct of the inquiry by an external authority.

- 3.13 In cases of incident involving death, the ADF contends that the ‘requirements for both an internal and independent review are in fact met through the present arrangements’¹³ of internal BOI and coronial review. The Committee acknowledged that, in essence, a coronial review does offer an independent review of the ADF inquiry. However, the Committee noted several specific cases of BOI into military incidents involving death. In every case where the BOI had been criticised for a lack of independence, the relevant state coroner had conducted an inquest or inquiry. In these cases, the major findings of the coroner accorded closely with the earlier ADF BOI. The Committee did not accept that a coronial review served to demonstrate the independence of the inquiry.
- 3.14 The Committee noted that under D(I)R, there is provision for a General Court of Inquiry to investigate matters that may have major ramifications for the ADF. The Committee further noted that the convening of a General Court of Inquiry removes the Department of Defence from the investigative process, negating any conflict of interest and ensuring independence in the investigation of a serious matter.¹⁴ The Committee concluded that a General Court of Inquiry would provide a suitable mechanism to conduct inquiries into matters involving the accidental death of an ADF member. Moreover, the Committee concluded that, during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member.
- 3.15 In developing an approach to achieving a level of perceived and actual independence for inquiries into matters involving the accidental death of an ADF member the Committee was cognisant of the need for any arrangements to function in both peacetime and during conflict. However, the Committee acknowledged that, during conflict, it may be neither appropriate or feasible to conduct independent inquiries into matters involving the accidental death an ADF member. Amongst other things, the type of inquiry conducted would be strongly influenced by the nature and intensity of the conflict. The Committee accepted that during conflict, the

13 *ibid*, p. 1031.

14 Department of Defence, Private Briefing, Transcript, p. 27.

decision to initiate an independent inquiry could not be mandated and should remain a discretionary power of the Minister.¹⁵

Recommendation 1

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

- 3.16 In a similar vein, the Committee considered the option of proposing that a General Court of Inquiry be convened by the Minister in all cases involving major capital loss. As discussed above, this would serve to remove the Department of Defence from the investigative process thus negating any conflict of interest and ensuring independence in the inquiry. However, the Committee acknowledged the difficulties in determining what is major capital loss and with the operation of such arrangements during conflict. Moreover, the Committee accepted that in most cases a BOI would provide a suitable avenue to investigate major capital loss and that the Minister currently has, under D(I)R, the discretion to convene a General Court of Inquiry where an issue was of such gravity to warrant independence greater than that offered by a BOI.

Recommendation 2

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

- 3.17 Where alleged fraud, corruption or similar occurrences are involved, the public interest requires that matters be removed entirely from the command and management chain. The Committee agreed that the current arrangements for placing such cases in the hands of the Inspector General¹⁶ or other appropriate independent authority are suitable. The

15 Under D(I)R 5, the Minister has the authority to appoint a General Court of Inquiry to inquire into such matters as the Minister specifies in the instrument of appointment.

16 For 'cases of alleged fraud, corruption or similar occurrences where the public interest requires that matters be removed entirely from the command and management chain and placed in the hands of the Inspector General or other appropriately independent authority this is discretely done.' (See Department of Defence, Submission, p. 579).

Committee concluded that, where an issue was of such gravity to warrant independence greater than that offered by these arrangements, the Minister could use his or her prerogative to convene a General Court of Inquiry.

Involvement of the Coroner

- 3.18 In cases involving the accidental death of an ADF member,¹⁷ the relevant coroner must be informed. Where that death occurs in Australia, a coroner's inquiry is mandatory, although the coroner decides whether to hold a formal inquest. Under current arrangements this decision will depend on the coroner's review of the ADF inquiry and whether there is anything to be gained from an additional inquiry.¹⁸ It must be noted that although the coroner is able to make a determination on potential criminal liability, should a coronial inquiry identify issues to be addressed by the ADF,¹⁹ the coroner²⁰ does not have the power to direct rectification action, only to recommend.²¹
- 3.19 The ADF has agreed that it 'cannot stand outside the Coronial Inquiry process and must be ready to provide the coroner whatever assistance is required to understand the systems and issues that need to be addressed.'²² Indeed the involvement of the coroner in the early stages of an ADF investigation may be valuable, providing expert skills and advice and ensuring that the initial investigation follows best practice for homicide, suspicious or multiple death.²³ Further, as far as the Committee is aware, there is no reason a coronial inquiry cannot be completed prior to an ADF inquiry and the coronial report tendered as evidence at that inquiry.²⁴
- 3.20 To facilitate the involvement of the coroner in the initial stages of an inquiry into an incident involving death, liaison needs to be established between the ADF and the coroner. Whilst the nature of such liaison may vary from case to case, the provision of a legally trained liaison officer to the coroner would provide a suitable conduit for relations. The aim of

17 Only cases which involve coronial (violent or unnatural) death.

18 Department of Defence, Submission, p. 1031.

19 eg personnel hazards.

20 In NSW under Section 22A of the Coroners Act.

21 Mr J. Abernathy, Transcript, p. 277.

22 Admiral C Barrie, Transcript, p. 376.

23 Mr J. Abernathy, op cit, p. 271.

24 While it is likely that a BOI would be commenced soon after the incident, there is nothing to preclude the Coroner initiating an inquiry, completing the inquiry before the BOI and tendering the coronial report as evidence at the BOI.

such liaison would be to assist Police and the coroner in securing access to military bases and property, including military documentation,²⁵ necessary to conduct the coronial inquiry. Moreover, the ADF should develop policy to involve the coroner from the outset of inquiries involving fatalities and Commonwealth legislation should not preclude state coroners from investigating coronial deaths of military personnel and civilians involved in military enterprises or on military land or property that would otherwise be the subject of a coronial inquiry.²⁶

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

- 3.21 In the coronial report, the coroner may attribute degrees of responsibility for the incident in his or her findings. This is a function which is not and should not be performed by an ADF inquiry conducted under D(I)R. However, the Committee agreed that this was an important role for the

25 Such documentation can be protected under the provisions of the Coroner's Act for each state.

26 Currently state coroners are not precluded from investigating coronial deaths of military personnel and civilians involved in military enterprises or on military land or property. However, under regulation 27 of *Defence Force Regulations 1957*, the Minister has delegated authority for a commissioned officer to give such directions as to the disposal of a member of the ADF who has died whilst on service. The officer must certify in writing that the circumstances surrounding the death are such that the exigencies of service preclude compliance with the provisions of the law of the state that relates to coronial inquiries.

coroner in matters involving the accidental death of an ADF member.²⁷ The Committee was of the view that a coroner investigating the death of an ADF member, should be encouraged to make a determination on potential criminal liability and, where appropriate, to attribute degrees of responsibility for the incident in his or her findings.

Recommendation 6

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

Composition of BOIs

- 3.22 The recent inclusion of specialist civilian personnel on a BOI²⁸ has demonstrated the value of non-ADF involvement in the inquiry process. The Committee strongly endorsed this approach, as it served to increase the *perceived*, as well as the *actual* independence of the inquiry process. The Committee emphasised that such non-ADF personnel should be selected for such boards on the basis of their specialist qualifications in order to maximise their contribution to the inquiry.
- 3.23 The selection of members of a BOI is a key issue in achieving a successful outcome. Personnel should be selected for duty on the basis of their qualifications, experience and expertise. One means of achieving this would be to develop arrangements to designate suitable ADF personnel for BOI duty and call on them as the need arises.²⁹ Another, possibly complementary alternative would be to establish a standing panel³⁰ comprising retired judges, Queen's Counsel or experienced senior counsel and a group of retired senior officers from which BOI members can be drawn.³¹ Whilst both alternatives have merit, with each providing an

27 The coroner is the only authority in the process who is placed to attribute degrees of responsibility. In matters involving the accidental death of an ADF member the ADF inquiry should not act to attribute degrees of responsibility for the incident and the function of a DFDA trial is to determine guilt or innocence, not to determine degrees of responsibility.

28 The appointment of civilian specialists to the BOI examining the 1998 HMAS *Westralia* fire.

29 Ms J. Kelly, Transcript, p. 68.

30 To be called the ADF Inquiry Board.

31 Mr R. Davies, Submission, p. 244.

avenue for well trained and experienced members to be appointed to every BOI, the Committee agreed that ‘pool of experts’ approach would be too restrictive.

- 3.24 Under current arrangements the Appointing Authority is not restricted in whom he or she may appoint to a BOI. Given the range of incidents that may form the basis of an inquiry there are a significant number of combinations of specialist qualifications and experience that may be required on the BOI. Moreover, non-availability of personnel may limit alternatives for staffing a BOI, a situation likely to be exacerbated in times of conflict. The Committee felt that confining the options for staffing a BOI to a small group of personnel would limit the freedom of action of Appointing Authorities to conduct BOIs.
- 3.25 One submission suggested that in appropriate circumstances a judicial officer or very senior barrister could be appointed as the president of a BOI. Noting that current policy and legislation does not preclude the appointment of a member of the ADF with legal experience as President of a BOI, the Committee concluded that this is always an option open to an Appointing Authority. Nonetheless, it is acknowledged that adequate and relevant forensic experience³² is essential for the successful outcome of a BOI. The Committee agreed that the counsel assisting, rather than a member of the Board, should provide such experience. To achieve this the Committee was of the view that a senior barrister with an appropriate level of forensic experience should be appointed as counsel assisting.³³

Recommendation 7

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

Inquiries by Investigating Officer

- 3.26 With regard to inquiries conducted by Investigating Officers the primary concern raised by the evidence presented to the Committee was the

³² Experience, as a qualified legal professional, in dealing with matters before the courts.

³³ During the inquiry the Counsel Assisting is responsible for advising the BOI, questioning witnesses on behalf of the President of the BOI and to provide a summation in a final address to the BOI. The Counsel Assisting is not required to present a case to the Board and should not attempt to influence their findings in any way. (Defence Instruction (General) Administration 34-1 ‘Inquiries into Matters Affecting the Defence Force’ and D(I)R).

independence of the officer appointed to conduct the investigation. There is no question that it is desirable for the Investigating Officer to have an understanding of the culture and technical nature of the environment in which the incident under investigation occurred. However, the independence of the Investigating Officer may be in question where he or she is appointed from within the chain of command of the individual(s) or element immediately under investigation³⁴ or is personally acquainted with any of the parties involved in the incident.

- 3.27 One option to avoid this is to use a tri-service pool of legally-trained personnel to conduct all investigations under D(I)R within the ADF. However this option suffers from many of the same limitations as that of using an external authority to conduct military inquiries: timeliness, cultural reluctance to call in an external party and possibly a lack of understanding of the culture and technical nature of the environment in which the incident occurred. The lack of cultural and environmental awareness may result in time lost by the Investigating Officer in familiarisation with these issues or perhaps inhibit the ability of the Investigating Officer to conduct an effective inquiry.
- 3.28 The Committee acknowledged that the majority of investigations conducted by Investigating Officers deal with issues of less significance. Moreover, the Committee accepted that inquiries by Investigating Officers under D(I)R 'offer several advantages: they are quickly constituted; they are inexpensive; they are administratively efficient to organise and conduct; and they are able to be finalised in relatively short periods of time.'³⁵ However, the Committee was of the view that Appointing Officers should make every effort to ensure the independence of the Investigating Officer. The Committee agreed that in all but exceptional cases, 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.³⁶

34 In a specific case notified to the Committee an officer was appointed to investigate an incident in a unit under that officer's immediate command, and particularly to examine the actions of an immediate subordinate.

35 Department of Defence, Submission, p. 1040.

36 This accords with the recommendations (albeit in the context of investigations into sexual harassment) of *Facing the Future Together: Report of the Senate Standing Committee on Foreign Affairs, Defence and Trade on Sexual Harassment in the ADF*, August 1994, p. xxi.

Recommendation 8

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

The Level of Inquiry

- 3.29 D(I)R provide for three levels of inquiry. The choice of which level of inquiry to employ is ‘critical to the efficient management and effective control of the conduct of the inquiry.’³⁷ The commander must select the inquiry tool that provides, within the full context of the circumstances, the best means of investigating a particular incident. Indeed the commander may take the decision not to proceed with an investigation under D(I)R but rather to take direct action to deal with an incident.
- 3.30 Current guidance³⁸ provides little advice to commanders regarding when to invoke the various levels of investigation. A number of submissions to the Committee suggested that guidance in this area needs to be improved. In her 1998 report, the Ombudsman recommended that the ADF consider amendments to the guidance on the decision to employ a BOI rather than other approaches as this would enhance perceptions of seriousness and consistency.³⁹ The Committee agreed that the ADF should provide more extensive guidance to commanders regarding when to invoke the various levels of investigation.

Recommendation 9

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

37 Department of Defence, Submission, p. 585.

38 Defence Instruction (General) Administration 34-1 ‘Inquiries into Matters Affecting the Defence Force’ and D(I)R.

39 Smith, P., op cit, p. 17.

Terms of Reference

- 3.31 The TOR for a Board of Inquiry or Investigating Officer inquiry are critical to success. They dictate exactly what is to be examined and provide instructions regarding the type of recommendations that may be made. Obviously if the TOR are too narrow the inquiry is likely to be inadequate as all aspects of the incident will not be examined. However, a TOR that is too wide will waste time and resources as irrelevant and peripheral issues are examined. The key issue is that an inquiry is not empowered to examine any issue outside the TOR.
- 3.32 It is important to note that the TOR may be altered by the Appointing Authority at any time during the conduct of the inquiry. Action to change the TOR can be initiated by the Appointing Authority or in response to a written request from the Investigating Officer or President of the BOI. This means that if an issue, not originally seen as germane to the case, develops to be relevant to the inquiry it can be incorporated into the TOR.
- 3.33 There was general consensus in the evidence presented that inquiries should be restricted to their TOR. The two principle issues raised dealt with the framing of TOR and the review of TOR before being issued. In her 1998 report, the Ombudsman suggested that the ADF 'revise its Instructions to ensure that Commanding Officers are provided with guidance on how to develop terms of reference and in particular, the requirement for terms of reference to be outcome focussed and to address context management issues'⁴⁰. Further, the strong view presented to the Committee by a variety of sources was that individual TOR must be specific and that wide, general and imprecise language should be avoided.⁴¹
- 3.34 Given the importance of TOR to the outcome of any inquiry, the appropriateness of the TOR should be confirmed by a legal review before they are issued. Several submissions suggested that TOR, particularly for BOIs, should be reviewed by a non-ADF body before an inquiry is commenced. The Committee felt that an external review of TOR before the commencement of an inquiry would add little to the process and would suffer from the same limitations as an external inquiry: timeliness and the understanding of military culture and procedures. These limitations would be exacerbated in times of conflict. The Committee agreed a review of the TOR should be conducted by legal officers prior to the commencement of the inquiry. Where possible for Investigating Officer

40 *ibid*, p. 37.

41 COL K Northwood, Transcript, p. 233 and Smith, P., *op cit*, p. 37.

inquiries and in all cases for BOIs, the review should be conducted by legal officers outside the chain of command of the Appointing Authority.

Recommendation 10

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

Power to Make Recommendations

- 3.35 The TOR are included in the Instrument of Appointment which is issued by the Appointing Authority. For BOI and inquiries by an Investigating Officer, the Instrument of Appointment must indicate whether or not the investigating body is empowered to make recommendations arising from its findings.⁴² The Committee noted that D(I)R⁴³ only provide for an investigative body to make recommendations if so empowered by the Instrument of Appointment. Depending on the Instrument of Appointment, the investigative body could make findings germane to the TOR but not be empowered to make recommendations flowing from such findings.
- 3.36 The Committee agreed that the most important function of an inquiry 'is to discover the facts and suggest changes to processes and procedures that are necessary to ensure that similar incidents or accidents do not occur again.'⁴⁴ Moreover, the Committee was of the view that such powerful investigative tools as military inquiries should not be restricted, by the Instrument of Appointment, from making recommendations flowing from findings that are germane to the TOR. While the Instrument of Appointment should be used to provide clear guidance to the investigative body of the nature of recommendations sought by the Appointing Authority, the Committee concluded that BOI and Investigating Officers should always be empowered to make recommendations flowing from findings germane to the TOR.

42 D(I)R 25 and 70.

43 D(I)R 36 for BOI and 70 for inquiry by Investigating Officer.

44 Department of Defence, Submission, p. 1033.

Recommendation 11

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

- 3.37 In her 1998 report, the Ombudsman concluded that Investigating Officers/BOI should not be entitled to find that a specific offence has been committed. The rationale for this conclusion is that the finding stems from evidence gathered under the military inquiry process where the rules of evidence do not apply. The Committee agreed that where an Investigating Officer/BOI consider that an offence may have been committed they should be prohibited from finding that a specific offence has been committed. However, in accordance with Recommendation 11 of this report, the investigative body should, if it sees fit, be empowered to find that sufficient grounds exist for a matter to be pursued under a DFDA investigation and to recommend the referral of that matter for DFDA action.

Recommendation 12

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

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

Procedure

Guidance

- 3.38 A key issue to emerge from the conduct of this inquiry was the lack of formal guidance to personnel charged with the responsibility to conduct military inquiries. Currently this guidance is provided by D(I)R and the policy encapsulated in Defence Instruction (General) Administration 34-1 '*Inquiries into Matters Affecting the Defence Force*'. This Defence Instruction was substantially amended on July 1997. In addition the ADF have an handbook, with accompanying video, for officers appointed to conduct investigations into allegations of harassment or discrimination.
- 3.39 Whilst D(I)R were, on the whole, regarded as providing a suitable framework for the conduct of military inquiries, the Committee agreed that Defence Instruction (General) Administration 34-1 provides an inadequate degree of guidance.⁴⁵ The Ombudsman's Report⁴⁶ into how the ADF responds to allegations of serious incidents and offences addressed the issue of guidance in detail and concluded that 'while all the information provided in various documents, taken as a whole, is a useful 'ready reckoner' for Investigating Officers, it does not represent a comprehensive manual on how to conduct an investigation.'⁴⁷
- 3.40 The Ombudsman went on to conclude that problems associated with military inquiries include: inadequate planning of the inquiry, failure to correctly collect evidence, poor handling and questioning of witnesses, failure to analyse evidence objectively and to weigh evidence appropriately, inadequate record keeping and poor development of recommendations.⁴⁸ In her report, the Ombudsman suggested that the ADF develop 'a comprehensive investigation manual for investigations under D(I)R'.⁴⁹
- 3.41 In response to the Ombudsman's report the ADF proposed the development of a comprehensive manual titled *Administrative Inquiries in the ADF*.⁵⁰ The intent of the manual is to address shortcomings in the policy covering the conduct and to improve the overall quality of military inquiries. The manual, currently in draft, is due for release in 1999 and
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45 CAPT P Callaghan, Transcript, p. 413.

46 Smith, P., op cit.

47 ibid, p. vi.

48 Smith, P., op cit, p. vii.

49 ibid, p. vii.

50 ADF Publication 202.

incorporates, inter alia, new or improved policy on: initiating an inquiry, conducting an inquiry, the collection and handling of evidence, procedural fairness, guidance on the development of recommendations, and executive action on completion of an inquiry.

- 3.42 In accordance with specific recommendations in the Ombudsman's report⁵¹ the draft manual suggests that Investigating Officers / BOIs should seek advice from lawyers and other experts in the formulation of recommendations relating to serious incidents or offences, human rights type complaints, and procedural fairness issues. The draft manual also addresses the Ombudsman's recommendation that in the development of recommendations flowing from the inquiry, Investigating Officers / BOIs need to take into account any systemic issues raised by the inquiry and to critically examine existing rules, procedures or legislation.
- 3.43 The Committee commends the ADF on the commitment to develop a manual providing comprehensive guidance on the conduct of military inquiries and agrees that the manual, currently in draft, should be issued as soon as possible.

Recommendation 13

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

Taking of Evidence

- 3.44 Significant evidence presented to the Committee dealt with the taking of evidence from witnesses in an inquiry. Several proposals suggested that statements taken as part of any inquiry should be taken under oath and be signed by the witness.⁵² In theory this would force witnesses to tell the truth and may allow such statements to be used in subsequent DFDA, civil or criminal proceedings. However, whilst some evidence presented did suggest that false accusations and misleading statements had been tendered in some cases, the Committee did not believe that the taking of statements under oath would markedly change this. Moreover, any person who wilfully gives false evidence to a military inquiry is subject to

51 Smith, P., op cit, p. vii.

52 The option to take evidence under oath or affirmation is available to the Appointing Authority for Boards of Inquiry and Courts of Inquiry but not for inquiries conducted by Investigating Officers.

prosecution for an offence under D(I)R. In such circumstances the false evidence given to the inquiry may be tendered as evidence in the prosecution under D(I)R.

- 3.45 During BOIs, the taking of witness statements under oath or affirmation adds to the perception of quasi-trials and in most circumstances will serve to reduce the willingness of witnesses to cooperate in a free and frank manner. This is equally applicable to inquiries by Investigating Officers and particularly relevant to cases where external parties are called as witnesses to the inquiry. The Committee concluded that the taking of witness statements under oath or affirmation, while an option for Boards and Courts of Inquiry, should not be mandatory for all inquiries.
- 3.46 Appearing, as a witness, before a BOI can be a daunting experience. This is especially the case for civilian witnesses who are unfamiliar with the military. The Committee agreed that in order to engender an atmosphere of willing cooperation, efforts should be made to ensure witnesses to the inquiry feel more comfortable. In the case of civilian witnesses, they should be advised of the process and the reasons that their evidence is required.⁵³ In addition, all witnesses who appear before an inquiry should feel confident that they will not be asked questions which are not relevant to the TOR. The President of a BOI should ensure that lines of questioning are relevant to the TOR and do not include unnecessary personal questions or pursue personal theories.⁵⁴

Recommendation 14

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

- 3.47 The provision for witnesses to an inquiry to decline to answer questions on the grounds of self incrimination was another issue raised for consideration by the Committee. While the Committee had some reservations about the absence of excuse provisions against self

53 Hilton Review into the BOI into the command of Squadron Leader R P Vance, Officer Commanding, No 92. Wing Detachment A, Butterworth, Malaysia, Recommendation 12.

54 *ibid*, Recommendations 7 and 11.

incrimination,⁵⁵ it recognised a disparity in regard to this issue between inquiries by Investigating Officer and other levels of inquiry. While no excuse provisions in relation to self incrimination exist for witnesses to Courts or BOIs⁵⁶ witnesses in an inquiry conducted by an Investigating Officer may decline to answer questions on the basis of self incrimination.⁵⁷ Moreover, while a statement or disclosure made by a witness to a Court or BOI is not admissible in any DFDA, civil or criminal proceedings against that witness,⁵⁸ a statement or disclosure made by a witness to an Investigating Officer is admissible in civil or criminal proceedings against that witness.⁵⁹

- 3.48 The Committee could not identify any rationale for the disparity in excuse provisions on the basis of self incrimination for witnesses before differing levels of the military inquiry system. Moreover, there appears to be no reason why witnesses to an inquiry conducted by an Investigating Officer should be able to claim the privilege against self incrimination. Nor does there appear to be any reason why a statement or disclosure made to an Investigating Officer by a witness should be admissible as evidence in civil or criminal proceedings against that witness. Indeed the Committee felt that these two issues served only to restrict the ability of an Investigating

55 Defence Instruction (General) Administration 34-1 '*Inquiries into Matters Affecting the Defence Force*' requires that all witnesses to a D(I)R inquiry are provided with written advice of offences in relation to such inquiries. Such written advice (Annex C to DI(G)ADMIN 34-1) stipulates excuse provisions for questions asked of witnesses to a D(I)R inquiry.

56 The one exception exists where a witness has been charged with an offence and that offence has not yet been dealt with by a court, or otherwise disposed of, that witness may decline to answer questions on the basis of self incrimination in regard to the outstanding charge.

57 While D(I)R are not clear on this issue the ruling of Sheppard. J, '*X v McDermott* (1994) 51 FCR 1. In regard to this issue Sheppard. J, found that 'the applicant is entitled not to answer a question if, on reasonable grounds, he believes the answer may tend to incriminate him.'

58 Subsection 124(2A) of the *Defence Act, 1903* provides that the power to make regulations by virtue of paragraph (1)(gc) of the section includes the power to make regulations requiring a person appearing as a witness before a Court or BOI to answer a question notwithstanding that the answer to the question may tend to incriminate the person. Nothing is said in the subsection about the proceedings of an investigating officer, the other method of investigation contemplated by paragraph (1)(gc) of Section 124. Moreover, a statement or disclosure made by a witness in the course of giving evidence before a General Court of Inquiry or a BOI is not admissible in evidence against that witness in: any civil or criminal proceedings in any federal court or court of a State or Territory; or proceedings before a service tribunal; otherwise than in proceedings by way of a prosecution for giving false testimony at the hearing before the General Court of Inquiry or the BOI.

59 Such a statement or disclosure is not admissible in any DFDA proceedings against that witness (See D(I)R 74A). However Subsection 124(2A) of the *Defence Act 1903* does not provide for a statement or disclosure made by a witness in the course of giving evidence to an Investigating Officer under D(I)R to be inadmissible as evidence against that witness in any civil or criminal proceedings in any federal court or court of a State or Territory.

Officer to conduct an inquiry.⁶⁰ The Committee concluded that Commonwealth legislation should be amended to remove the privilege against self incrimination for witnesses to an inquiry conducted by an Investigating Officer⁶¹ and to ensure that any statement or disclosure made to an Investigating Officer by a witness should not be admissible as evidence in civil or criminal proceedings against that witness.⁶²

Recommendation 15

The Committee recommends that the Australian Government ensure that legislation

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

Public or Closed Inquiries

One of the benefits in holding public inquests is that a body responsible for the safety of its personnel will set about putting things right before the formal inquiry begins, improving procedures, demonstrating a willingness to do better, and avoiding public criticism.⁶³

- 3.49 D(I)R state that ‘an inquiry conducted by a General Court of Inquiry shall be in public’⁶⁴ although, at the discretion of the President, evidence may be taken *in camera*. The Appointing Authority may direct a BOI to conduct all or part of the inquiry in public with elements of the proceedings taken *in camera* as necessary.⁶⁵ There is no provision for inquiries by Investigating

60 Where evidence may be withheld from the Investigating Officer under the privilege against self incrimination factors contributed to an incident will be more difficult to determine.

61 D(I)R 74.

62 Subsection 124(2A) of the *Defence Act 1903* and D(I)R 74A.

63 Waller, Kevin, *Suddenly Dead*, Pan MacMillan Publishers Australia, 1994, p. 9-10.

64 D(I)R 11.

65 D(I)R 29.

Officers to be conducted in public.⁶⁶ Since the introduction of D(I)R it has been the norm for inquiries to be held in private, however more recently the ADF has chosen to conduct the proceedings of BOIs in public.

- 3.50 There are valid reasons for some BOIs to be conducted in private. In some instances, matters of national security may be involved, requiring that military capabilities, tactics or ADF operational aspects be shielded from public examination. In other cases, the professional conduct or judgement of a specific individual may be under review, and the need for fairness to that individual dictates that the inquiry be conducted out of the view of the media. Another general attribute militating against open BOI stems from their inquisitorial nature. With some exceptions, witnesses to a BOI have no right to silence on the grounds that their answer may incriminate them. This process allows a BOI to consider all details relating to an incident, including hearsay and opinion.
- 3.51 Where an inquiry is open to the public, the media has freedom to report on individual facets arising from each day of evidence. The resultant media coverage is likely to focus on sensational or newsworthy statements that may be reported out of the context of the inquiry. This may include adverse editorial comment against an individual or organisation which may not be substantiated, or allowed as evidence in subsequent disciplinary or legal action. In such circumstances there is a real risk that the rights of an individual or organisation in associated future criminal proceedings may be prejudiced and reputations may be unfairly damaged.
- 3.52 Media access to an inquiry also adds to the perception that the process is a trial rather than an inquiry. This is particularly the case with regard to public perception, as the purpose of military inquiries is not widely understood. In turn this may cause problems for the inquiry, as witnesses may tend to be more careful, and less forthcoming where their remarks may be seized upon, potentially out of context, by the media. Moreover, there is a tendency for media reports to play on the adversarial and fault attribution aspects of the inquiry. This is likely to reduce the willingness of individuals and external parties to cooperate with the inquiry and thus is likely to impede the inquiry's ability to ascertain the relevant facts of an incident.
- 3.53 In a recent BOI⁶⁷ an external party that provided evidence, questioned the fairness of an inquiry conducted in public.⁶⁸ As a contracted supplier to the ADF, the external party was intimately involved in the incident under

66 D(I)R 72.

67 BOI into the deaths aboard the HMAS *Westralia* on 5 May 1998.

68 Australian Defence Industries, Submission, p. 1121.

investigation. Media attention on the inquiry focused on fault attribution and more specifically the division of fault between the external party and the ADF. Perhaps more damaging was that the inquiry permitted the public airing of testimony critical of the external party, without the protection of the rules of evidence. The Committee considered these concerns and acknowledged that recent moves to contract out ADF maintenance and support functions make it more likely that external parties will be required to appear before future military inquiries.

- 3.54 Whilst, ideally, such inquiries will be conducted in an inquisitorial style, designed to elicit the facts of the matter, it is more likely that the need to allow the interests of affected parties to be appropriately represented by legal counsel is likely to produce a more adversarial environment. One offshoot of an inquiry of this nature is a perception of fault attribution; a perception likely to be exacerbated by a public inquiry. Nonetheless, the Committee concluded that the ADF's need for a rapid, internal review to inform subsequent rectification action remains the imperative and, where the case before the BOI is serious and of legitimate public interest, that BOI should be open to the public. Moreover, where information to assist a BOI is available from a non-Defence party there is a strong case for that external party to be required to appear before the inquiry.
- 3.55 With regard to fault attribution, the Committee was firm in its view that this should not be allowed to become the central focus of any inquiry. Indeed, where an external party may be involved in the processes culminating in a serious incident, it would be counter-productive and inappropriate for an ADF inquiry to make findings relating to apportionment of blame.⁶⁹ From an environmental perspective, the requirement for an inquiry to make findings apportioning blame is likely to increase the adversarial nature of the inquiry and reduce the willingness of witnesses to cooperate.
- 3.56 Notwithstanding the need to avoid fault attribution and, specifically, findings by the investigative body that apportion blame, the Committee remained convinced that the investigative body should be empowered to find that sufficient grounds exist for a matter, or matters to be the subject of a DFDA investigation and to recommend the referral of that matter for DFDA action.⁷⁰ The Committee accepted that a recommendation referring a matter for DFDA action would indirectly serve to apportion blame. While the Committee agreed that such circumstances should be avoided it

69 The Committee understands that the terms of reference of the HMAS *Westralia* did not require the board to attribute blame or otherwise make findings of fault by individual parties.

70 See Recommendation 12 of this report.

accepted that the prerogative to recommend a disciplinary investigation was paramount. However, the Committee agreed that, to minimise the fact and appearance of the fault attribution component of any findings, the ADF should amend guidance on the conduct of military inquiries to ensure that investigating bodies are not empowered to make specific findings apportioning blame.

Recommendation 16

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

- 3.57 Although findings relating to the apportionment of blame have no standing in subsequent legal proceedings, and cannot be used to pursue criminal negligence or civil damages claims against an external party, they may be seen as likely to influence subsequent proceedings and are therefore inappropriate. In the case of an incident involving death⁷¹, the coroner will conduct an inquiry into the accident and may attribute degrees of responsibility for the accident in his or her findings. In other cases fault attribution is more appropriately a matter for civil or criminal litigation.
- 3.58 The Committee accepted that there are valid arguments for BOI, particularly those involving external parties, to be conducted in private. However, closed inquiries have frequently led to accusations of Defence conspiracies and cover-ups, and claims that the Service involved has manipulated the BOI process to hide blame, or to protect senior officers. Although such allegations have been made against a relatively small number of BOIs, the ADF has acknowledged that there is legitimate public interest in open inquiries that investigate major incidents and tragedies.⁷²
- 3.59 Moreover, the ADF has recognised that this public interest often outweighs the need for a closed inquiry and that closed boards should in future become the exception rather than the rule.⁷³ The main rule for departure from this policy would be where inquiries were directed to inquire into a named individual's professional conduct, command or judgement; in such cases inquiries should remain closed to ensure

71 Only those cases which involve coronial (violent or unnatural) death.

72 Such as the Blackhawk and HMAS *Westralia* accidents.

73 Department of Defence, Submission, p. 1028.

fairness. Open inquiries will be protected by reserving the option of certain evidence being taken *in camera*.

Recommendation 17

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

- 3.60 The Committee welcomed this broad policy as an appropriate balance between public interest and fairness to individuals. However, the Committee also made more specific findings in regard to the access of relatives and next of kin of deceased members to ADF inquiries. This right to access had priority over the right of the media and general public for access, and is covered in more detail in a subsequent section.⁷⁴

Procedural Fairness

- 3.61 The ADF requires properly focused inquiries, conducted expeditiously to establish the facts and make recommendations aimed at avoiding a repetition of failure that gave rise to the inquiry in the first instance. Nonetheless, issues of procedural fairness must be observed and the rights of individuals must be adequately protected during the inquiry process. Moreover, decisions made in the conduct of ADF inquiries under the D(I)R must comply with the normal standards of decision making applicable to Government agencies, based on the principles of natural justice and relevant national laws.⁷⁵
- 3.62 In any circumstances where an inquiry may adversely affect an individual he or she has a right to expect that the principles of procedural fairness will apply. While the principles of procedural fairness are built into the DFDA processes for charging a member with an offence, hearing of the charges and dealing with the charges procedural fairness is not clearly articulated in the D(I)R or current guidance on the conduct of military inquiries.⁷⁶

74 See paragraphs 3.81-3.94 of this report 'Involvement of Next of Kin'

75 Department of Defence, Submission, p. 580.

76 Defence Instruction (General) Administration 34-1 'Inquiries into Matters Affecting the Defence Force'

- 3.63 Notwithstanding, the ADF accepts that ‘both individuals appointed to participate in any phase of the inquiry, as well as those who are required to give evidence, need to be assured that the procedures they are following or are subject to are demonstrably of the highest standard. The credibility of the outcome depends on this [and] the ADF is required to justify its activity with regard to the conduct of military inquiries before the courts or in the public domain.’⁷⁷ The recent ‘own motion’ report by the Ombudsman⁷⁸ addressed a number of criticisms in regard to procedural fairness in the conduct of military inquiries. In light of these criticisms, the ADF has ‘resolved to revamp its procedures’⁷⁹ and incorporate the principles of procedural fairness in the new manual on the conduct of military inquiries.⁸⁰
- 3.64 The Committee accepted that the ADF had commenced action to incorporate the Ombudsman’s recommendations regarding procedural fairness into the new manual on the conduct of military inquiries.⁸¹ However, given the volume of evidence presented regarding issues of procedural fairness, the Committee agreed that a brief treatment of the issues was necessary in this report.

The Right to be Informed

- 3.65 Under the D(I)R there is no requirement for personnel to be informed of allegations against them which are to be investigated by a military inquiry. Current guidance for the conduct of military inquiries⁸² allows for the President of a Court or BOI to determine that a member may be affected by an inquiry and therefore should be informed and allowed to contribute to the deliberations of the inquiry. This is not the case for inquiries by Investigating Officers. Indeed ‘it is quite possible for a member to be investigated without ever being informed of the allegations against them or being given the opportunity to present their case’.⁸³
- 3.66 The Committee agreed with the Ombudsman that ‘members should be informed of any complaint or allegation against them where any action is to be taken as a result. The right to be informed should apply not only to

77 Department of Defence, Submission, p. 581.

78 Smith, P., op cit.

79 Department of Defence, Submission, p. 581.

80 ADF Publication 202.

81 ibid.

82 Defence Instruction (General) Administration 34-1 ‘*Inquiries into Matters Affecting the Defence Force*’.

83 Smith, P., op cit, p. 74.

those members about whom allegations have been made, but also to any member who may be adversely affected by the outcome'⁸⁴ of an inquiry. Moreover, action to inform members should be taken promptly and be specific including the provision of full and complete details of allegations made, times, dates and events. The exception to this right to be informed should be where an individual is 'suspected of an offence and where forewarning may result in the destruction of evidence.'⁸⁵

Recommendation 18

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

The Opportunity to Respond

- 3.67 The subject of a complaint or allegation, against whom action is to be taken as a result, should, after the right to be informed has been satisfied, be afforded adequate opportunity to respond to the allegations or complaint. Current guidance for the conduct of military inquiries⁸⁶ allows the President of a Court or BOI discretion to advise a member that may be affected by an inquiry of their right to appear before the Board and to make a written statement. The provision for a member that may be affected by an inquiry to respond to allegations or complaints is not addressed in current guidance for the conduct of inquiries by Investigating Officers.
- 3.68 The Committee agreed with the Ombudsman's conclusion that 'a report which is critical of a member should not be made to an Appointing Authority without the member having been afforded an opportunity to appear before the inquiry and to make any submissions (either orally or in writing) as he or she sees fit'.⁸⁷

⁸⁴ *ibid*, p. 70.

⁸⁵ *ibid*, p. 73.

⁸⁶ Defence Instruction (General) Administration 34-1 *'Inquiries into Matters Affecting the Defence Force*.

⁸⁷ Smith, P., *op cit*, p. 75.

Recommendation 19

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

Access to Evidence Considered

- 3.69 It would seem fair that a member against whom action is to be taken should have access to any evidence relied upon in making a decision or taking any action that affects them.⁸⁸ However, D(I)R provide that the President of a Court or BOI may, by directions in writing, either completely prohibit the disclosure of information or documents or prohibit the disclosure of information or documents to named individuals. No further mention regarding the release of evidence is made in current guidance⁸⁹ for the conduct of military inquiries.
- 3.70 In the Ombudsman's consideration of this issue, the example used was that of the Captain of HMAS *Swan*, who was adversely affected by the outcomes of the BOI into sexual harassment aboard his ship. Although he appeared as a witness before the BOI, he was not provided access to all of the evidence, and thus appeared without knowledge of all of the evidence the Board was considering in reaching its conclusions. The Senate Committee that inquired into sexual harassment in the ADF concluded, in regard to the *Swan* BOI, that the failure to inform some of the persons directly affected by the Board resulted not only in those people experiencing a high level of unnecessary stress but in creating a perception on their part that Navy was trying to cover up matters raised by the BOI.⁹⁰
- 3.71 The Committee endorsed the conclusions drawn by the Senate Committee and agreed that in the interests of natural justice, a member against whom action is to be taken should have access to any evidence relied upon in making a decision or taking any action which affects them. The exception to this right to access should be where the release of evidence given by another witness may, if disclosed, constitute a threat to the safety of that

88 *ibid*, p. 73.

89 Defence Instruction (General) Administration 34-1 *'Inquiries into Matters Affecting the Defence Force*.

90 Report of the Senate Standing Committee on Foreign Affairs, Defence and Trade, *Sexual Harassment in the ADF*, August 1994, p. 87.

witness.⁹¹ In such circumstances, a summary of the evidence should be provided.

Recommendation 20

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

Timely Notification of Decisions

- 3.72 Although D(I)R do not address the issue, Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* provides guidance to Appointing Authorities regarding the notification of witnesses into personnel matters. This guidance states, inter alia, that ‘witnesses who gave evidence to inquiries into personnel matters are to be provided with written notification, as soon as possible after any decisions flowing from the inquiry have been made, of their status and, subject to [the provisions of the *Privacy Act*] of the outcome of the inquiry in relation to matters relevant to them.’⁹² The Committee agreed that this guidance is sufficiently prescriptive to ensure that all witnesses are adequately informed regarding their status and the outcome of the inquiry in relation to matters relevant to them. Moreover, Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* states that action to inform witnesses of the outcome of the inquiry should occur as soon as possible after any decisions flowing from the investigating body’s report have been made. The Committee agreed that this guidance is sufficient to ensure that witnesses are informed in a timely manner.

Defensible Decisions, Reasons for Decisions and Factors Considered

- 3.73 Under D(I)R, the reasons for a decision, factors considered and any action recommended are detailed in the investigating body’s report on the inquiry. However members affected by the outcomes of the inquiry do not have automatic right to the investigating body’s report. Rather, the report can only be released to a member with the approval of the Minister for

91 Smith, P., op cit, p. 73.

92 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, Annex E, p. 1.

Defence.⁹³ The Committee acknowledged that if a member is to be satisfied that the findings, conclusions and recommendations made by the investigating body are consistent with an objective consideration of the evidence, he or she needs access to the investigating body's report.

- 3.74 The Committee agreed with the Ombudsman's conclusion that 'members who may be adversely affected as a result of the investigating body's report on the inquiry should be afforded access to that report.'⁹⁴ The Committee further agreed that the provisions of the Privacy Act should guide such access.

Recommendation 21

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

The Right of Reply and to Have Submissions Considered

- 3.75 D(I)R provide that the appointment of an investigative body continues until two months after the completion of the inquiry. During this period the Appointing Authority, where he or she deems necessary, may direct the investigating body to make a further report. The Ombudsman suggested that during this period members affected by the outcome of the inquiry should be provided an opportunity to make further submissions to the investigating body and that an Appointing Authority should take such submissions into account when deciding whether to act on the report recommendations.⁹⁵
- 3.76 The rationale for this suggestion is that invariably the investigating body will fail to consider some information or evidence that is relevant to the inquiry. This is not a reflection of the performance of the investigating body, rather an acceptance that perhaps a particular piece of information was not provided to the investigating body or that it was not elicited by questions during the conduct of the inquiry. The Ombudsman suggested that providing members with a right of reply to the investigating body's

93 Smith, P., op cit, p. 78.

94 ibid.

95 ibid, pp. 78–79.

report may avoid review action by a higher authority, external agency or civilian courts.⁹⁶

- 3.77 The Committee noted that any member affected by the outcome of the inquiry against whom action is to be taken, will be offered the opportunity to state their case. In the situation where DFDA action is initiated against a member, he or she will be afforded the opportunity to defend themselves.⁹⁷ In the situation where administrative action is proposed against a member, he or she will have the opportunity to show cause why the administrative action should not proceed.⁹⁸
- 3.78 While the Committee accepted the logic of the Ombudsman's argument, it noted that providing members with an automatic right of reply to the investigating body's report may markedly increase the time taken to complete the inquiry process. Given the purpose of military inquiries and the accepted requirement for a responsive process, the automatic right of reply is hard to reconcile. The Committee did not support the Ombudsman's suggestion regarding an automatic right of reply to the investigating body's report.

Advice on Rights of Review

- 3.79 Neither D(I)R nor Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* provide any guidance regarding avenues of review for a military inquiry. While the issue of reviews of military inquiries is covered in another section, advice to members regarding their rights of review is an issue of procedural fairness. The Ombudsman suggested that when witnesses are informed regarding their status and the outcome of the inquiry in relation to matters relevant to them they should also be informed as to their rights of review.⁹⁹ The Committee supported this suggestion.

Recommendation 22

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

⁹⁶ *ibid*, p. 79.

⁹⁷ See paragraph 2.121 of this report.

⁹⁸ See paragraph 2.163 of this report.

⁹⁹ Smith, P., *op cit*, p. 79.

Privacy

- 3.80 The Ombudsman briefly addressed the issue of privacy¹⁰⁰ suggesting that existing guidance in regard to confidentiality and privacy is clear. The Committee was unequivocal in its agreement that the ADF must adhere to existing guidelines on the right to privacy and that members are entitled to expect that any information relating to them will be treated discreetly and their privacy respected. While the Committee accepted the Ombudsman's comments with regard to existing guidance it felt that there was benefit in including guidance on confidentiality and privacy in the proposed manual titled *Administrative Inquiries in the ADF*.¹⁰¹

Recommendation 23

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

Involvement of Next of Kin

- 3.81 Military inquiries are convened to examine a variety of military incidents and accidents. Inquiries conducted by Investigating Officers normally deal with the more minor issues whereas BOI are used to inquire into matters of greater significance. While an Investigating Officer can be used to inquire into an incident involving the death of a member of the ADF the most common use, to date, of BOI has been to inquire into military accidents involving the deaths of ADF members. Earlier in this report,¹⁰² the Committee has recommended that during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member.
- 3.82 The Committee identified that the major sources of evidence expressing dissatisfaction with the military inquiry process were next of kin, or close family members (known collectively in this report as 'next of kin') of personnel killed while engaged in ADF activities. The principal reason for

¹⁰⁰ *ibid.*

¹⁰¹ ADF Publication 202.

¹⁰² See Recommendation 1 of this report.

the dissatisfaction of next of kin with the military inquiry process is twofold; their perception of exclusion from the inquiry process and ADF's failure to keep them informed.

- 3.83 Since the introduction of D(I)R it has been the norm for inquiries to be held in private although more recently the ADF has chosen to conduct the proceedings of BOI in public. A direct impact of the practice of conducting private inquiries was that next of kin of deceased ADF personnel were excluded from the inquiry into the circumstances surrounding the death. In addition, the information available to relatives was often dependent upon the willingness of the Appointing Authority or superiors of the deceased to keep the next of kin informed. More often than not it appears that the principal sources of information for next of kin were unofficial channels, such as the 'grapevine' from friends of the deceased.
- 3.84 Irrespective of the reasons for this lack of communication, the result has frequently been dissatisfaction of bereaved relatives, whose grief demands a full explanation of the factors contributing to the death of a member of their family. A poignant example of this attitude was reported by the press during the BOI into the 1996 Blackhawk accident:
- The widow of ... one of the SAS soldiers killed, said the report had not answered enough questions about her husband's death.
 "That's the frustrating and disappointing part of it; we felt like we'd get some answers today, and really we didn't."¹⁰³
- 3.85 It is natural that bereaved relatives need answers, and explanations, to help them come to terms with the death of a loved one. Knowledge of what happened also forms a crucial part of the grieving process.
- I can't get on with my life unless I really know what happened on that night, that took my only son away from me.¹⁰⁴
- 3.86 When relevant information is not forthcoming, it is understandable that next of kin perceive the process as a 'cover up', and an example of the ADF closing ranks to protect itself, or senior officers, from criticism.
- 3.87 The Committee noted several examples where bereaved relatives had been denied information on the death of a family member, or had been excluded from the inquiry process. Responses to this exclusion ranged from distrust of the military inquiry process to an almost obsessive belief

103 Wright, Tony. 'Black Hawk Disaster Inevitable'. *Sydney Morning Herald*, Friday 7 March 1997, p. 1.

104 Attributed to Mrs Judy Baker, mother of Corporal Michael Baker who was killed in the 1996 Blackhawk accident. Quoted in Christopher Niesche, 'Blackhawk crash victim's mother alleges cover-up', *The Australian*, 24 November 1997.

in a military conspiracy. Such levels of dissatisfaction can manifest themselves in, what is in practical terms, a long-term administrative problem for the ADF. Next of kin, dissatisfied with the inquiry process and moreover with the outcomes of the inquiry, have lobbied the ADF to re-open investigations, petitioned Ministers and generally used every avenue of review and appeal in order that the case be revisited. In several cases, next of kin have continued to pursue their case and continued their criticism of the ADF for a significant period of years. The Committee noted that involvement of bereaved families early in the inquiry process can serve to reduce the possibility of a long-term administrative problem for the ADF and moreover assists relatives of the deceased with the grieving process.

- 3.88 Literature on the grieving process suggests that ‘a sudden violent death is more difficult to cope with than an anticipated non-violent death.’¹⁰⁵ In many of the cases brought to the attention of the Committee, the death was sudden, giving the relatives no time to prepare for the loss of their loved one. Studies have shown that the way in which individuals grieve depends on a number of factors, among which are the circumstances under which the deceased was killed and the success the family has after the event in dealing with the systems with which they become involved.¹⁰⁶ The most frequent experience among next of kin who made submissions to the inquiry was a feeling of alienation from the system following an investigation into the death of a loved one. This feeling of alienation has the potential to prolong the suffering of the victims’ families by reducing their willingness to accept the death.
- 3.89 Where an incident involving fatalities has occurred, the price of not involving families in the inquiry process is high, regardless of the reasons for doing so. It impedes the grieving process, and in many instances creates long-term problems for family members who refuse to accept the outcome of a military inquiry. In contrast, the cost of involving bereaved families much earlier is often lower, particularly in terms of reducing the suffering of the next of kin.
- 3.90 The Committee noted that where relatives were kept fully informed, or allowed to attend the BOI, they were accepting of the equity of the inquiry process. That is not to say that they were satisfied with the report of the BOI nor with the action taken by the ADF as a consequence of the inquiry.

105 Harris Lord, J., *No Time for Goodbyes-Coping With Sorrow, Anger and Injustice After a Tragic Death*, Millennium, Pathfinder Publishing, 1988, p. 55.

106 *ibid*, p. 18.

However, the Committee noted that there was compelling evidence that involvement in the inquiry process was of distinct benefit to next of kin.

Recommendation 24

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

- 3.91 The evidence presented to the Committee suggested that one of the great difficulties in ADF dealings with next of kin of personnel killed in military incidents is in understanding military procedures, nuances and most importantly, the inquiry process. It is this latter area which is of most concern since next of kin need to understand the inquiry process if they are to feel they are involved in the inquiry.
- 3.92 While there are many ways to achieve this, the Committee noted that in one case¹⁰⁷ the provision of a liaison officer had proven quite successful. The liaison officer was available to explain the inquiry process,¹⁰⁸ aid in the flow of information to next of kin and generally to deal with liaison tasks within a military environment. In addition, the liaison officer was used to ensure that the immediate needs of the next of kin were satisfied during the BOI. The Committee acknowledged that the use of a liaison officer would assist next of kin in understanding the investigating body's report on the inquiry and the subsequent action by the Appointing Authority and the ADF in discharging the recommendations of the report.
- 3.93 Several examples put before the Committee showed that next of kin expect the findings and recommendations of an inquiry to be followed. Where these recommendations are subsequently not put into effect, next of kin may have difficulty accepting the decision and reasons underpinning the decision. This lack of understanding frequently manifests itself in anger directed at the authority or Service seen as responsible for this decision. In

107 Mrs G Otenowski, Transcript, p. 191.

108 Including guidelines and preconditions for disciplinary or administrative action.

many cases neither the inquiry report¹⁰⁹ nor the reasons underpinning the decision not to implement recommendations of a BOI report have not been made available to next of kin. In the Committee's view this information should be provided to next of kin before the outcomes of the inquiry are released to the public. Indeed next of kin should be warned prior to the release of information to the press regarding the inquiry and where possible, provided with copies of that information.

- 3.94 The Committee concluded that, as part of involving next of kin in the inquiry process, they should, within the provisions of the Privacy Act and relevant security considerations, be provided a copy of the inquiry report and advice on all actions taken as a result of the inquiry. Where a recommendation from the inquiry report is not implemented, next of kin should be provided with the reasons underpinning the decision not to adopt that recommendation.¹¹⁰ The Committee believed that this was the moral obligation of the ADF to the next of kin.

Recommendation 25

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

Recommendation 26

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

¹⁰⁹ In some cases, the rationale for withholding the inquiry report proceedings may have been that graphic detail of a member's death (including medical evidence) which may have caused undue distress for the relatives. In other cases, there may have been some apprehension within the Department that some evidence given to the inquiry may be critical of the ADF.

¹¹⁰ When a relative or person involved in an inquiry decides to take legal action against the ADF the ADF becomes the plaintiff in a case and the relationship between the relative or person involved in an inquiry and the ADF becomes governed by legal process. In such circumstances the ADF cannot normally share the results of the BOI.

Legal Representation

- 3.95 Under D(I)R legal representation for persons likely to be affected by military inquiries is not a right. Indeed for inquiries by Investigating Officer or BOI, a person likely to be affected must seek approval for legal representation.¹¹¹ Persons likely to be affected by a General Court of Inquiry are provided with a right to legal representation.¹¹² Evidence presented to the Committee suggested that everyone who is required to act as a witness in a military inquiry should have a right to legal representation.
- 3.96 The Committee agreed that this should generally be the case for witnesses to BOIs and that recent experience had shown that an Appointing Authority is unlikely to deny a person likely to be affected legal representation, particularly where the inquiry is conducted in public.¹¹³ The Committee acknowledged that where persons likely to be affected have legal representation and the investigating body is perceived to be represented by the Counsel Assisting, then the adversarial nature of the inquiry¹¹⁴ is likely to be exacerbated. However, the denial of legal representation to a person likely to be affected is only likely to add to the perception that BOI lacks fairness. The Committee agreed that persons who are likely to be affected by a BOI should have a right to Service legal representation and that right should be incorporated in D(I)R. For members of the ADF who may be affected by a BOI, where legal representation is approved, that representation may be provided by a Service legal officer¹¹⁵ at no cost to the witness.
- 3.97 Deceased members of the ADF may also be affected by an inquiry and next of kin of deceased members should be afforded the option of legal representation. The Committee agreed that, where a deceased member is likely to be affected by an inquiry a legal practitioner should be appointed by the Appointing Authority to represent the deceased member for the purposes of the inquiry. Notwithstanding, the next of kin of a deceased member who is likely to be affected by the inquiry should have the
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111 In the case of inquiries conducted by an Investigating Officer, the matter of allowing witnesses legal representation is entirely at the discretion of the Investigating Officer. For a BOI, D(I)R stipulate that legal representation may be approved by the Appointing Authority before the commencement of the inquiry and by the President of the BOI during the conduct of the inquiry. For a more detailed explanation see paragraph 2.63 of this report.

112 D(I)R 15(3).

113 Admiral C Barrie, Transcript, p. 390 agreed that 'every person who appears before a BOI is entitled to be properly represented'.

114 See paragraphs 3.50-3.54 of this report.

115 Either full-time or part-time.

alternative option to be represented, at their own expense, by a private legal practitioner.

- 3.98 With regard to inquiries by Investigating Officer, the Committee noted that a witness is entitled to seek legal advice, at no cost to the member prior to being interviewed by an Investigating Officer. However, the Committee was of the view that a right of access to legal representation would reduce the effectiveness of the inquiry process. Earlier in this report the Committee recommended that excuse provisions on the grounds of self incrimination be removed for witnesses to an inquiry conducted by an Investigating Officer. In addition, the Committee recommended that any statement or disclosure made to an Investigating Officer by a witness should not be admissible as evidence in civil or criminal proceedings against that witness. Given these recommendations and the fact that inquiries by Investigating Officer are normally conducted to investigate incidents of a more minor nature, the Committee did not agree that a witness to an inquiry conducted by Investigating Officer should have a right to legal representation.
- 3.99 Notwithstanding, the Committee recognised the value of legal advice in the conduct of a military inquiry and agreed that when a non-lawyer is appointed to conduct an inquiry, legal advice should be available to the Investigating Officer. Furthermore, the Committee agreed that guidance on the use of legal advice in the conduct of military inquiries should be included in the proposed manual titled *Administrative Inquiries in the ADF*.¹¹⁶
- 3.100 The Committee agreed that under current arrangements a Counsel Assisting may not be necessary. However, given its recommendation¹¹⁷ that witnesses should be provided with a right to legal representation, the Committee agreed that the appointment of a Counsel Assisting to a BOI should be strongly recommended in guidance to Appointing Authorities.

Recommendation 27

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

¹¹⁶ ADF Publication 202.

¹¹⁷ See Recommendation 27 of this report.

Recommendation 28

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

Recommendation 29

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

- 3.101 The standard of legal representation provided to witnesses at BOI by the ADF was raised in the evidence presented to the Committee.¹¹⁸ However, the Committee could find no evidence to suggest that any procedural issue would inhibit the ADF from providing adequate legal representation to witnesses. Indeed, current guidance to Appointing Authorities is that in ‘nominating a Service legal officer to represent a witness authorised to appear before a BOI, an Appointing Authority should ensure that the legal officer is suitably qualified and experienced, and is readily available to undertake the task.’¹¹⁹ The Committee agreed that while ADF legal officers are unlikely to have significant forensic experience, the procedures in place to provide legal representation to witnesses authorised to appear before a BOI are sufficient to ensure an adequate level of representation. Further, while a Service legal officer¹²⁰ may be provided at no cost to the witness, the witness may, if he or she is unhappy with the standard of representation, choose to be represented by a private legal practitioner at private expense.

118 Mr and Mrs Mackney, Submission, p. 266.

119 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*, p. 7.

120 Either full-time or part-time.

Support Services

- 3.102 A military inquiry can be a traumatic experience for people appearing as witnesses and for next of kin and close relatives of ADF members killed in the incident that is the subject of the inquiry. This is particularly the case for witnesses who are called upon to discuss personal or distressing matters. Some evidence presented to the Committee addressed this issue and suggested that in such circumstances witnesses should have access to counselling services provided by a qualified social worker or psychologist. Furthermore, it was suggested that counselling services should be provided to next of kin and close relatives of ADF members killed in the incident which is the subject of the inquiry.¹²¹
- 3.103 The Committee agreed that counselling services¹²² should be available to witnesses and to next of kin and close relatives of ADF members killed in the incident that is the subject of the inquiry. Moreover, it was the view of the Committee that guidance regarding the provision of counselling services during military inquiries should be included in the proposed manual titled *Administrative Inquiries in the ADF*.¹²³

Recommendation 30

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

Monitoring

- 3.104 The Ombudsman, in her 1998 report,¹²⁴ suggested that the Appointing Authority needs to be regularly updated on the progress of the investigation, the matters yet to be investigated and the processes that

121 Mr and Mrs Jenner and Ms S Taylor, Submission, p. 821.

122 Provided, as appropriate, by ADF resources or non-Defence services (the circumstances may well exist where the next of kin or close relatives do not reside in a location where ADF counselling services are readily available. In such cases the use of non-Defence services may be more appropriate).

123 ADF Publication 202.

124 Smith, P., op cit, p. 50.

have been followed to ensure procedural fairness. In addition, the monitoring process needs to confirm that the investigator has access to all relevant material and witnesses, has considered the need to consult experts on process and substance and appreciates the need to back up judgements with reasoned analysis which will stand up to external scrutiny. Furthermore, the Appointing Authority needs to remain appraised of the progress of the inquiry in regards to meeting the expected completion date.

- 3.105 There is no intent, in the Ombudsman's suggestion, to allow the chain of command to interfere in the inquiry process. Indeed, after the initiation of an inquiry, an Appointing Authority should not have any direct involvement with the conduct of the inquiry. While it is appropriate for the Appointing Authority to be provided with a progress report it is not appropriate for the questions under investigation to be discussed. The Committee was of the view that communications between the investigating body and the Appointing Authority upon this, or any other, matter should be in writing and should be disclosed to all legal representatives.¹²⁵

Recommendation 31

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

- 3.106 Ultimately, the Appointing Authority 'has the responsibility to ensure that the inquiry is conducted in a timely and efficient manner, and that it conforms to the TOR'.¹²⁶ As part of this responsibility the Appointing Authority must ensure that inquiries are conducted properly, and do not become unduly expensive in terms of either cost or time.¹²⁷ Moreover, the Appointing Authority must be alert to the need to either expand or contract the scope of the TOR to ensure the inquiry remains focused but able to achieve its aims.

125 Hilton Review into the BOI into the command of Squadron Leader R P Vance, Officer Commanding, No 92. Wing Detachment A, Butterworth, Malaysia, Recommendation 16.

126 Department of Defence, Submission, p. 1029.

127 The RAAF BOI into the Command of 92 Wing Detachment at Butterworth, Malaysia provides an example of where an inquiry became unduly expensive in cost and time.

- 3.107 Within current legislation and policy¹²⁸ there is no guidance regarding the monitoring of military inquiries. Moreover, the Ombudsman, in her 1998 report,¹²⁹ suggested that she was not satisfied that the processes in place for supervising and monitoring investigations under D(I)R are appropriate.
- 3.108 This was a view supported by evidence presented during the inquiry regarding the RAAF BOI into the Command of 92 Wing Detachment at Butterworth, Malaysia.¹³⁰ The BOI was conducted into a case of alleged management harassment in Butterworth, Malaysia, after an informal investigation, and a subsequent inquiry by an Investigating Officer failed to resolve the issue. Including periods of recess, the BOI sat from November 1995 until February 1997. Subsequent to the BOI, allegations of improper conduct during the inquiry prompted the ADF to initiate an independent review of the BOI by Mr J Hilton, SC and Dr J Renwick.¹³¹
- 3.109 While the ADF agreed that the BOI might have been avoided through strong command influence, the Hilton Review found that the decision by the Air Commander to appoint a BOI was not unreasonable in all the circumstances. Nonetheless, the Hilton Review found that the TOR were inappropriately wide and the level of resources afforded to the Board, in terms of professional legal experience and administrative support, was inadequate to progress the inquiry.¹³²
- 3.110 The Committee agreed with the Ombudsman that current legislation and policy does not address the monitoring of military inquiries and concluded that the ADF should issue guidance to Appointing Authorities regarding their duties in monitoring a military inquiry.

128 D(I)R and Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*.

129 Smith, P., op cit , p. 50.

130 The ADF agreed that the BOI might have been avoided through strong command influence but the Hilton Review into the BOI into the command of Squadron Leader R P Vance, Officer Commanding, No 92. Wing Detachment A, Butterworth, Malaysia, found that the decision by the Air Commander to appoint a BOI was not unreasonable in all the circumstances. Nonetheless, the Hilton Review found that the TOR were inappropriately wide and the level of resources afforded to the Board, in terms of professional legal experience and administrative support, was inadequate to progress the inquiry (See Department of Defence, Submission, p. 1029).

131 Hilton Review into the BOI into the command of Squadron Leader R P Vance, Officer Commanding, No 92. Wing Detachment A, Butterworth, Malaysia.

132 Department of Defence, Submission, p. 1029.

Recommendation 32

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

Who Should Be Responsible for Corrective Action?

- 3.111 Once the inquiry is complete the inquiry report is passed to a superior authority for decisions based on the findings and recommendations of the investigating body. For Board of Inquiry or inquiry by an Investigating Officer,¹³³ that superior authority is the Appointing Authority who is subsequently responsible to furnish, to the superior headquarters, a copy of the report, details of action taken and any associated recommendations for future action.¹³⁴ This procedure was the subject of considerable criticism in the evidence presented to the Committee. Criticism centred on the involvement of the Appointing Authority and the freedom available to adopt or discard recommendations of the investigating body.
- 3.112 The principal criticism regarding the Appointing Authority dealt with the legitimacy of having, as the Appointing Authority of a military inquiry, an officer who may have been responsible, because of his or her appointment, for the circumstances leading to the incident which is being inquired into.¹³⁵ Furthermore, much of the evidence was critical of current arrangements that make the Appointing Authority responsible for dealing with the findings and recommendations of the investigating body.
- 3.113 The Committee was of the view that criticism regarding the legitimacy of the Appointing Authority in the process of military inquiries failed to accept, or perhaps to understand, the role of the inquiry to determine facts as a basis for further action by the commander, that commander being the Appointing Authority. However the Committee acknowledged that once the Appointing Authority had initiated the inquiry, he or she should, apart from monitoring responsibilities, not be involved in the conduct of

133 D(I)R and Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*.

134 That superior headquarters is responsible to furnish a report of the outcome of the BOI to the Minister of Defence.

135 Commodore M Dunne (Retired), Submission, p. 1024.

the inquiry until receipt of the inquiry report. Indeed, the independence of the inquiry may be jeopardised by any direct involvement of the Appointing Authority with the conduct of the inquiry. This is not clear in current guidance for Appointing Authorities. While some consideration was given to making such involvement an offence the Committee accepted that clear guidance would be sufficient to avoid the independence of the inquiry being jeopardised by the direct involvement of the Appointing Authority.

- 3.114 Some submissions went so far as to suggest that the Appointing Authority has the power to edit, re-word or manipulate the inquiry report to reflect most favourably on the Service or personalities in question.¹³⁶ The ADF assert that this is most definitely not the case,¹³⁷ an Appointing Authority is not, in any way, permitted to alter the findings of an inquiry report. However, the Appointing Authority may choose to take action different from that recommended by the investigating body. If the Appointing Authority does choose to take action different from that recommended by the investigating body, he or she must give reasons to his superiors, and ultimately to the Minister, for that decision.
- 3.115 In taking decisions regarding actions stemming from the inquiry report, the Appointing Authority must give due consideration to the recommendations of the investigating body, but must also consider, *inter alia*, legal advice, fairness to the victims, their relatives and other affected parties, and protection of morale within the unit or Service affected. On occasions the Appointing Authority may choose not to action findings or recommendations of the investigating body. In the case of BOIs, every report 'recommendation is disposed of at the Service Chief level and must be disposed of to the satisfaction of the Minister for Defence. Ultimately the Minister and the parliament are responsible.'¹³⁸
- 3.116 Some submissions to the Committee strongly criticised examples where the decisions, public statements or action taken by the Appointing Authority were at variance with the findings and recommendations of the investigating body. The majority of these submissions went further, suggesting that the overwhelming interest of the Appointing Authority in the outcome of the inquiry has significant potential to influence a decision regarding implementation of the recommendations of the investigating body. Suggestions to address this perceived shortfall in the inquiry

136 Commodore M Dunne (Retired), Submission, p. 1021, Mrs K Ellis, Submission, p. 363; and Mr G Mackelmann, Submission, p. 20.

137 Department of Defence, Submission, p. 1032. 'The integrity of ADF officers to carry out their duties irrespective of their consequences should not be dismissed lightly.'

138 Admiral C Barrie, Transcript, p. 383.

process included: identifying an Appointing Authority from a Service different to that of the individual or organisation under inquiry, having the matter dealt with by an empowered independent body, or giving the investigating body, particularly in the case of BOIs, the authority to make recommendations which must be adopted by the Appointing Authority and the ADF.

- 3.117 The ADF position remains that enforcement of the recommendations of a BOI is solely the responsibility of the commander and handing that responsibility to anyone else would attack the very foundation on which the ADF is structured.¹³⁹ The safeguard in the system is provided by the requirement for a military authority superior to the Appointing Authority, and in respect of BOIs, the Minister, to review the outcomes of the inquiry. The review material includes the inquiry report, details of action taken and any associated recommendations for future action. Authorities that review the outcomes of the inquiry have the power to overturn the Appointing Authority's decision. In the case of BOIs, the Minister must accept the reasons for not proceeding with any recommendations made by the investigating body.
- 3.118 The Committee agreed that, to protect the independence of the process, after the initiation of an inquiry an Appointing Authority should not, apart from necessary monitoring responsibilities, have any direct involvement with the conduct of the inquiry. The Committee noted the paucity of guidance in this regard and concluded that such guidance should be provided. The Committee also agreed that the decision to enforce the recommendations of an investigating body should remain the responsibility of the commander. However, if the ADF is to avoid criticism over the discharge of recommendations stemming from an inquiry a degree of openness is required.

Recommendation 33

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

139 *ibid*, p. 386.

Public Accountability

- 3.119 A significant number of submissions to the Committee suggested that the ADF publicly account for its decisions in discharging the recommendations of a BOI. Such accountability would require the ADF to release the recommendations of the investigating body, action taken to adopt those recommendations and, where a recommendation is rejected, the reasons for that action. The Committee was of the view that such accountability should be considered for all BOIs into serious incidents and accidents. The Committee accepted that privacy and secrecy considerations may impact on the ability of the ADF to be totally publicly accountable. Furthermore, the Committee accepted that to avoid influencing subsequent DFDA or administrative proceedings resulting from the BOI, outcomes of the inquiry should not be released until all such proceedings have been concluded.

Recommendation 34

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

- 3.120 Earlier in this report¹⁴⁰ the Committee has recommended that, during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member. In addition, the Committee recommended that the Minister of Defence continue to have the discretion to convene a General Court of Inquiry in cases of major capital loss. The Committee acknowledged that the requirement to publicly account for actions and decisions in discharging the recommendations of an inquiry was more significant in cases where the Minister of Defence convenes a General Court of Inquiry.
- 3.121 The Committee concluded that such accountability should include the tabling in the Parliament of the inquiry report, the recommendations of the investigating body, details of action taken to adopt those recommendations and, where a recommendation is rejected, the reasons for that action. The Committee was of the view that such accountability

140 See Recommendation 1 of this report.

should be mandatory when a General Court of Inquiry is conducted. The Committee accepted that privacy and secrecy considerations may restrict the Minister from meeting all public accountability requirements. Furthermore, the Committee accepted that to avoid influencing subsequent DFDA or administrative proceedings resulting from the General Court of Inquiry, outcomes of the inquiry should not be released until all such proceedings have been concluded.

Recommendation 35

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

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

'Informal' Investigations

- 3.122 When an incident occurs, a commander may need to establish some preliminary facts before deciding on whether to proceed with an investigation under the DFDA or a formal inquiry under the D(I)R. Preliminary inquiries may also be required to establish what terms should be included in the terms of reference for a formal inquiry. In the past informal inquiries have also been used to investigate motor vehicle accidents, technical issues, workplace relations and other cases where a formal inquiry under D(I)R is not appropriate.
- 3.123 Currently there exists no provision under D(I)R or guidance in Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* for the conduct of informal inquiries. Informal inquiries are conducted under the authority of the commander who has administrative command of the organisation or individual in question. The investigation is not governed by any TOR and may be conducted by

any member. Witnesses cannot be compelled to answer questions and are not afforded the protection provided for under the DFDA or D(I)R.

3.124 In her 1998 report¹⁴¹, the Ombudsman was critical of the term ‘informal’ in association with these type of inquiries, suggesting that this gives the perception that the matter is not being treated seriously. Moreover, she suggested that ‘where an investigation is viewed as ‘informal’ there may be a tendency to be less assiduous about documenting decisions held, decisions or actions taken and the reasons for those decisions or actions.’¹⁴² The Ombudsman went on to suggest that the term ‘informal’ is a misnomer and that the type of inquiries in question would be more appropriately referred to as preliminary inquiries. The Committee agreed with the Ombudsman’s suggestion that informal inquiries would be more appropriately referred to as preliminary inquiries.

3.125 The Committee acknowledged that there are sound reasons why the practice of informal inquiries should be continued, albeit under a different title. These reasons range from the need to quickly establish the facts in order to proceed to formal action to the need to avoid exacerbation of a sensitive situation, particularly those involving conflicts between personnel. While the Ombudsman did not disagree with the use of informal inquiries, she was equivocal in her support. She agreed that informal inquiries should be used to assist in determining the best course of action for dealing with an incident¹⁴³ and to scope a higher level inquiry.¹⁴⁴ Specifically, the Ombudsman suggested that informal inquiries ‘should be **confined** to:

- making inquiries sufficient to establish whether it is reasonable to suggest that an incident may have occurred, or that there may be some validity to the complaint or allegation;
- establishing basic facts, such as who was involved, when it occurred, whether there is any corroborating information or witnesses and what action the member(s) took as a result of the incident;
- determining who else has been informed of the allegation or incident;
- establishing what action the complainant or member(s) affected thinks should be taken in relation to the complaint and / or incident;

141 Smith, P., op cit, p. 50.

142 ibid , p. 23.

143 ibid, p. 25.

144 Scoping is a planning process that involves determining the nature, dimensions and implications of an inquiry.

- determining what further action should be taken to resolve the complaint or deal with the incident; and
- establishing what action needs to be taken to manage the context of the complaint or incident.¹⁴⁵

3.126 The Committee accepted that informal investigations provide the commander with a valuable tool to establish the facts and provide a basis for determining the best course of action for dealing with an incident. Indeed, swift, informal action may, in itself, be sufficient to resolve some issues, particularly those issues that may not be amenable to formal action by a formal inquiry which may polarise positions and preclude a mediated settlement. Moreover the Committee agreed that such inquiries should be used to assist in determining the best course of action for dealing with an incident¹⁴⁶ but not to investigate motor vehicle accidents, technical issues, workplace relations and other cases where a commander determines that a formal inquiry under D(I)R is not appropriate. Rather, the Committee agreed that an inquiry by an Investigating Officer would be an appropriate avenue for the commander to investigate such an issue. Thus, once the preliminary step of establishing the facts had been completed a commander should decide whether to take no formal action¹⁴⁷ or to proceed with action under the DFDA or D(I)R.

Recommendation 36

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

Recommendation 37

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

3.127 Foremost in the factors considered by the Committee in arriving at these recommendations were the issues of natural justice and procedural fairness. While noting the value of preliminary inquiries, the Committee

¹⁴⁵ Smith, P., op cit, p. 24.

¹⁴⁶ ibid, p. 25.

¹⁴⁷ To drop the issue or to employ alternative dispute resolution techniques.

was cognisant of the lack of formal guidance and concerned at the potential for issues of procedural fairness to be ignored. Moreover, the lack of documentation in preliminary inquiries can leave the ADF 'open to criticism of its investigatory processes'.¹⁴⁸ In one case presented to the Committee, such criticism contributed to the perception of victimisation of the member under investigation, exacerbating the difficulties of subsequent formal investigations. The Committee agreed that, although preliminary inquiries are not provided for under D(I)R, the principles of procedural fairness are still applicable and should be incorporated in official guidance on the conduct of preliminary inquiries.

Recommendation 38

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

Secret Investigations

- 3.128 A secret investigation is one conducted without the knowledge of the member being investigated. The Committee considered several cases of purported secret investigations that involved investigation of both the 'victim' and the 'perpetrator' in an alleged incident of sexual harassment and / or molestation.¹⁴⁹ Principally, the issues raised centred on the use and condoning of secret investigations into the activities of individuals within the ADF. The evidence alleged that secret investigations were not confined to military inquiries and were also employed during DFDA action.
- 3.129 In her 1998 report,¹⁵⁰ the Ombudsman suggested that it is essential for members to be informed of any complaint or allegation against them where any action (such as an investigation) is to be taken as a result. Moreover, the right to be informed should apply not only to those members about whom the allegation is made, but also to any member who may be adversely affected by the outcome of an investigation.¹⁵¹ However,

148 Smith, P., op cit, p. 23.

149 Colonel M Sampson, Submission, p. 945; and Ms L Kardas , Submission, p. 784.

150 Smith, P., op cit, p. 50.

151 ibid, p. 74.

the Ombudsman also noted that an exception to the right to be informed may be applicable where a person is suspected of an offence and where any forewarning may result in the destruction of evidence.¹⁵²

- 3.130 The ADF accepted that except where issues of national security are involved or there is a real risk of evidence being removed or destroyed,¹⁵³ investigations under D(I)R should not be conducted in secret. Furthermore, the ADF acknowledged that guidance for the conduct of investigations under D(I)R is not clear, specifically in regard to issues of procedural fairness. The ADF agreed¹⁵⁴ that detailed guidance on this issue should be included in the proposed manual titled *Administrative Inquiries in the ADF*.¹⁵⁵
- 3.131 However, the ADF maintained that during the initial stages of an investigation into disciplinary matters it may be necessary for the investigation to be kept secret, in order to prevent vital evidence from being removed or destroyed.¹⁵⁶ The example proffered by the ADF was a hypothetical investigation involving an accusation of drug use in a Defence barracks block. If personnel accused of the alleged offence were informed of the investigation before its commencement, the collection of evidence necessary to support progression of disciplinary charges could be jeopardised.
- 3.132 In addition, it may be necessary to conduct a preliminary investigation into an allegation of an offence in order to make an initial determination of jurisdiction. This situation will arise when an alleged offence under the DFDA also involves an offence under ordinary criminal law.¹⁵⁷ When a preliminary inquiry to determine jurisdiction is conducted current ADF policy stipulates that ‘there is no requirement for a military commander to notify a member who is suspected of having committed an offence of their alleged involvement in the matter.’¹⁵⁸ Indeed the policy goes further, directing that ‘members who are suspected of having committed an offence are not to be alerted to the nature of the allegations made against them so as to avoid jeopardising any subsequent investigation, whether military or civilian.’¹⁵⁹

152 *ibid.*, p. 73.

153 Department of Defence, Submission, p. 1041.

154 *ibid.*

155 ADF Publication 202.

156 Department of Defence, Submission, p. 1040.

157 Defence Instructions (General) Personnel 45-1 *Jurisdiction Under the DFDA Guidance for Military Commanders*, dated 19 January 1998, p.3.

158 *ibid.*

159 *ibid.*

- 3.133 Evidence presented to the Committee suggested that the conduct of secret investigations involves breaches of procedural fairness for an individual accused of an offence.¹⁶⁰ Indeed, article 14(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) states that ‘in the determination of any criminal charge against him, everyone shall be entitled...to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.’¹⁶¹ However, the wording of the article leaves its applicability to investigations open to question since the ICCPR applies in the ‘determination of any criminal charge,’¹⁶² not in its investigation. Moreover, the ICCPR specifically applies to charges of a criminal nature, while the DFDA deals with disciplinary, rather than criminal charges. Notwithstanding, the Committee agreed that the requirement for procedural fairness should be a vital consideration in any decision to conduct a secret investigation.
- 3.134 The Committee accepted the need for secrecy in the initial stages of DFDA investigations when advice to the accused would prejudice the integrity of evidence collection and for preliminary investigation into an allegation of an offence in order to make an initial determination of jurisdiction. However, the Committee concluded that except where issues of national security are involved or there is a real risk of evidence being removed or destroyed investigations under D(I)R should not be conducted in secret. In addition the Committee agreed that the ADF should include detailed guidance on the issue of secret investigations under D(I)R in the proposed manual titled *Administrative Inquiries in the ADF*.

Recommendation 39

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

160 Smith, P., op cit, p. 74.

161 International Covenant on Civil and Political Rights, Article 14, Section 3(a).

162 ibid, Section 3.

Mischievous Allegations

- 3.135 The issue of false accusations was raised by some of the evidence presented to the Committee. In a number of examples, false or misleading accusations were used to the detriment of individuals, even where the resultant investigations failed to prove any offence committed by the individual. Several submissions suggested that disciplinary action was seldom taken in such cases against members making accusations subsequently demonstrated to be false. Even where administrative action may have been taken in those cases, this was not evident to third parties, creating the impression that false accusations can be made with impunity. Several submissions suggested that accusations could be used maliciously as a form of retribution or a weapon in a case of personal disagreements.¹⁶³
- 3.136 The Committee also considered the detrimental impact on members' careers of investigations initiated by false accusations. In one instance accusations were proved to be false after a Ministerial inquiry, the accuser suffered no adverse career effects but the accused felt compelled to leave the ADF.¹⁶⁴ Another case involved an investigation conducted on the basis of a witness statement that, according to the member, contained 'numerous untruths, exaggerations, spiteful omissions and malicious accusations.'¹⁶⁵ The member also claimed that collusion between witnesses was allowed to occur during the investigation. No subsequent investigation was conducted to verify these claims.
- 3.137 ADF policy does not specify that accusations be made in writing. Rather the form in which accusations are accepted is left to the judgement of the individual unit or local commander. Where verbal accusations are accepted and subsequently found to have been knowingly false formal action against the accuser may be difficult to pursue. The Committee agreed that serious accusations should be submitted in a written form,¹⁶⁶ to increase accountability.
- 3.138 Where the accusation is the basis for a Service investigation¹⁶⁷ there should be no difficulty in pursuing formal action against the accuser since the giving of false or misleading information by any member who knows that the information is false or misleading during a Service investigation is an

163 Lieutenant Colonel N James, Submission, p. 686.

164 Ms L Kardas , Submission, p. 785.

165 Lieutenant Colonel N James, Submission, p. 679.

166 This may include a written statement signed by the accuser or a Record of Conversation taken by an interviewing officer and signed by the accuser.

167 Investigation conducted under D(I)R or the DFDA.

offence. Such an offence may be subject to administrative action or action taken under the DFDA. The Committee was of the view that a false accusation made during an inquiry conducted under the auspices of D(I)R or the DFDA could be used as evidence in a case against the accuser.

- 3.139 The Committee recognised that members of the ADF must be able to bring to light unlawful actions and the principal means of doing this is by lodging a complaint; thereby making an accusation. However the Committee was of the view that members making false accusations or accusations for malicious purposes should be held fully accountable for their actions, especially in light of the adverse effects their accusations might have on those accused.
- 3.140 The Committee agreed that uniform guidelines should be established to ensure that members making knowingly false, malicious or vexatious accusations against other members are held accountable and that suitable action is taken against them. Moreover, such action should be taken as transparently as possible, to ensure that justice is seen to be done. In conjunction with action against the accuser, action should be taken, as transparently as possible, to put right any detriment to the member who was falsely accused. Furthermore, the Committee agreed that members making accusations should be made aware of those guidelines and of the consequences of making such accusations.

Recommendation 40

The Committee recommends that:

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

Protection of Senior Officers

- 3.141 An allegation raised by some evidence presented to the Committee was that senior ADF personnel are immune from action as a result of investigations under the system of military justice.¹⁶⁸ Moreover, it was asserted that the system is open to, and had been, manipulated by members of the ADF to protect senior personnel.¹⁶⁹ The Committee considered a number of specific cases where it was alleged that senior ADF officers had influenced the outcome of an inquiry to protect themselves or other senior personnel or been protected from disciplinary action.¹⁷⁰ The principal issues to arise from this consideration were the ability of senior officers to influence the outcome of a military inquiry and the reluctance of the ADF to progress disciplinary action against senior personnel.
- 3.142 Some submissions went so far as to suggest that senior military personnel had the power to edit, re-word or manipulate the inquiry report to reflect most favourably on the Service or personalities in question.¹⁷¹ The ADF assert that this is most definitely not the case,¹⁷² although it is up to the Appointing Authority to decide whether to accept the findings of an inquiry report. Indeed, the Appointing Authority or Service Chief may choose to take action different from that recommended by the investigating body in its report however, he or she must give reasons to superiors, and ultimately to the Minister, for that decision. Regardless of the action taken subsequent to the presentation of the investigating body's report there is little evidence to suggest that senior personnel are able to influence the findings and recommendations of an inquiry.
- 3.143 The Committee was of the view that all military personnel should be accountable for failing to effectively discharge their responsibilities of command and administration and that, where necessary, disciplinary action should result from such failure. However, when disciplinary action is taken as a result of the finding of an inquiry report, charges must be pursued under the DFDA, criminal or civil law. The evidentiary requirements to progress such charges are the same, regardless of whether the charges are of a disciplinary or criminal nature. That is, the evidence weighed by the tribunal must be of sufficient substance to comply with

168 Mrs K. Ellis, Submission, p. 365.

169 *ibid*, p. 361.

170 Mrs K. Ellis, Submission, p. 361; and Commodore M Dunne (Retired), Submission, p. 1021.

171 Mrs K. Ellis, Submission, p. 361.

172 Department of Defence, Submission, p. 1032. 'The integrity of ADF officers to carry out their duties irrespective of their consequences should not be dismissed lightly.'

the rules of evidence, and the case must be proven beyond reasonable doubt by the prosecution.

- 3.144 The Committee noted that in each case where charges were not progressed against a senior officer who had been perceived to have failed to effectively discharge their responsibilities of command and administration, independent opinion from either the coroner or Director of Public Prosecutions suggested that there was insufficient evidence to support a criminal charge.¹⁷³ While more senior officers may be functionally responsible for an incident it would appear that they are rarely directly responsible to a level of culpability necessary to sustain disciplinary action. The Committee noted that in most cases, senior commanders had sought extensive legal opinion and other inputs before reaching the decision not to progress disciplinary action against other senior personnel. The ADF suggest that decisions are taken in light of all of the information and are not based upon the premise that ‘someone was killed, something has gone wrong and therefore some senior officer must be automatically held responsible.’¹⁷⁴
- 3.145 The Committee noted that, in the past, the outcome of a military inquiry may have been a recommendation that disciplinary action be taken against junior ADF personnel. This was evidenced in the inquiry into the 1996 Blackhawk accident case, where the highest rank considered for disciplinary action was a major. It was also the case in the inquiry into the HMAS *Otama* incident where, despite the fact that the captain accepted responsibility, the two personnel considered for disciplinary action were a lieutenant¹⁷⁵ and a petty officer.
- 3.146 One reason advanced for this outcome is that, in discharging their delegated responsibility, junior personnel are often judged to have directly contributed to the causes of an incident. Moreover, the nature of their involvement in the incident may allow a level of culpability sufficient for charges to be pursued under the DFDA or criminal or civil law. However, as in similar situations affecting senior personnel, the Committee noted that senior commanders sought extensive legal opinion and other inputs before reaching their decision whether to progress disciplinary action

173 In the Brooks winching death case, the Coroner was critical of Navy practices, but concluded that there was insufficient evidence to support a criminal charge against any individual.

174 Department of Defence, Submission, p. 1039.

175 Who was officer of the watch at the time of the incident.

against junior personnel.¹⁷⁶ Regardless, the public perception remains that the ADF is reluctant to progress disciplinary action against senior personnel.

- 3.147 In considering the options available to deal with the findings and recommendations of a military inquiry a commander may choose administrative rather than disciplinary action. Although not formally a measure under the DFDA, administrative action allows the commander to institute punitive administrative measures against individuals.¹⁷⁷ While it may not address the needs of some next of kin or members of the public to see that a senior officer has been held responsible, such action has the potential to have a far greater impact on senior personnel than on junior personnel. Indeed, for a senior officer the career impact may be severe whereas similar administrative action against a junior officer may have little or no effect.¹⁷⁸ The ADF suggested that 'in cases where a senior officer's performance has been lacking in some respect, this will be taken into account; particularly in determining future appointments to prestigious commands, and will affect prospects for promotion or even continued employment in the ADF.'¹⁷⁹ At the highest levels of the 'ADF, the Minister and the Government retain the option to dispense with the services of an individual, or to withhold reappointment, promotions or extensions of service.'¹⁸⁰
- 3.148 The perception that senior officers have been protected from action flowing from the report of a military inquiry has been exacerbated by the ADF approach of taking administrative action in private. In most cases, not just for senior officers, the administrative action process is conducted as a private matter between the commander and the subordinate in order to reduce the undermining effect on the subordinate's credibility that may result from more public action. Where senior officers have in the past used administrative action as an alternative to disciplinary action in cases of professional negligence, this action has not been publicly visible.¹⁸¹

176 In both the HMAS *Otama* incident and the 1996 Blackhawk accident the Service Chief decided, contrary to the recommendations of the BOI, not to proceed with disciplinary action. While there may some argument that in both cases the decision was strongly influenced by political and media pressure the duty of the Service Chief was to determine if proceeding with disciplinary action was likely to succeed and if so, in the interests of the Service.

177 See Chapter 2 of this report.

178 The junior officer's error of judgement may be ascribed to a lack of experience.

179 Department of Defence, Submission, p. 1039.

180 *ibid.*

181 *ibid.*

- 3.149 The Committee agreed that all military personnel, regardless of rank, should be accountable for failing to effectively discharge their responsibilities of command and administration. Further, where necessary, disciplinary action should result from such failure.
- 3.150 Earlier in this report the Committee has recommended that, during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member.¹⁸² The Committee has also recommended that within the limitations of privacy and secrecy, and at the conclusion of all resultant disciplinary and administrative action, the Department of Defence publicly account for its actions and decisions in discharging the recommendations of a BOI or General Court of Inquiry.¹⁸³ The Committee was of the view that these two steps would contribute significantly to alleviating the perception of immunity for senior personnel.

Training

- 3.151 Although well within the professional competence of ADF officers, the effective and efficient conduct of military inquiries calls for considerable knowledge and judgement of those involved. The ADF acknowledged that relatively few officers are called upon to either personally inquire into a matter as an Investigating Officer or to participate as a member of a BOI and there is a lack of experience.¹⁸⁴ In her 1998 report, the Ombudsman concluded that there is a need to provide better training to officers investigating matters under D(I)R.¹⁸⁵
- 3.152 In response to recommendations of the Ombudsman in her 1998 report the ADF have agreed to develop a formal training strategy for investigating officers. The Committee was advised that a joint training needs analysis team has been established by the ADF with the objectives of developing a policy framework for training officers to conduct investigations under the D(I)R; producing a training plan; and developing an implementation strategy. As an interim training measure, Charles Sturt University has

182 See Recommendation 1 of this report.

183 See Recommendations 34 and 35 of this report.

184 Department of Defence, Submission, p. 582.

185 Smith, P., op cit, p. vi.

been engaged to conduct a three-week course to train personnel as investigating officers appointed under the D(I)R.¹⁸⁶

- 3.153 The Committee acknowledged that whilst initial training is essential, hands-on investigative experience is necessary to develop real expertise in the conduct of inquiries.¹⁸⁷ However, an inquiry that is poorly conducted may provoke a subsequent review, or require the appointment of a further inquiry. Moreover, where the findings of a military inquiry are subsequently overturned because of perceived bias, or errors made by the investigating officer, the costs rise substantially, the incident under inquiry becomes harder to resolve satisfactorily, and the scope for criticism and personal bitterness between the parties involved in the inquiry is likely to increase.
- 3.154 The Committee agreed that in addition to adequate training ‘clear practical policy and procedural guidance’¹⁸⁸ is necessary to facilitate the effective conduct of investigations under D(I)R. Currently such policy and guidance is not provided although the ADF have advised that the proposed manual titled *Administrative Inquiries in the ADF*.¹⁸⁹ will provide clearer, more practical guidance for investigating officers.
- 3.155 The Committee accepted that improved training and guidance for investigators would contribute significantly to the facilitation of effective investigations under D(I)R. However, officers should not be appointed to conduct investigations under D(I)R unless they possess a level of experience appropriate to the type of investigation to be conducted. Necessarily, investigations into more significant or sensitive issues require a greater level of experience and this factor must be considered when an investigator is appointed. Current guidance¹⁹⁰ on the appointment of an Investigating Officer does not address the level of training or experience required. The Committee agreed that the ADF should provide guidance to Appointing Authorities regarding the level of training or experience required of officers selected to conduct Defence (Inquiry) Regulation investigations.
- 3.156 With regard to BOIs, the Committee acknowledged that opportunities for ADF officers to build experience in the conduct of such inquiries are limited. However the Committee noted that prior to the commencement

186 Department of Defence, Private Briefing, Transcript, p. 32.

187 Lieutenant General J Sanderson, Transcript, p. 43.

188 Department of Defence, Submission, p. 582.

189 ADF Publication 202.

190 D(I)R and Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*.

of proceedings it is normal for a BOI to have a long period of instruction from legal officers.¹⁹¹ Further, legal officers are available, as specialist advisers, to facilitate the conduct of the inquiry.¹⁹² The Committee noted that current guidance¹⁹³ on the conduct of BOIs is inadequate but that the ADF have undertaken to provide improved guidance in the proposed manual titled *Administrative Inquiries in the ADF*.¹⁹⁴ The Committee acknowledged that improved guidance in conjunction with an adequate standard of training and specialist support from legal staff should allow ADF officers to effectively contribute to a BOI.

Recommendation 41

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

Recommendation 42

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

Recommendation 43

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

191 Lieutenant General J Sanderson, Transcript, p. 42.

192 Department of Defence, Submission, p. 582.

193 D(I)R and Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force*.

194 ADF Publication 202.

Reviews of Inquiries

- 3.157 The procedure for review of military inquiries was not a subject of considerable comment in the evidence presented to the Committee. All evidence which addressed the issue called for the review process to be open and explainable. Other issues raised in the evidence addressed the need for an independent review process prior to the level of the Ombudsman and the automatic review of significant inquiries by Parliament.
- 3.158 One submission proposed that automatic triggers should be established to ensure that inquiries involving the death of an ADF member and the loss of property above an amount are reviewed by the Parliament.¹⁹⁵ Earlier in this report,¹⁹⁶ the Committee has recommended that during peacetime, the convening of a General Court of Inquiry by the Minister of Defence should be mandatory for all inquiries into matters involving the accidental death of an ADF member. The Committee has also recommended¹⁹⁷ that, following the conduct of a General Court of Inquiry, within the limitations of privacy and secrecy, and at the conclusion of all resultant disciplinary and administrative action, the Minister of Defence should table in the Parliament: the inquiry report; the recommendations of the investigating body; details of action taken to adopt those recommendations; and where a recommendation is rejected, the reasons for that action. These recommendations not only address the independence of the inquiry process but also necessitate the review of the inquiry report by the Parliament.
- 3.159 For BOI, every report 'recommendation is disposed of at the Service Chief level and must be disposed of to the satisfaction of the Minister for Defence.'¹⁹⁸ The review material presented to the Minister includes the inquiry report, details of action taken and any associated recommendations for future action. The Minister must accept the reasons for not proceeding with any recommendations made by the investigating body and has the power to overturn the decisions of the Appointing Authority and / or Service Chief. The Committee accepted that the extant process of review by the Minister provided a sufficient level of review for BOI.

195 Mr R Davies, Submission, p. 244.

196 See Recommendation 1 of this report.

197 See Recommendation 35 of this report.

198 Admiral C Barrie, Transcript, p. 383.

3.160 Currently, external review avenues for military inquiries exist in the courts¹⁹⁹ and with the Ombudsman.²⁰⁰ Some evidence presented to the Committee suggested that the ADF should have an independent review process for military inquiries prior to the level of the Ombudsman.²⁰¹ Current processes provide for at least one review of any military inquiry by the superior of the Appointing Authority. In the case of BOIs there exist at least two levels of review being the Service Chief and the Minister. The Ombudsman provides an initial level of independent review external to the ADF with a subsequent level provided by civil courts. The Committee was of the view that the current arrangements provide sufficiently for review of military inquiries that there was insufficient evidence to support the introduction of an additional level of review within the ADF.

Cost

3.161 The Committee acknowledged that there is no historical cost for the conduct of D(I)R inquiries within the ADF and that the cost of each inquiry will 'vary considerably according to the type of inquiry being conducted and the complexity of the matter being inquired into.'²⁰² The Committee noted that the military inquiry system is operated primarily by members of the ADF who perform disciplinary functions as a secondary duty that is incidental and additional to their normal duties.²⁰³ While many of the functions performed in the military inquiry system involve no direct cash expenditure there is a cost in accrual terms. However, the Committee noted that the ADF does not currently capture accrual costings of such functions.

Recommendation 44

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

199 The military inquiry process is not linked to the judicial hierarchy of Australia other than by administrative review (Mr M Slattery, Transcript, p. 287).

200 Department of Defence, Private Briefing, Transcript, p. 34.

201 Mr D Hartshorn, Submission, p. 2.

202 *ibid.*

203 Department of Defence, Submission, p. 1290.

Reporting

- 3.162 The Committee noted that there is no statutory or policy requirement for the ADF to provide an annual report on the operation of D(I)R. Further the Committee noted that, in practice the only reporting of D(I)R inquiries outside of the ADF occurs when the report on the outcome of a BOI is passed to the Minister of Defence and that public release of the report and /or the BOI Report is at the discretion of the Minister.²⁰⁴
- 3.163 The Committee concluded that the ADF should publicly account for the operation of the military inquiry system by the provision of an annual report to the Minister of Defence. Without attempting to be prescriptive, the Committee was of the view that the report should include statistical information and details of major inquiries conducted during the reporting period. Like the annual report by the JAG, the report on the military inquiry system should be laid before each House of the Parliament by the Minister of Defence. Once tabled in the Parliament the report would become public information.
- 3.164 The Committee also concluded that the ADF should publicly account for administrative action taken during the reporting period. This conclusion is covered in detail at paragraph 5.65 of this report. The Committee was of the view that it would be sensible to combine the reporting requirements for military inquiries, the DFDA and administrative action in a single report to the Minister of Defence.

Recommendation 45

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

²⁰⁴ *ibid*, p. 1285.