

Chapter 3

Issues and committee view

Background

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

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

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

Issues raised in submissions

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

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

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

2 *Submission 8*, p. 2.

Functions of the Inspector-General ADF

Independence

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

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

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

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

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

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

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

3 *Submission 6*, p. 2.

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

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

6 *Submission 6*, p. 2.

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

Definition of 'military justice system'

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

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

Relationship to Defence inquiries

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

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

Redress of grievance process

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

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

8 *Submission 3*, p. 1.

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

10 *Submission 7*, p. 2.

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

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

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

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

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

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

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

Service-related deaths

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

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

14 *Submission 6*, p. 1.

15 *Submission 8*, p. 2.

16 *Submission 2*, p. 2.

17 *Submission 2*, p. 2.

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

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

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

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

Annual report requirement

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

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

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

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

20 Section 110R, *Defence Act 1903*.

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

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

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

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

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

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

Power to compel evidence

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

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

23 *Submission 7*, p. 3.

24 *Submission 4*, p. 1.

25 *Submission 4*, p. 1.

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

27 *Submission 8*, p. 2.

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

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

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

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

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

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

Scrutiny of Bills Committee

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

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

28 *Submission 7*, p. 3.

29 *Submission 7*, p. 2.

30 *Submission 7*, p. 3.

31 EM, p.2.

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

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

Committee view

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 1

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

Recommendation 2

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

Recommendation 3

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

Senator Chris Back
Chair

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