

Chapter 10

Adverse action, appeal processes and external review of administrative procedures

Appeal and review processes

10.1 If, during the course of an inquiry, circumstances come to light that reflect adversely on the professional conduct of a member, the appointing authority may decide to take adverse administrative action against that person. Adverse administrative action is official action that reflects formal disapproval on a temporary or permanent basis. Conduct or performance which results in DFDA or civilian court proceedings may also be relied on to support adverse action.

10.2 Clearly, the punishment for a member facing administrative action, particularly if it involves a serious warning, removal from duty or discharge from the force, has serious implications for his or her career and professional standing. It is important that such a member is afforded certain rights in order to ensure that his or her interests are properly protected.

10.3 The appeal and review processes underpin accountability and are an essential guarantee against injustice. They provide an important mechanism whereby the findings of one decision-maker are tested by another. In this way, the process is held up to scrutiny and can be assessed to ensure that the proceedings were proper and the decision correct. It should provide members of the ADF with assurances that the process is fair and objective and engender public confidence in the integrity of the system.

10.4 Australia's military justice system recognises the right of an individual to complain about a decision. It provides a number of avenues for a member to lodge an appeal or seek a review of a decision. For instance, where adverse administrative action is proposed, there are safeguards in place to ensure that people in the ADF receive procedural fairness through the notice to show cause process. Also, under the redress of grievance provisions, a member has a legally protected right to make a complaint about any matter affecting his or her service.¹ General Cosgrove stated that the acid test of the military justice system is 'whether there are adequate and independent avenues of review and appeal available'.²

10.5 This chapter looks at the adequacy of the internal review and appeal processes available to ADF members including:

- notice to show cause; and

1 See for example, General Cosgrove, *Committee Hansard*, 1 March 2004, p. 9.

2 *Committee Hansard*, 6 August 2004, pp. 40–3.

- redress of grievance and the CRA as an oversight body.

10.6 In Australia the right to ‘due process’ or procedural fairness is not constitutionally guaranteed. However, at the federal level, the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act), in particular, requires that administrators observe the principle of natural justice. The Act provides for a right of review, which is one aspect of procedural fairness.

10.7 As discussed in the previous chapter, there are two rules that underpin the principles of natural justice:

- The hearing rule that no person should be condemned unheard is a well-founded principle of Australian administrative law. It requires that individuals adversely affected by a decision must be fully informed of the action against them and allowed a reasonable opportunity to put their case. The facts, information or other evidence relied on by the decision-maker must be disclosed to the person facing adverse action.
- The no bias rule requires the decision-maker to be neutral. He or she must act impartially, honestly and without prejudice, and be above suspicion that he or she has an interest in the outcome of the matter or has prejudged it.

10.8 There is also growing recognition that certain rules of evidence in administrative decision making must be observed. Notably, that a decision must be based upon evidence that logically proves the case.

Notice to show cause

10.9 The ADF recognises that for members to be able to defend their position adequately, they must be fully informed about the reasons underpinning the decision to take adverse administrative action. They must also be provided with all the evidence supporting the decision, and be allowed the opportunity to reply to the findings. This is commonly provided for in the notice to show cause processes used in the ADF.³ Thus, an individual whose conduct has been found to be of an unacceptable standard and is facing adverse administrative action would be issued formally with such a notice. It allows him or her the opportunity to test the evidence supporting the notice, challenge the decision-maker's findings and refute the argument for the adverse administrative action.

10.10 Irrespective of rank or position, or whether a member is giving or receiving orders, the principles of natural justice should apply to protect members from an arbitrary and unfair decision. The Defence submission explained:

...if the appointing authority accepts the facts and recommendations, but before a decision on the matter is made, any proposed adverse

3 *Committee Hansard*, 1 March 2004, p. 7.

administrative action against a member must be preceded by a notice to show cause process. This affords the member natural justice before a final decision is made on the issue and means that the member will have the right to respond to a proposed adverse decision, and the alleged facts being relied upon. This is also the opportunity to seek a review of any decisions made.⁴

10.11 The Defence Manual ADFP 06.1.3 sets down the steps to be followed when a notice to show cause or similar form of notification is issued. They are consistent with, and are intended to promote, the principles of procedural fairness. The notice must be in writing and contain:

- the proposed adverse decision;
- a statement of the facts, information, or other evidence to be relied on in making the decision;
- relevant documents; and
- an invitation to the member to respond within a specified time (the law does not fix a specific time but requires that the member be given a 'reasonable opportunity to do so').⁵

10.12 There can be no doubt about the requirement to provide all relevant material to the member. The Manual elaborates on this matter:

A member is entitled to know the substance of the case against them and sufficient facts giving rise to the action, so that the member has a reasonable opportunity to respond to the proposed action. The notice should precisely and clearly summarise the matters alleged or other information about the misconduct or poor performance of the member.⁶

10.13 It stresses that there is 'a general legal obligation on the part of decision-makers to take positive steps to ensure that all relevant information is disclosed to the member'.⁷ The Manual goes further:

A copy of all relevant medical reports, witness statements or police reports, DFDA or civilian conviction certificates, inquiry officer reports or training reports should be attached to the notice so they may be considered by the member.⁸

10.14 An article in the Defence Forces newspaper reinforced this point:

If the proposed action affects the member's rights, interests or expectations such as their pay entitlements or reputation, no matter what rank or position

4 Submission *P16*, para. 2.67.

5 ADFP 06.1.3, paras 2.6 and 2.24.

6 ADFP 06.1.3, para. 2.13.

7 ADFP 06.1.3, para. 2.16.

8 ADFP 06.1.3, para. 2.20.

they hold, the member must be given an opportunity as to why the proposed action should not be taken. This is a requirement of procedural fairness, also known as 'natural justice'.

Once the member has had the opportunity to respond, the commander must decide what form of adverse administrative action should be imposed, if any. This professional decision must be fair, open, lawful and be based on the rights of the member and the merits of the case without bias.⁹

10.15 The Defence (Personnel) Regulations set down the requirements where an officer's service may be terminated. The regulations also observe the principles of natural justice.¹⁰

10.16 Once the member has responded to the notice to show cause, the original decision must be reviewed and a judgement made about whether or not to proceed with the adverse administrative action.¹¹

Redress of Grievance (ROG)

10.17 The administrative system also provides for an ADF member to make a complaint about administrative procedures or decisions through the redress of grievance process. It is a formal procedure available only to a member of the ADF, allowing complaints to be investigated and reviewed and for wrongs to be corrected where necessary. It is accepted as a legitimate and important means of ensuring that decisions affecting members' rights, working conditions and careers are made fairly, impartially and according to law.¹²

10.18 The redress of grievance should be considered to be a last resort.¹³ As noted in previous chapters, the ADF prefers that, in the first instance, complaints should be resolved at the lowest level possible through normal command channels and administrative arrangements. Thus, if there were a complaint about the actions of another person, the chain of command would normally deal with it. Indeed, at the initial stage of lodging a complaint, the complainant must submit their complaint to the commanding officer.

9 'Decisions, decisions', *Army, the Soldiers' Newspaper*, 8 April 2004.

10 Defence (Personnel) Regulations 2002, Sub regulation 85(2). It reads: The officer is to be given a termination notice that: states the proposal to terminate the officer's services; states the reason for the termination; sets out particulars of the facts and circumstances relating to the reason for terminating the service that 'is sufficient to allow the officer to prepare a statement of reasons why the service should not be terminated; invites the officer to provide a written statement of reasons why the service should not be terminated; and specifies a period of at least 28 days after the date of the notice as the period in which the officer may give the statement of reasons.

11 Legal advice, See Ms Harris, *Committee Hansard*, 2 August 2004, p. 40.

12 Department of Defence, *Submission P16*, p. 30 and CRA, *Committee Hansard*, 2 August 2004, p. 24.

13 *Committee Hansard*, 2 August 2004, p. 34.

10.19 Where the complaint cannot be resolved within the chain of command, members may initiate a complaint by lodging a Redress of Grievance (ROG) or complaint to the Inspector-General of the Australian Defence Force (IGADF). The role of the IGADF is discussed in the following chapter.

10.20 The CO is required to acknowledge receipt of an ROG in writing, investigate the complaint, decide whether the member has grounds for complaint and resolve the matter if it is within his or her authority. He or she is to inform the complainant in writing of the results. On receiving an ROG, the unit is required to advise the Complaint Resolution Agency (CRA) so that it is aware of who submitted the ROG, the subject matter and the date the grievance was lodged.¹⁴

10.21 The CRA is responsible for the present ADF's ROG system.¹⁵ It was established in 1997 as part of the Defence Personnel executive to ensure 'independence in the investigation, review and handling of complaints made by members under the redress of grievance procedures'.

10.22 Under Defence Force Regulations, if a member is not satisfied with the decision of a commanding officer on a complaint, the member may refer the complaint to the Chief of the relevant Service or in some cases to the Vice Chief of the Defence Force. An officer not satisfied with the result may refer the matter to the CDF.¹⁶

The effectiveness and fairness of the notice to show cause and the ROG processes

10.23 The report has presented a solid body of evidence that supports the contention that there are deficiencies in investigating officer inquiries and Boards of Inquiry (see chapters 8, 9 and 12). The committee now turns to establish whether these or other problems find their way into the appeal or review processes. Indeed, it seeks to put the ADF's administrative system to General Cosgrove's acid test of whether there are adequate and independent avenues of review and appeal available to members (see para. 10.4).

Procedural fairness—access to all relevant material and the consideration of all the evidence

10.24 There can be no doubt about the requirement to provide a person facing proposed adverse action with all the material that was taken into account when deciding that such action was appropriate. The ADF highlights this important requirement in its instruction manuals and in internal publications (see paras. 10.12–16). Yet a number of witnesses assert strongly that they were not provided with all

14 *Committee Hansard*, 2 August 2004, p. 24.

15 Department of Defence, *Submission P16*, p. 45.

16 Regulations 76 and 79, Defence Force Regulations 1952.

relevant documentation. One witness stated categorically that 'no evidence, statements or other documents containing evidence were attached or disclosed...in the Notice to Show Cause Why a Censure Should Not Be Imposed.'¹⁷ A pilot presented with an unsuitability report argued that his career as a pilot ended without the opportunity to sight the case against him. He submitted:

I was not given access to the evidence used to support the decision or given a chance to respond before the decision was made. I was not told of this decision until...over two weeks after the decision was made.¹⁸

10.25 As a further complication, he argued that crucial documents indicating serious flaws in the process leading to the unsuitability report were not considered. In his mind, the failure to 'disclose favourable evidence constituted a significant and clear breach of procedural fairness'.¹⁹

10.26 In an almost identical situation, another officer found that, on the purported grounds of unsuitability, he received 'no warning or opportunity to understand, rebut or correct the deficiencies' that were alleged in his performance before his removal was effected.²⁰

10.27 Indeed, a number of witnesses had to battle to gain access to material vital to building their defence. One member submitted that an important document:

...was only disclosed after I took legal action. If I had not done so I would never have received the document or even been certain of its existence. I have had to spend over \$10 000 dollars to ensure full disclosure.²¹

10.28 Not only did some members experience difficulty in obtaining relevant material, but some also suggested that they did not get a fair hearing. One witness explained that he had not once been interviewed or questioned throughout the five years and seven months of processing his grievance.²² He believed that there was a strong predisposition of the relevant officers not to investigate the complaints. He summed up his experiences:

The unresponsive, superficial, tardy and inefficient treatment of myself and my formal complaints in the redress system was not expected given the high standard of administration demanded in other areas of Defence. The poor treatment I received was sustained over a period of more than five years.²³

17 Confidential *Submission C15*, p. [6].

18 Confidential *Submission C9*.

19 Confidential *Submission C9A*, p. 3.

20 Confidential *Submission C38*.

21 Confidential *Submission C9*, p. 13.

22 Confidential *Submission C14*, para. 7.3.

23 Confidential *Submission C14*, paras 4.1 and 7.2.

10.29 Another member, who was not consulted during the investigation process, found that his review had relied on evidence used to support the original administrative action such as past psychological tests. He argued:

I was denied natural justice in that I was not informed of the content of the report, I was not provided with the evidence used to support the case, and I was not given the opportunity to prepare and present a case in my own defence.²⁴

10.30 An independent review of one case found that the member was given no effective opportunity, as required by the relevant Defence Instruction, to present reasons why he should not be removed from his command.²⁵

10.31 The committee believes that there can be no excuse for denying members the most basic of rights to know the evidence supporting the decision or proposal to take adverse action against them. On this most fundamental principle, the ROG process falls short.

Conflicts of interest and the independence of the investigators and decision-makers

10.32 As noted earlier, a member must lodge their redress of grievance with the CO. A situation often develops where the grievance is submitted to the person who is at the very centre of the complaint. This means that ultimately the CO could be in the position of reviewing his or her own decision. For example, the CRA explained that a report about unacceptable behaviour would be investigated and the CO would make a decision as to whether or not the behaviour was unacceptable. It explained that, if the behaviour was unacceptable:

...the CO would make a decision about what action should be taken...By the time it gets to a redress, if that original complainant wants to submit a redress of grievance, it would be about the decision made by the CO. If the complainant felt that the action taken by the CO was inadequate or inappropriate that would be the subject of the redress. When we are talking about a respondent, there is not really a respondent in terms of the redress other than the CO because it is the CO's decision, action or perhaps failure to act.²⁶

10.33 Mr Neil James, Australian Defence Association, underlined the likelihood of a conflict of interest occurring under the current review of decision process. He told the committee:

Unfortunately, under the administrative provisions a senior officer proceeds administratively against a member and is also the person who hears the member's answer. If the senior officer is involved in the circumstances,

24 Confidential *Submission C59*.

25 Attachment 'Review of Defence Actions Related to a Claim for Administrative by...', Confidential *Submission C24*.

26 *Committee Hansard*, 2 August 2004, p. 39.

there is obviously a conflict of interest. Most lawyers will tell you...that, in most cases, the person being proceeded against has to be very careful about going to the senior officer in question and saying, 'Sir or Ma'am, I think you should disqualify yourself because of a possible conflict of interest,' because if they say, 'I have no conflict of interest,' they are then likely to be even more biased against the person being proceeded against.²⁷

10.34 Another witness stated:

The CO who raises the report controls which documents are disclosed to the member. The same CO also responds to the members rebuttal. This allows the CO to significantly control information that is presented to future decision makers.²⁸

10.35 In this witness's view, the protections supposedly in-built in the ROG process can be easily circumvented.²⁹ He stated further:

A CO is able to influence what information and documents are released to the decision maker. In a military environment if any conflict that exists in information presented by a commander and subordinate the commanders assertions will be accepted as truth.³⁰

10.36 In noting that the Redress of Grievance Defence Instructions dictate that any ROG goes to the CO even if the complaint is against the CO, a witness argued:

This situation is flawed as 99% of the time the CO will not admit that he/she has made a mistake and so the resolution process has been delayed by up to a month by a step that is unlikely to succeed.

The situation is also flawed because the CO can choose not to inform his/her immediate superior that a ROG has been submitted against him/her.³¹

10.37 He suggested that the ROG process needs to be amended to allow a member to go to the next person in the chain of command or to an independent civilian agency.³²

10.38 In support of this general argument, a member who attempted to have administrative action properly investigated through a ROG accepted that the chain of command is a critical feature of the military but was of the view:

As such subordinates will always be inclined to agree with those more senior than them. Members of the military will never be able to properly investigate other members of the military. I strongly believe that the

27 *Committee Hansard*, 9 June 2004, pp. 25–6. See also Mr Allen Warren, *Submission P5B*, p. 3.

28 *Confidential Submission C9*.

29 *Confidential Submission C9*.

30 *Confidential Submission C9*, p. 14.

31 *Confidential Submission C43*.

32 *Confidential Submission C43*, para 26.

intensely hierarchical nature and relatively small size of the services makes it impossible for each one to investigate itself.³³

10.39 A number of specific cases were reported to the committee where an inappropriate person was responsible for the ROG. In one particular case, and against the advice of the CRA, a person who was named in the ROG took carriage of the process.³⁴ Another member also alleged serious failings in her ROG process including missing or falsified documents, delays, not being consulted or interviewed and the willingness of investigators to accept unquestioningly the word of a senior officer. She was of the view that the first step to right any wrong must begin with 'minds which are open to the fact that just because it is in writing from a senior officer, it may not necessarily be true'. She concluded:

All the recommendations regarding procedures, and even implementation of them, cannot ensure that those who are charged with responsibility will be open minded, honest, skilled in investigation, demonstrate integrity and most importantly, have the courage to pursue the truth.³⁵

10.40 This criticism was not confined to the investigation officer. One member identified conflicts of interest that go beyond the actual investigation. He had no substantial complaints about the investigating officers and the investigation following his ROG, but with the role of the appointing officer in overturning important findings. He explained:

Two very experienced investigating officers listened to hours of evidence and considered their findings carefully, only to have all their findings that were in my favour overturned by the Appointing Officer, whilst the same individual endorsed all their conclusions that protected either the office of the Chief of the Air Force or the Commonwealth's interests.³⁶

10.41 The member believed that the appointing officer should not have been selected because he was the immediate supervisor and the ROG 'directly implicated him in failing to fulfil certain due process functions'.³⁷ He could not understand why the appointing officer did not withdraw immediately upon commencing his review of the investigating officer's report once he realised that he was implicated in the report.³⁸ He asked, 'if we can have two civilian investigating officers, who were both military reserve officers, then why can't we have an Independent Reviewing or appointing officer drawn also from the military reserve?'³⁹ He concluded that, had a 'truly

33 Confidential *Submission C8*, p. 2.

34 Confidential *Submission C39*.

35 Confidential *Submission C13*, p. 6.

36 Confidential *Submission C24*, p. 12.

37 *ibid.*

38 Confidential *Submission C24A*, Addendum 1, Attachment 14, p. 16.

39 Confidential *Submission C24*, p. 12.

independent appointing officer been nominated, then much of the perception of irregularity would have been avoided'.⁴⁰

10.42 As noted on a number of occasions in this report, the need to observe due process is spelt out clearly and unambiguously in numerous Defence manuals. Yet, the adherence to the rules underpinning procedural fairness is not always observed and the safeguards built into the military justice system are not always sufficiently robust to offer the necessary protection to members. Indeed, the lack of independence of the investigator and the decision-maker appears to be one of the most corrosive influences undermining the application of the principles of natural justice and one of the most commonly cited concerns.

10.43 Closely tied to this matter of conflict of interest coming out of the chain of command structure is often the lack of support and, in some cases, blatant opposition to a member submitting a redress of grievance. One member recounted how a fist was put into his face by the administrative officer who asked why he was pursuing a ROG.⁴¹

Assistance when preparing a complaint

10.44 Equal bargaining positions is an essential guarantee of the right to defend oneself against adverse allegations. It means that those answering the allegations are in a procedurally equal position to the party making the allegation and, are in an equal position to defend their interests. In the case of a notice to show cause or an ROG, the person having to answer the notice or appeal against a decision is pitted against the considerable resources of the ADF as well as the authority, status and influence of senior officers who often are defending their own decision. One witness observed that:

...the 'weight of coercive legislation and organisation can be brought to bear on any individual soldier who must face it with his personal resources of resolve, time, money and strength'.⁴²

10.45 It is therefore critical that the fundamental principles of procedural fairness are observed. A member may request assistance when preparing a complaint. Defence instructions advise that 'unless this assistance is of a legal nature, the CO will nominate a suitably qualified member from within the unit to provide assistance to the complainant'.⁴³ Defence instructions further direct that:

Requests for legal assistance are to be made through the legal office that supports the member's unit and are subject to the reasonable availability of a legal officer. The type and duration of legal assistance to be provided to a

40 Confidential *Submission C24*, p. 12.

41 Confidential *Submission C18*, p. 2.

42 Confidential *Submission C40A*.

43 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B, para. 5.

member must be approved by the legal office that supports the unit, in accordance with current policies and directions from The Defence Legal Service. The role of a legal officer appointed to assist the member in the preparation of a ROG is to provide specialist advice concerning the grounds for complaint. The legal officer is not to conduct an inquiry or investigation into the complaint, or negotiations on behalf of the member, without authorisation from the legal office, which will only be given in exceptional and complex cases.⁴⁴

10.46 One witness, however, criticised the Defence Legal Service (TDLS) for being out of touch with current developments in military justice:

The traditional approach to investigations taken by TDLS refuses to acknowledge that the most vexed area in Defence today are administrative inquiries into personnel and operational matters. TDLS's approach is out of the ark; it does not reflect community standards and expectations as to how members under investigation should be treated, and it does not adequately accommodate administrative law requirements.⁴⁵

10.47 The responsibility for mounting a defence in a ROG rests solely with the aggrieved member. A member who chooses to obtain legal assistance from a civilian lawyer in preparing or pursuing a ROG is liable for any costs incurred.⁴⁶ Defence instructions stress that:

The onus is on the member to ensure that all evidence in support of the complaint is presented to the CRA. It is not the role of the CRA to act as an advocate for the member and the case officer will not normally seek additional evidence solely for the purpose of strengthening the member's case.⁴⁷

10.48 Keeping in mind the difficulties that a member may have in producing relevant documentation as shown in the previous section as well as the potential conflicts of interest inherent in the command structure of the Forces, the ADF has an obligation to ensure that a member is not unfairly handicapped in defending his right to a fair hearing. It must ensure that a member has available to him or her adequate resources to answer the case against them including appropriate legal advice. The committee has noted the criticism levelled at TDLS for its failure to grasp the importance of making adequate legal advice available to ensure that investigations are fair and proper.

44 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B, para. 6.

45 Confidential *Submission C49*, para. 16.

46 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B para. 7.

47 Defence Instructions (General) PERS 34-1, Redress of Grievance-Tri-Service procedures, Annex B, para. 12. Note this sentence is in bold. See para 9.20 in this chapter for some background on the CRA.

Competency of investigators

10.49 The quality of investigations was discussed at length in the previous chapter. The criticism was directed at matters such as deficiencies in evidence gathering and analysis, failure to observe natural justice principles, bias in the processes and lack of objectivity. Such shortcomings were also evident in the investigations undertaken under the notice to show cause and the redress of grievance. In particular, evidence suggested that these processes did not provide a genuine review function with some investigators relying uncritically on the findings of previous investigations or reluctant to change earlier decisions.⁴⁸

10.50 With regard to the ROG process, the training of CRA personnel was also found wanting. One witness maintained that 'the personnel who are charged with making important decisions about peoples' lives appear to be ill qualified to do so.' She suggested that it 'should be mandated that as part of the ROG process, an independent legal practitioner reviews each case, in its entirety'.⁴⁹ In the view of another witness, the CRA is 'unable to always provide fair impartial investigations'.⁵⁰ Another believed that Defence authorities 'appear to have provided inadequate resources to the redress system which could, if properly managed, be a valuable asset than a "running sore"'.⁵¹

10.51 This evidence again highlights the need for the adequate training of investigators.

Delays

10.52 Delay and other organisational failures that frustrate the timely completion of an investigation described in the previous chapters similarly plague the review and appeal processes. The Defence Force Ombudsman noted the time taken to deal with a complaint. He stated:

Some matters that come to us already have quite an administrative history insofar as the internal investigation and the redress of grievances are concerned. The redress of grievance process can be time consuming and multilayered. There can be delay in our investigation and in getting responses from the department. Delay is the problem.⁵²

10.53 One witness stated simply that, in her case, 'the time taken to progress a redress through a commanding officer and then the Complaint Resolution Agency (CRA) is measured in years, not weeks or months'.⁵³ She attributed the delays to a

48 Confidential *Submission C14*, p. 3.

49 Confidential *Submission C8*, p. 3. Also confidential *Submission C9*, p. 15.

50 Confidential *Submission C9*, p. 15.

51 Confidential *Submission C14*, para. 7.3.

52 *Committee Hansard*, 9 June 2004, pp. 1–4.

53 Confidential *Submission C8*, p. 2. Similar complaints were raised by a number of members.

chronic shortage of personnel in CRA to investigate redresses, the failure to take redress of grievances seriously and the lack of incentive for units to participate in the process in an expedient manner.⁵⁴ Unnecessary hold-ups can start with the lodgement of a redress of grievance. One witness claimed that the ROG had been lost while another discovered that his ROG had not been sent to the CAF as previously advised by his former CO.⁵⁵ One former member stated:

I have long been heavily patronised and stonewalled in my quest to achieve this Redress of Grievance.⁵⁶

10.54 Another ADF member explained that he had submitted his claim for defective administration on 8 August 2002 but had received no acknowledgement from the Delegate. He submitted official hasteners in March and September 2003 and received three written assurances of completion dates, none of which were met. He then stated that, in March 2004, he wrote to the Minister for Defence and, on his hastening, received a 'rapid, non-analytical and flippant response from the Delegate denying any claim'.⁵⁷

10.55 Delays can cause particular hardship for those waiting for a decision on proposed adverse administrative action. Difficulties can arise between the period that adverse action is proposed and the findings of an investigation following a redress of grievance. One witness stressed the fact that members 'suffer detriment from the day the action is raised'. She explained:

In some cases they can be removed from their duties after being informed that action will take place. It may actually take weeks even months before the action is officially raised and then take many months for the process to take place.⁵⁸

10.56 In one case a soldier, implicated in the use of illicit drugs, was issued with a notice of termination. He made a submission noting a number of major flaws in the investigation. While waiting for the redress of grievance process to be completed, he had been subject to adverse administrative action including denial of Christmas and holiday leave, removal of living-off base privileges resulting in financial loss and restriction of active duty. Of most concern to his parents, however, was the physical and emotional isolation experienced by their son:

Our son and other members who continue to appeal their termination remain in a holding platoon and are denied the opportunity to undertake normal duties. In effect this means that for however long this appeal

54 Confidential *Submission C8*. Confidential *Submission C15* was concerned with the delay in processing the Notice to Show Cause.

55 Confidential *Submission C56* and Confidential *Submission C57*.

56 Confidential *Submission C51*, p. 2.

57 Confidential *Submission C62*, p. 2.

58 Confidential *Submission C8*.

process continues (maybe several years), these young men are sitting idle and are being denied the opportunity to actively participate in army life and their chosen career.⁵⁹

10.57 Overall, the evidence received by the committee suggests that the ROG process in particular is riddled with deficiencies. Indeed, one former member remarked that his 'sustained attempt to obtain a redress has generated further grievances'.⁶⁰ The experiences of a high ranking officer with 35 years distinguished service highlighted just some of the problems with the ROG. He told the committee:

I contend that I was the victim of non-adherence to due process... intimidation tantamount to harassment...unjustified constraint on my employment in my career profession and permanent damage to my reputation and employment prospects.⁶¹

10.58 This view was supported by an even more damning assessment of the ROG from another high ranking officer who submitted that his case:

...chronicles a sombre litany of abuse, covering a spectrum of lies, deceit, abrogation of duty, abuse of power, denial of natural justice, failure to follow due process, and finally gross defective administration.⁶²

10.59 The extreme difficulties endured by these two individuals both of star rank, men with a thorough knowledge and understanding of the military justice system and with the tenacity to pursue a ROG regardless of the frustrations and troubles, can only emphasise the ordeal that young ADF members might confront in seeking redress. The committee has no doubts that the avenues for review and appeal available to ADF members not only fail to deliver a fair and proper process but can also create unnecessary hardship for those who pursue this course of action.

10.60 The evidence presented in this chapter shows clearly that the problems evident in the investigating officer inquiries and Boards of Inquiry flow into the review processes—conflicts of interest, lapses in procedural fairness, poorly conducted investigations and delays. In other words, the evidence given in relation to the review and appeal processes builds on that applying to other administrative inquiries.

10.61 The committee acknowledges that much of the evidence presented in this chapter is drawn from confidential submissions which have not been made public let alone provided to Defence for comment. It should be noted that the committee would have preferred all evidence presented to it during this inquiry to be made freely available for public debate. This lack of openness has severely limited the ability of

59 Confidential *Submission C6*.

60 Confidential *Submission C14*, p. 2.

61 Confidential *Submission C62*, p. 3.

62 Confidential *Submission C24*.

the committee to test the veracity of this evidence. The committee accepts this limitation. It notes, however, that this confidential material builds on a solid body of evidence presented in the previous chapters that has clearly identified failings in the administrative system.

10.62 The committee decided not to make the submissions public for a number of reasons. Firstly, in many cases the evidence reflected adversely on named individuals and the committee wanted to respect people's rights to privacy. Secondly, some submitters requested that the circumstances of their particular case be kept confidential because they feared some form of reprisal. Thirdly, a number of the cases had not been resolved, and the committee deemed it inappropriate to discuss openly cases still under consideration or subject to negotiation. Finally, some people did not wish to bring the ADF into disrepute by publicly airing their grievances. One serving member stated:

I remain a dedicated, loyal and long serving officer. It therefore gives me absolutely no pleasure or gratification to make this submission which is likely to be perceived by many within the Australian Defence Force (ADF) as inappropriate and in conflict with the nature of my employment and long established military protocols. For over 27 years I have been inculcated with the need to remain apolitical and render unqualified service to the Government of Australia and its citizens. Accordingly, I considered it inappropriate for me to be a member of a political party, make public comment on Government policy, openly discuss military affairs, or be a member of any association which holds or promotes a political agenda—until now.⁶³

10.63 Having taken this significant step in lodging a submission with the committee, he was not prepared to go any further and requested that the committee treat his submission as confidential and for it be withheld from public scrutiny. In this chapter, the committee has also cited the case of two highly ranked ADF officers who, according to their evidence, have endured extreme difficulties in pursuing their case, including intimidation, denial of natural justice, and damage to career and reputation. Despite this treatment, they, too, did not want to sully the public standing of the ADF and its members by making their complaints public. The evidence provided by these three officers is compelling and reinforces each other's conclusion that the ROG system is seriously flawed. Their evidence is also consistent with, and further validates the evidence from members and former members presented in this chapter which was highly critical of the ROG process.

10.64 A number of suggestions were put forward by witnesses that specifically address the problems identified with the appeal and review process. They include:

- the use of sworn statements in the raising of administrative action which would help ensure that claims made by the CO are truthful and accurate;

63 Confidential *Submission C37*, Foreword.

- the requirement to make a sworn statement that all relevant evidence has been disclosed which would reduce the likelihood that documents are not disclosed to the member;
- the automatic legal review of adverse administrative decision which would be independent and binding and could eliminate delays in reaching an outcome; and
- priority given to administrative decisions affecting a member's livelihood.⁶⁴

10.65 The committee sees merit in such suggestions but, in light of the range and seriousness of the deficiencies in the current system, believes that a comprehensive restructuring is required.

Recent initiatives and the role of the Complaints Resolution Agency (CRA)

10.66 According to the Department of Defence, the CRA has taken steps to improve the operation of the administrative system. It has taken on the role of monitoring unit-level redress of grievance investigations to reduce delays. According to the CRA it:

...is proactive in offering advice to unit commanders on how to deal with complaints, and is also consulted regularly by unit staff who may be unsure of the process and its requirements.⁶⁵

10.67 Indeed, General Cosgrove was of the view that 'significant progress continues to be made to improve the openness and external scrutiny of the administrative system, including inquiries.'⁶⁶ He regards the current system of internal checks and balances, of review and counter review, of appeal and counter appeal as 'extraordinarily resilient.'

10.68 The committee is mindful of the assurances given by the ADF of the recent steps taken to improve the internal review and appeal process. Even so, it is aware that the experiences of many participants in the inquiry run contrary to the official view as presented by General Cosgrove. There can be no doubt based on the evidence before this committee that the internal review and appeal processes manifest the same deep seated flaws as those evident in the investigating officer and BOI investigations. They include cases where there were:

- serious failings to adhere to the fair hearing rule in that:
 - members were not informed that adverse action was being taken;
 - members were not provided with all material relevant to the decision taken to impose adverse action including documentation that would

64 Confidential *Submission C9*, p. 14.

65 *Submission P16*, p. 45.

66 *Committee Hansard*, 1 March 2004, p. 9.

assist them in building their defence—some members had to battle to gain access to relevant material;

- members were not provided with an effective opportunity to present a case;
- failures by the reviewing body to consider all relevant evidence;
- conflicts of interest involving the reviewing authority that cast serious doubt on the objectivity and independence of the proceedings, particularly where an individual was reviewing his or her own decision;
- inadequacies in the training and experience of those responsible for investigating a grievance or overseeing the ROG;
- delays in processing complaints; and
- improper tactics used to dissuade members from proceeding with their grievance including conduct intended to frustrate the process.

10.69 The committee accepts that, on paper, there is 'a system of internal checks and balances, of review and counter review'. The overall lack of rigour to adhere to the rules, regulations and written guidelines, the inadequate training of investigators, the potential conflicts of interest and the inordinate delays in the system rob it of its very integrity. The committee believes that measures must be taken to build greater confidence in the system and most importantly to combat the perception that the system is corrupted by its lack of independence.

10.70 Before discussing proposals to address these shortcomings, the report examines the roles of the IGADF and the Defence Force Ombudsman in the following chapter.

