

# Chapter 11

## The IGADF and the Defence Force Ombudsman

11.1 The previous chapters identified a long list of perceived flaws in the conduct of routine and investigating officer inquiries and inquiries undertaken as part of a review or a redress of grievance. One of the main concerns was the apparent lack of independence. There are now a number of review mechanisms that stand outside the chain of command—the newly created Inspector-General of the Australian Defence Force and the Defence Force Ombudsman—that are intended to provide a greater degree of objectivity and impartiality to the military justice system. This chapter considers their roles and functions and the contribution they make to the effectiveness of this system.

### Inspector-General of the Australian Defence Force (IGADF)

11.2 The ADF looks to the newly appointed Inspector-General of the Australian Defence Force (IGADF) to counter criticisms about the perceived lack of independence in its administrative system. Its establishment stems from recommendations contained in the Burchett Report which suggested that:

A Military Inspector General independent of the normal chain of command and answering directly to the CDF would provide greater assurance of independence for those cases where complaints do need to be brought forward.<sup>1</sup>

11.3 The main function of the IGADF is to provide the CDF with an internal review of the military justice system, separate from the normal chain of command, and 'to provide an avenue by which failures in the system—systemic or otherwise—may be examined.'<sup>2</sup> According to General Cosgrove, recent initiatives such as the establishment of an IGADF provide an additional 'failsafe layer' in the military justice system.<sup>3</sup> He stated that the IGADF offers an opportunity for independent review.<sup>4</sup>

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1 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S. Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 39. The Burchett Report envisaged a Military Inspector General who, among his or her other functions, would provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint. He or she would also have the authority 'to take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities'. Following any referral, the IGADF would receive it and, if necessary, report to the CDF on the response of the authority to whom the matter was referred.

2 *Committee Hansard*, 1 March 2004, pp. 57–9.

3 *Committee Hansard*, 1 March 2004, pp. 30–1.

### ***The Independence of the IGADF***

11.4 The Burchett Report stressed that its proposed OIGADF 'must be, and be plainly seen to be, independent of the normal chain of command'. It went on to state:

It should be directly under the command of the CDF. Thus it will be seen that the Military Inspector General is not susceptible to undue influence by anyone in a chain of command. This does not mean that the position would have to be completely outside the Australian Defence Force and the Department of Defence...It does mean, however, that the Military Inspector General should be seen as a distinct entity from the three Services and from the principal joint organisations, under which all military personnel are administered.<sup>5</sup>

11.5 The Burchett Report stated further that:

The Military Inspector General will require to be a figure who can actually maintain independence. For that reason, the appointee should ideally not be a person who could be thought to have career expectations in Defence. Of course, the appointee should have a close familiarity with the Australian Defence Force environment or should be at the apex of a highly expert staff with that familiarity. An understanding of the military justice system would be essential.<sup>6</sup>

11.6 The appointment of the IGADF is in keeping with the findings of the Burchett report. He or she does not hold military rank although for administrative purposes the position equates with Senior Executive Service Band 2. He or she reports to the CDF and, according to Defence Instructions, 'is independent of the normal ADF and public service chain of command or line management'. Defence Instructions advise that:

This arrangement is intended to allow the IGADF to undertake his/her duties impartially and to counter any perceptions of undue influence arising in relation to matters under consideration by the IGADF.<sup>7</sup>

11.7 They make clear that the 'establishment of the OIGADF is not intended to duplicate or displace the functions of other such agencies or appointments but rather

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

5 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 165.

6 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 166.

7 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 6.

should be regarded as complementary to them'. The IGADF's role is unique in that, unlike other agencies, its focus is on the military justice system as a whole.<sup>8</sup>

11.8 In response to committee concerns about the independence of the IGADF, Mr Earley noted:

Mr Burchett's visions and his recommendations were never that the office of IGADF would be completely independent in the sense of being external to the defence department entirely, like the Ombudsman. He envisaged it being independent of the normal chain of command but responsible to the CDF—and only the CDF. I am not responsible to any of the service chiefs, only to General Cosgrove.<sup>9</sup>

11.9 He explained further that the office does not purport to be, and was never intended to be, independent in the sense of being completely external to the Defence Organisation. In his opinion:

Given its role, the present arrangements of being aside from and yet at arms-length to and not divorced from the ADF offers advantages which, in my view, are unlikely to be available had the office been established completely externally. This includes the ability to move freely within the Defence Organisation to go directly to the relevant area of interest and to operate with and under the authority of the CDF. In a hierarchical structured organisation such as the ADF, they are pretty important considerations. They are important, in my view, because they greatly assist the office to perform its function in a way which lessens the risk of resentment arising from a lack of awareness of cultural factors while at the same time allowing an arms-length impartial approach.<sup>10</sup>

11.10 The committee notes that the IGADF does not have executive authority to implement measures arising out of his or her investigations. The IGADF's only authority is 'to make recommendations to other authorities who may remedy the matter'. The IGADF may, however, report the outcome of his or her inquiry, including the adequacies of any responses, to the CDF.<sup>11</sup> The committee is concerned that there are inadequate measures in place that would hold the CDF publicly accountable should he or she fail to act in part or in full on a recommendation by the IGADF. For example, there is no requirement for the CDF to provide written explanations to the IGADF for rejecting recommendations which would for example enable the IGADF to comment on any concerns related to such matters in his or her annual report.

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8 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 8.

9 *Committee Hansard*, 5 August 2004, p. 88.

10 *Committee Hansard*, 1 March 2004, pp. 57–9.

11 Defence Instructions (General), Inspector-General of the Australian Defence Force—role, functions and responsibilities, para. 34.

11.11 The committee believes that such a requirement for the CDF to notify the IGADF in writing where the CDF does not accept a recommendation should be explicitly stated in paragraph 34 of the Defence Instructions (General): Inspector-General of the Australian Defence Force—role, functions and responsibilities.

11.12 In the context of his status as an independent body, the IGADF elaborated on the nature of his employment conditions:

...at CDF's direction, action is being taken to move my position of IG ADF from a contractual basis, where it now lies, to a legislative basis. The intention is that the basic role, structure and reporting arrangements, which have actually proven to be quite effective, will remain as presently established, except that the authority for it will have a legislative or statutory basis at some time in the future. I think the earliest, optimistically speaking, that that might happen is probably legislation to go before the autumn sittings next year...The object there is to enhance the perception and the reality that the IG ADF and his office are independent from the normal chain of command.<sup>12</sup>

11.13 In May 2005, when asked about progress toward placing the appointment and employment conditions of the IGADF on a statutory basis, Mr Mark Cunliffe, Head Defence Legal, informed the committee that a bill was proposed for introduction in the June 2005 parliamentary sittings. When pressed on this matter, Mr Cunliffe stated that he did not know exactly how much of the bill was drafted but it 'certainly has been in various draft versions.' He went on to say that 'There have been policy clearance procedures in place in relation to some parts and that is continuing'. The Minister for Defence noted that it has taken four years of drafting to get to this point which, in his view, was 'a very long time.'<sup>13</sup>

11.14 As observed by the minister the progress toward moving the IGADF from a contractual basis to a legislative one has been slow. This delay in placing the IGADF's appointment and employment conditions on a statutory base weakens any attempt by the Government and the ADF to convey a positive message about the purported independence of the IGADF.

### ***The accessibility of the IGADF***

11.15 In establishing the IGADF, the Government and the ADF recognised that there may be occasions when individuals feel they are unable or are reluctant to report their concerns through the chain of command. Even so, the office takes the approach that it does not offer 'a short cut for complainants'. Its objective is:

to allow and encourage the normal systems for dealing with failures in the military justice system to operate first. If there is some specific reason why

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12 *Committee Hansard*, 5 August 2004, p. 87.

13 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Hansard*, 31 May 2005, pp. 69–70.

they cannot or if a member feels that for some particular reason they are unable to access the normal systems, that brings into being the sort of role that we can play.<sup>14</sup>

11.16 Submissions may be made to the IGADF where:

- the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means;
- the person making the submission has no confidence that the chain of command will properly deal with their Military Justice concern, for instance, if the chain of command is perceived to be part of the problem; or
- the established complaint mechanisms for specific Military Justice issues or the chain of command have been tried and have failed to address properly the problem.<sup>15</sup>

11.17 Persons may make submissions whether of a systemic or individual nature that relate to the processes and arrangements under which military justice is administered. They may be concerned with matters such as:

- abuse of authority;
- abuse of process;
- procedural fairness/denial of natural justice;
- avoidance of due process and specified procedures;
- failure to act;
- unreasonable delay;
- unlawful punishments;
- victimisation, harassment, threats, intimidation, bullying and bastardisation; and
- general suggestions regarding the military justice system particularly in relation to examples of systemic failure and/or suggestions for improvement.<sup>16</sup>

11.18 Under this reporting framework, individuals may make anonymous submissions. The Manual notes, however, that:

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

15 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 17.

16 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 19. This list is based on that given in the manual. The manual notes that the list is illustrative and not exhaustive.

...such submissions are regarded as being informative rather than evidentiary which means that the scope for taking further action may be more limited than if the person makes their identity known to the IGADF staff. Nonetheless investigation of the allegations will be assisted by the provision of as much information as possible about the subject of the complaint. Persons who make anonymous submissions cannot, since their identity is unknown to the IGADF, be provided with feedback information concerning the progress and outcome of their submission.<sup>17</sup>

### ***Protection of those making submissions to the IGADF***

11.19 Defence Instructions recognise that in some cases persons making submissions to the IGADF may fear for their safety, security, career or general well-being. It advises that support and protection mechanisms are available to assist in these circumstances and that IGADF staff 'will liaise directly with the person in order to best determine the nature and level of support and protection required in each case'.<sup>18</sup>

11.20 The committee refers to the Defence Whistleblowers Scheme which also provides for a person to be assigned to a case to ensure that the person making a report does not suffer reprisals on account of making a report. It is concerned that confusion may be created about who has responsibility for the protection of people reporting wrongdoing or making a complaint. It has suggested that the reporting system be streamlined.

### ***Delays in processing a grievance***

11.21 The IGADF, which was established in January 2003, started from scratch and, according to the IGADF, early indications are that it is beginning 'to make a positive difference and is shaping up...to be a most worthwhile and important initiative for military justice in the ADF'.<sup>19</sup>

11.22 Because the position is newly created, few witnesses had used the new system and were not able to make any substantial comments about the role and function of the IGADF. A number approved of the establishment of the office with one observing that 'it appears that investigations may take place without the chain of command influence that is present for the ROG process.' Even so, she identified a number of potential problems, in particular the requirement for the ROG process to be exhausted before the IGADF can address a matter.<sup>20</sup> Given the delays that afflict the ROG process, complainants may still have to endure prolonged periods before final decisions are

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17 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force—role functions and responsibilities, para. 36.

18 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 39.

19 *Committee Hansard*, 1 March 2004, pp. 57–9.

20 Confidential *Submission C8*, pp. 3–4.

made causing what one witness described as 'enormous stress and heartache to the member involved and their family'.<sup>21</sup>

11.23 In establishing the IGADF, no serious steps were taken to break the cycle of delay that frustrates the ROG process such as empowering the IGADF to intervene in order to expedite the conclusion of an ROG that has stalled in the system. Paragraphs 17 or 18 of the Instructions Manual could state explicitly that a person may submit their grievance to the IGADF if its progress has been delayed and could even stipulate the time at which the IGADF could intervene.

### ***Early days for the IGADF***

11.24 The committee acknowledges that it is far too early to evaluate whether the establishment of the IGADF will prove to be an effective review mechanism. It notes the heavy emphasis placed on settling matters under the administrative system using the chain of command, line management or other specialised agencies at the lowest possible level. The committee is concerned that unless the IGADF shows a willingness to act and does act decisively and promptly to accept submissions that have legitimate grounds for by-passing the line of command, it will lose credibility as an effective force in the administrative system.

11.25 As noted previously, the position of IGADF has only recently been established and it is too early to make any certain judgements about its effectiveness. One witness, however, who had lodged a submission with the IGADF was disappointed and noted:

- there was no initial confirmation of receipt of submission;
- the lack of response became a regular feature of interaction with some requests left unanswered;
- the requirement to resubmit submission as the original could not be located;
- case officer had a poor understanding of the case; and
- the IGADF could do nothing until the ROG process had been finalised.<sup>22</sup>

11.26 The committee believes that, although these could be examples of teething problems, the criticism underlines the importance of monitoring the performance of the IGADF.

11.27 In light of the failings of the current administrative system as identified in this report, one of the major challenges facing the IGADF is to win the trust and confidence of members of the ADF. Any suspicion that the office is susceptible to the influences of senior levels in the ADF will undermine its credibility. It must be seen to

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21 Confidential *Submission C8*, p. 4.

22 Confidential *Submission C57*.

stand apart from the command structure, to be committed to the principles of procedural fairness and to be a professional organisation with adequate resources and staff equipped with the skills and training necessary to process grievances or complaints competently and expeditiously. This is a sound reason for providing the IGADF with effective reporting procedures.

### ***Reporting obligations***

11.28 A reporting regime that is transparent and promotes accountability would greatly improve the perceived independence of the Office of the IGADF. As noted earlier, the IGADF reports directly to the CDF. The IGADF is required to provide the CDF with internal audit and review of the military justice system independent of the ordinary chain of command.<sup>23</sup> There does not appear, however, to be any adequate avenue for the IGADF to air his or her concerns about the military justice system to any authority other than the CDF.

11.29 Mr Earley informed the committee that the original intention was that there would not be an annual report to the parliament. It has now been agreed, however, that there will be a section in the annual Defence Report which will relate to the office.<sup>24</sup>

11.30 The committee argues for a separate IGADF's report independent of Defence's annual report. It believes that the reporting obligations placed on the IGADF must allow public scrutiny. The current reporting requirements do not offer any real guarantees that the information provided would be sufficient to allow effective parliamentary scrutiny. The committee refers to the Defence Force Ombudsman's report for the years 2000–01 and 2001–02. They provide a critical and comprehensive assessment of the complaints it received as well as a number of case studies which provide some insight into the nature of the complaints. This report provides an ideal model for the IGADF.

### ***Measures taken to improve the competency of investigating officers***

11.31 The committee notes the initiative taken by the IGADF to improve the competence of investigating officers. Defence Instructions state that the IGADF:

...will maintain a register of persons considered suitable by training and/or experience to act as investigating officers, or members of administrative inquiries. Personnel listed in the register may be used by the IGADF for administrative investigations, but will also be available on request to other Appointing Authorities including Commanding Officers. The objective is to

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23 Defence Instructions (General) ADMIN 61-1, Inspector-General of the Australian Defence Force – role functions and responsibilities, para. 11. It states 'The IGADF will provide an avenue by which any failure of Military Justice may be examined and exposed, but not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available and that systemic causes of injustice (if they arise) are eliminated.'

24 *Committee Hansard*, 5 August 2004, p. 98.



establish a pool of suitably qualified persons who understand the administrative inquiry process and the attendant legal and procedural obligations and who are capable of conducting, or taking part in, an administrative inquiry under the Defence (Inquiry) Regulations 1985.<sup>25</sup>

11.32 The IGADF is sponsoring a pilot training course for administrative inquiry officers with the object of producing a 'larger pool of officers with a good understanding of how to go about conducting an administrative inquiry'.<sup>26</sup> It has established a register of inquiry officers drawn from the three services. The IGADF has also under development, and has volunteered to manage, a reporting system whereby all administrative inquiries above the level of investigating officer are to be centrally reported to the office of the IGADF. Mr Earley told the committee:

...the implementation of recommendations and outcomes from those inquiries could undergo some scrutiny and some monitoring, which currently is a bit of a difficult area and, as I think most people would agree, needs some attention.<sup>27</sup>

11.33 The committee endorses the measures taken to improve the competence of investigating officers, to develop a register of investigators, and to establish a central reporting system for administrative inquiries (see recommendation 29, para. 11.67)

### **Other external review mechanisms**

11.34 In addition to the internal review mechanisms available to ADF members, there are a number of external review mechanisms: the Defence Force Ombudsman (DFO), the Privacy Commissioner and the Human Rights and Equal Opportunity Commission. Furthermore, conduct and decision making in the ADF may be subjected to external judicial review in the Federal Court and thereafter in the High Court.<sup>28</sup>

### **Defence Force Ombudsman (DFO)**

11.35 General Cosgrove expressed his concern with proposals that would move involvement in the military justice system away from the command structure:

If disciplinary action is taken in respect of an offence, then there is also legal protection, such as the right to a defence, under the Defence Force Discipline Act. We cannot afford to breed a generation of risk adverse commanders who are so concerned about being second-guessed that they do not act at all. Our junior leaders are trained to demonstrate their initiative and to exercise a high level of responsibility. They have shown themselves to be very good at it. They know that with responsibility comes

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25 Defence Instructions (General) ADMIN 61–1, Inspector-General of the Australian Defence Force—role, functions and responsibilities, para. 50.

26 *Committee Hansard*, 5 August 2004, p. 86.

27 *Committee Hansard*, 5 August 2004, p. 99.

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

accountability. The more we shift the responsibility for military justice away from the chain of command, the more we risk undermining both systems.<sup>29</sup>

11.36 Even so, he acknowledged that 'despite the Forces' best efforts some cases of poor administration will inevitably occur'. According to the CDF, in such cases, the Ombudsman is 'a valuable external point of review for ADF members unsatisfied with the results or conduct of a grievance investigation, and the support of that office continues to be appreciated.'

11.37 In 1983 the Ombudsman Amendment Bill was passed creating a statutory office of Defence Force Ombudsman with much the same powers as the Commonwealth Ombudsman. It recognised that servicemen and women at that time did not have access to complaint handling mechanisms that other Australians in civilian employment enjoy such as representation through union membership or access to arbitration processes.<sup>30</sup> The legislation was intended to provide an important step forward in the conditions of employment for ADF members. Mr Willis, then Minister for Employment and Industrial Relations and Minister assisting the Prime Minister for Public Service Matters, informed the House that:

Servicemen and women differ from most other Australians in that their relations with their employers can extend into almost every aspect of their lives. It is in the nature of Defence Force service that members do not have the advantage of external grievance mechanisms typical in civil employment. With the creation of a Defence Force Ombudsman an independent avenue for the review of grievances will be established.<sup>31</sup>

11.38 The amendment proposed that the office of Defence Force Ombudsman be established within the Ombudsman Act as a complement to the Ombudsman's jurisdiction. The office, however, was to be identifiable and distinct.<sup>32</sup> It conferred on the Defence Force Ombudsman the function to investigate, either on complaint being made or of his or her own motion, administrative actions related to or arising out of a person's service in the Defence Force.

11.39 The legislation acknowledged that 'For effective management in the Defence Force, officers should usually hear and have the first opportunity to remedy the grievances of those under their command'.<sup>33</sup> It envisaged that the Defence Force Ombudsman would complement, rather than compete with, existing internal redress procedures.

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

30 Administrative Review Council, *Report to the Attorney-General, Defence Force Ombudsman*, Canberra 1981, p. 5.

31 Second reading speech, Mr Willis, *House Hansard*, 26 May 1983, p. 1021.

32 See second reading speech, Mr Willis, *House Hansard*, 26 May 1983, p. 1021.

33 *ibid.*

### ***Independence of the DFO***

11.40 One of the major strengths of the Defence Force Ombudsman is its independence from the Defence Force. Mr Ron Brent, Deputy Ombudsman, explained:

...we are independent and impartial. That very significantly changes the character of the review not just because it gives us a capacity to view issues with a freshness and an independence that you just cannot get with the system but also because it presents to the complainant an impartial and dispassionate review so that, even if the outcome is that we uphold the original decision, the fact that we have come to that conclusion can be a significant factor in satisfying the complainant that they have been fairly treated. One of the features of the Ombudsman's office is that we are independent and do carry that sort of status and credibility.<sup>34</sup>

11.41 He also identified a second strength:

...while the rate at which we find complaints to be upheld is relatively low, often the complaints that we do find upheld are very significant. Therefore, the measure of our value added is not in the percentage of cases where we find a mistake; the measure is in looking at the nature of the mistakes and at the quality of the contribution we can make. Often the issue will be a more significant problem because, were it a simple problem, the internal grievance processes would have been able to deal with it. Where the problem lies in the character of the system or in the character of the structures, the administrative processes or the legislation, we become more significant.<sup>35</sup>

11.42 Although the Defence Force Ombudsman jurisdiction is limited to making recommendations, he was confident that 'the legitimacy of our involvement in that area has been accepted'.<sup>36</sup> He noted that his role of Defence Force Ombudsman was not well known in the forces.<sup>37</sup>

### ***Constraints on the DFO***

11.43 The current Defence Force Ombudsman, Professor John McMillan, was of the view that the Ombudsman Act imposed some constraints on the jurisdiction of his office. He explained:

One is that our jurisdiction does not extend to action taken in connection with proceedings against a member of the Defence Force for a breach being a disciplinary offence, so matters in connection with proceedings for a disciplinary offence are beyond our jurisdiction. That is an elastic concept

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34 *Committee Hansard*, 9 June 2004, p. 9.

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

36 *Committee Hansard*, 9 June 2004, p. 15.

37 *Committee Hansard*, 9 June 2004, p. 16.

and by and large we have interpreted it fairly narrowly and declined jurisdiction, for example, once a charge has been preferred against a person. But certainly we interpret our jurisdiction as extending to the inquiries that, for example, can sometimes lead up to or culminate in disciplinary proceedings being brought. And, equally, we interpret our jurisdiction as extending to the administrative actions that are sometimes taken subsequent to or in implementation of decisions made in disciplinary proceedings.<sup>38</sup>

11.44 He also noted, as a further limitation, the statutory presumption in favour of a person first using the internal processes for redress of grievance before the Ombudsman accepts a complaint and investigates. He explained:

The act says that the Ombudsman can investigate in special circumstances or can investigate once 29 days have expired since the redress of grievance process commenced. In fact...the redress of grievance process can sometimes take a lot longer, so our investigations are commonly delayed for some period by that statutory presumption in the act. We received 722 complaints that fell within the Defence Force Ombudsman role last year.<sup>39</sup>

11.45 The Annual Report noted that the Ombudsman's 2004 Client Satisfaction Survey highlighted that complainants in the Defence Force Ombudsman jurisdiction are 'generally less satisfied with our service than complainants in other jurisdictions'.<sup>40</sup> This is on top of the delays and frustrations experienced in the internal investigation and review processes.

11.46 Witnesses who remarked on the role of the Defence Force Ombudsman identified a number of shortcomings acknowledged by the Ombudsman himself including the inability to investigate a complaint until a ROG process is finalised and the lack of authority to enforce recommendations.<sup>41</sup> The committee notes that this lack of authority is typical of functions of most Ombudsmen. One witness who sought to have his complaint dealt with by the Defence Force Ombudsman was told he would be asked to use the military justice system first. In his view:

Having to go through the Military Chain of Command first before the Defence Ombudsman deprives staff of the ability to have an independent agency investigate the matter. The situation allows the Chain of Command to cement its position and delay any potentially damaging findings until after the CO/OC have left the job or been promoted.<sup>42</sup>

11.47 Another witness contacted the Defence Force Ombudsman on three separate occasions for help in the progression of his ROG. On each occasion, he was advised

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

39 *ibid.*

40 Chapter 5, Defence, *Commonwealth Ombudsman Annual Report*, 2003–04.

41 Confidential *Submission C8*.

42 Confidential *Submission C43*.

that the Ombudsman could not act until the RAAF had processed and adjudicated on the ROG notwithstanding the effects that the undue delay was causing.<sup>43</sup>

11.48 The CDF and the Defence Force Ombudsman agreed to conduct a joint review of the ROG system with the intention to identify strategies to refine the system.<sup>44</sup>

11.49 The joint review of the ROG system, undertaken by the Department of Defence and the Office of the Ombudsman, recently made public its findings. It underlined many of the conclusions reached in this report. For example, it considered that the rapid increase in complaint handling avenues had 'vastly added to the complexity of managing and administering complaints in Defence'.<sup>45</sup> The review stated:

Very few complainants and managers appear to understand all of these avenues. Many of these processes have the mandate to examine similar issues, and some may result in executive action such as disciplinary proceedings or sanctions. The Review found that this myriad of systems is not only complex and somewhat bewildering to the user, it must also result in less than optimal use of resources and inefficiencies. The systems have grown in a piecemeal and ad hoc fashion. The current ROG system now lies uncertainly within a complex and poorly understood network of inter-linked processes and mechanisms that make up the military justice system.

11.50 The review made a number of recommendations designed to:

- expand the role of the CRA to include leadership, direction and coordination of all Defence's formal complaint handling systems;
- develop a common information system for complaint management with the ability to provide information in a form that will support Defence wide reporting including information required by the Inspector General (ADF)
- co-locate where possible and centrally manage the numerous agencies that deal with complaints—DEO, Army Fair Go Hotline, Army Land Command Sensitive and Unacceptable Behaviour and Incident Management Section, Directorate of Alternative Dispute Resolution and Conflict Management, Navy's Sexual Offence Support Persons program;
- enhance the process of preliminary assessment by CRA to prevent delays;

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43 Confidential *Submission C57*.

44 Chapter 5, Defence, *Commonwealth Ombudsman Annual Report 2003–04*.

45 A Joint Report by the Department of Defence and the Office of the Commonwealth Ombudsman, *Review of the ADF Redress of Grievance System 2004*, dated 27 January 2005 but not made public until April 2005, Executive Summary.

- expand the role of CRA to measure, monitor and report the total time taken to address each complaint;
- impose strict timelines for ROGs to be lodged well in advance of an advised termination date;
- improve the approach to prioritisation of ROGs;
- improve the coordination of training in administrative investigations across all ADF courses that currently include elements of investigation and administrative law.

11.51 The committee accepts that the implementation of the recommendations may go some way to address the problems identified in the ROG process. The committee, however, is not confident that the recommendations go far enough especially in light of the failure of initiatives, introduced over the past decade, to redress the problems. The committee, therefore, stands by its view that the time for tinkering with the complaint handling mechanisms is over and a comprehensive reform of the ROG process is required.

### **Courts and Commissions**

11.52 Members may apply to the courts or other institutions such as the HREOC to seek redress from adverse administrative action. The terms of reference did not mention these external review mechanisms and they attracted little comment from submitters. The report notes but does not examine their important role in the military justice system.

11.53 The committee did, however, receive a disturbing allegation that RAAF officers had threatened to take action against a member should that member proceed with court action.<sup>46</sup> The use of intimidation by ADF members to dissuade others from pursuing a complaint or grievance debases the military justice system. The committee has already voiced its concern about the prevalence of unlawful reprisals and urged the ADF to take firm steps to remedy this problem (see paras 7.39–7.59 and 7.76–7.80).

### **Summary**

11.54 This report has identified serious problems with the administrative component of the military justice system. The problems emerge at the very earliest stage of reporting a complaint or lodging a grievance and carry through into the final stages of review or appeal. The problems are not new—they have dogged the system for many years—nor are they confined to specific ranks or areas of the Forces. Young recruits and senior officers, female and male members across the three services engaged in the full range of military activities have given evidence before the committee raising their concerns about the military justice system.

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46 Confidential *Submission C9*.

11.55 The problems identified by these witnesses are not unique to the ADF. Many countries have grappled with similar difficulties and have taken steps to reform their systems. The Canadian initiatives have particular significance for the ADF.

### Looking forward

11.56 The committee is impressed with the reforms that have taken place in the Canadian Forces on the redress of grievance process. The Canadian reforms were intended to compensate for shortcomings in the military justice system—notably a grievance process tied closely to the chain of command with no adequate external checks and a lack of unions or employee associations to represent the interests of members. Indeed, the Canadian reforms address issues similar to those that plague the Australian system—confusion due to the number of bodies that handle complaints or grievances, the perceived lack of independence in the investigators and decision makers and delays in processing a complaint.

11.57 In December 1998, the Canadian Forces Grievance Board (CFGB), an independent, arms-length organisation, was created through amendments to the *National Defence Act*. Prior to these amendments, a grievance could have passed through multiple levels of review. The Act now provides for two levels of authority in reviewing grievances and has effectively made the process 'simpler and shorter'.<sup>47</sup>

11.58 The first level is the initial authority where the CO takes responsibility for reviewing the grievance and granting redress. A person not satisfied with a decision at this level may submit an application for review to the Chief of the Defence Staff. At this second level, grievances, except those related to matters such as performance appraisals, promotions, postings, training and other career issues, are referred on to the CFGB. Thus, the CDF refers to the Grievance Board any grievance relating to matters such as administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces. Other grievances referred to the Board include matters such as the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities, civil employment, conflict of interest and post-employment compliance measures, harassment and racist conduct.<sup>48</sup>

11.59 All Board members of the CFGB are civilians, although some members may have been serving members of the Forces. They are appointed by the Governor in Council for terms not exceeding four years. The Chairperson is a full-time member, is

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47 Canadian Forces Grievance Board, *Performance Report*, for the period ending March 31, 2002, pp. 6–8. [http://www.tbs-sct.gc.ca/rma/dpr/01-02/CFGB/CFGB0102dpr-PR\\_e.asp?printable\\_Tr](http://www.tbs-sct.gc.ca/rma/dpr/01-02/CFGB/CFGB0102dpr-PR_e.asp?printable_Tr) (17 November 2004)

48 This list is not exhaustive. See Canadian Forces Grievance Board, *Performance Report* for the period ending March 31, 2002; Canadian Forces Grievance Board, *Annual Report 2003*, p. 6; Canadian Forces Grievance Board, *Report on Plans and Priorities* for the full period 2003–2004, 2005–2006.

the Chief Executive Officer of the Board, and has supervision over and direction of the work of the Board staff.

11.60 The CFGB has the powers of an administrative tribunal to summon civilian or military witnesses, as well as order testimony under oath, and the production of documents. In the interests of individual privacy, hearings are held in-camera. Nonetheless, the Chairperson may decide to hold public hearings when it is deemed the public interest is at stake. The Board is supported in its work by experts in the fields of labour relations, human resources and the law and is accountable to parliament through annual reporting.

11.61 In 2003, an independent review found that the CFGB had been a positive development especially in conveying the perception of impartiality in the review of grievances. It, however, had not solved the problem of unnecessary delays. The large number of outstanding grievances was deemed to be unacceptable and of serious concern. The report recommended that clear time limits be established for a grievance to proceed through the process.<sup>49</sup>

### **Proposed new Australian Defence Force Administrative Review Board (ADFARB)**

11.62 In turning to the Australian military justice system, the committee found that the perceived lack of independence dominated the discussion on the administrative system. Concerns about partiality and bias emerged in the reporting stage of a complaint or report, carried through into the investigation phase and finally into the internal appeal or review processes. Without doubt reforms are needed to ensure that the independence of those investigating complaints or grievances is beyond question.

11.63 The committee understands that the establishment of the IGADF was intended to address this perception of independence. While the IGADF is a step in the right direction, the committee believes that it does not go far enough in establishing an independent review body for grievances. It is of the view that any further ad hoc change to the system will only exacerbate problems rather than ameliorate them and prolong the life of a system that is fundamentally flawed.

11.64 Having said that, the committee commends the initiatives being taken by the IGADF to establish a database of administrative inquiries, to improve the training of investigating officers and to develop a register of investigators. Even so, it is not confident that such measures are sufficiently strong to eradicate the perception of bias and to engender public trust in the system. The committee believes that the time has arrived for a restructure of the system and sees great merit in adopting the CFGB model.

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49 *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other acts, as required under section 96 of Statutes of Canada 1998, c.35, September 2003, pp. 93–103.*



11.65 In the committee's proposed structure, the chain of command retains the primary responsibility for resolving administrative complaints or grievances but a statutorily independent body established along the lines of the Canadian Forces Grievances Board will assume a strong presence as an appeals body. Mr Michael Griffin in his paper commissioned by the committee proposed the established of such a body to be named the Australian Defence Force Administrative Review Board (ADFARB). He explained:

...it may be best to provide the opportunity for COs to manage these administrative problems initially and keep the first level of review within the unit for a reasonable period, the suggested 30 days, before it is referred to ADFARB. However, the volume of complaints received by the Committee about the handling of ROG at the unit level and the degree of damage caused thereby suggests that some external accountability is required. Therefore, it may be necessary to require notification to ADFARB within 5 working days of the lodgement of every ROG at unit level, with 30 day progress reports to be provided to and progress monitored by ADFARB.

The program of training for investigators can be maintained within Defence with oversight by ADFARB and the panel of suitable investigators raised by the IGADF can be incorporated into this process (thereby preserving an asset for use on overseas operations as required). ADFARB can call upon such investigators as required or conduct its own investigations or formal hearings if necessary.<sup>50</sup>

11.66 The committee agrees with Mr Griffin's proposal.

### **Recommendation 29**

**11.67 The committee makes the following recommendations—**

**a) The committee recommends that:**

- **the Government establish an Australian Defence Force Administrative Review Board (ADFARB);**
- **the ADFARB to have a statutory mandate to review military grievances and to submit its findings and recommendations to the CDF;**
- **the ADFARB to have a permanent full-time independent chairperson appointed by the Governor-General for a fixed term;**
- **the chairperson, a senior lawyer with proven administrative law/policy experience, to be the chief executive officer of the ADFARB and have supervision over and direction of its work and staff;**

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50 Michael Griffin, Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, para. 89–90.

- all ROG and other complaints be referred to the ADFARB unless resolved at unit level or after 60 days from lodgement;
  - the ADFARB be notified within five days of the lodgement of an ROG at unit level with 30 days progress reports to be provided to the ADFARB;
  - the CDF be required to give a written response to ADFARB findings/recommendations;
  - if the CDF does not act on a finding or recommendation of the ADFARB, he or she must include the reasons for not having done so in the decision respecting the disposition of the grievance or complaint;
  - the ADFARB be required to make an annual report to Parliament.
- b) The committee recommends that this report
- contain information that will allow effective scrutiny of the performance of the ADFARB;
  - provide information on the nature of the complaints received, the timeliness of their adjudication, and their broader implications for the military justice system—the Defence Force Ombudsman's report for the years 2000–01 and 2001–02 provides a suitable model; and
  - comment on the level and training of staff in the ADFARB and the adequacies of its budget and resources for effectively performing its functions.
- c) The committee recommends that in drafting legislation to establish the ADFARB, the Government give close attention to the Canadian National Defence Act and the rules of procedures governing the Canadian Forces Grievance Board with a view to using these instruments as a model for the ADFARB. In particular, the committee recommends that the conflict of interest rules of procedure be adopted. They would require:
- a member of the board to immediately notify the Chairperson, orally or in writing, of any real or potential conflict of interest, including where the member, apart from any functions as a member, has or had any personal, financial or professional association with the grievor; and
  - where the chairperson determines that the Board member has a real or potential conflict of interest, the Chairperson is to request the member to withdraw immediately from the proceedings, unless the parties agree to be heard by the member and the Chairperson permits the member to continue to participate in the proceedings because the conflict will not interfere with a fair hearing of the matter.

- d) **The committee further recommends that to prevent delays in the grievance process, the ADF impose a deadline of 12 months on processing a redress of grievance from the date it is initially lodged until it is finally resolved by the proposed ADFARB. It is to provide reasons for any delays in its annual report.**
- e) **The committee also recommends that the powers conferred on the ADFARB be similar to those conferred on the CFGB. In particular:**
- **the power to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath or affirmation and to produce any documents and things under their control that it considers necessary to the full investigation and consideration of matters before it; and**
  - **although, in the interest of individual privacy, hearings are held in-camera, the chairperson to have the discretion to decide to hold public hearings, when it is deemed the public interest so requires.**
- f) **The committee recommends that the ADFARB take responsibility for and continue the work of the IGADF including:**
- **improving the training of investigating officers;**
  - **maintaining a register of investigating officers, and**
  - **developing a database of administrative inquiries that registers and tracks grievances including the findings and recommendations of investigations.**
- g) **To address a number of problems identified in administrative inquiries at the unit level—notably conflict of interest and fear of reprisal for reporting a wrongdoing or giving evidence to an inquiry—the committee recommends that the ADFARB receive reports and complaints directly from ADF members where:**
- **the investigating officer in the chain of command has a perceived or actual conflict of interest and has not withdrawn from the investigation;**
  - **the person making the submission believes that they, or any other person, may be victimised, discriminated against or disadvantaged in some way if they make a report through the normal means; or**
  - **the person has suffered or has been threatened with adverse action on account of his or her intention to make a report or complaint or for having made a report or complaint.**
- h) **The committee further recommends that an independent review into the performance of the ADFARB and the effectiveness of its role in the military justice system be undertaken within four years of its establishment.**

11.68 The committee understands that, at the moment, there are a number of complaints and ROGs that still remain unresolved years after being lodged. It believes that the ADF should take steps immediately deal with this backlog of grievances.

**Recommendation 30**

**11.69 The committee recommends that the Government provide funds as a matter of urgency for the establishment of a task force to start work immediately on finalising grievances that have been outstanding for over 12 months.**

11.70 The following chapter examines inquiries that are concerned with serious and complex matters requiring a higher level of investigation—the Board of Inquiry.

**Making a complaint or reporting wrongdoing under the proposed new system where the ADFARB is the independent review body**



