

Chapter 12

Boards of inquiry

12.1 The matters considered by a Board of Inquiry (BOI) are generally of a more serious or complex nature than those examined by Routine or Investigating Officer inquiries. They are most appropriate where an incident involves multiple deaths and injury of personnel, where there has been a death or serious injury involving complex matters, where there has been a serious or systemic breakdown of Service discipline or morale or where damage, loss or malfunction of a major Defence asset has occurred.¹

12.2 The composition of, and procedures for, BOIs reflect their importance. Apart from the obligation to observe the rules and regulations set down for Routine and Investigating Officer inquiries, they must meet additional requirements and give greater attention to the principles of natural justice. For example, a BOI is conducted under the authority of Part III of the Defence Regulations and it:

- places stricter requirements on the appointment of the members of the Board—there must be at least two members one of whom must be an officer and one is to be appointed President;²
- gives greater recognition to providing legal assistance to BOI members and to members likely to be affected by the BOI—for example a person deemed likely to be affected by the inquiry including a deceased member is to be provided with legal representation;
- accords a more prominent role for legal practitioners in the proceedings notably the role and function of Counsel Assisting and the legal representatives of potentially affected persons (PAP);
- requires proceedings to be tape recorded and a full transcript of evidence to be prepared;
- strengthens the right to defend oneself by requiring PAPs to be given the opportunity to be present during hearings and by allowing their legal representatives to question witnesses;
- allows for evidence to be taken under oath or affirmation—where the appointing authority considers that a person may be affected by the inquiry;³

1 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual*, Annex E to Chapter 2.

2 Regulation 26, Defence (Inquiry) Regulations 1985.

3 Regulation 31 (2).

- provides for public hearings as a matter of policy, particularly those involving major accidents which may attract strong and legitimate public interest—where the appointing authority has given such a direction; and
- imposes more stringent reporting obligations.

12.3 Consistent with other administrative inquiries, the purpose of a BOI is 'to determine the facts and circumstances surrounding an incident or situation so that an informed decision may be taken about the action required including, where appropriate, action to avoid a recurrence'.⁴ The Defence Force Manual repeats in a number of places that a BOI is not empowered to make specific findings apportioning blame.⁵

12.4 The committee received evidence regarding a number of BOIs including the most recent inquiries into Army Exercise Big Wall, the loss of Leading Seaman Gurr, the death of Corporal Jason Sturgess, Exercise Everest 2001, and the accident aboard HMAS *Westralia*. This chapter examines the concerns raised in submissions about the BOI process. It looks first at a recent management audit of BOIs before considering matters raised in submissions.

Recent management audit of BOIs

12.5 Acumen Alliance, commissioned by the Defence Legal Service (TDLs), recently undertook a management audit of BOIs. It was to 'identify, assess and validate the practices and processes which facilitate efficient and effective BOIs'. Overall, it concluded that the BOI process is 'generally sound and serves the purpose for which it was created.' However, it also raised issues with regard to appointments of board members, the monitoring of, and guidance and support given to, BOIs.⁶

12.6 In summary, Acumen Alliance made a number of recommendations that TDLs instruct or provide further guidance on matters such as:

- alternative applications of the administrative inquiry options;
- the skills and experience appointees need to act efficiently and effectively;
- drafting and amending Terms of Reference;
- scoping and planning;
- PAPs and how they can appear and what type of appearance is advisable; and

4 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual*, para. 7.3.

5 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual*, para. 7.25.

6 Acumen Alliance, *The Defence Legal Service Board of Inquiry Management Audit*, October 20043, para. 1.3.

- reducing risk by selecting the appropriate Board format or combination of formats.

12.7 It also recommended that TDLS take certain action including:

- review the policy with regard to progress reports and monitoring;
- provide data in relation to any costs borne by them for each BOI to the appointing authority;
- examine alternative remuneration structures to determine more appropriate ways of recompensing Reserve Legal Officers;
- establish a process to manage and monitor Board performance; and
- develop a briefing program for appointing authorities and their staff and a second program for those appointed to the Inquiry to be given prior to any involvement with a BOI.

12.8 The above list of recommendations made by Acumen Alliance is not exhaustive but indicates the emphasis it placed on improving the education and training of personnel involved in a BOI and ensuring that TDLS takes an active part in monitoring particular aspects of a BOI. The committee agrees with the main thrust of these recommendations but draws attention to a number of matters raised in submissions to this inquiry that the audit did not address.

12.9 Even though a BOI offers greater assurances that an investigation will be thorough and well resourced, a number of witnesses believed that there were major flaws in the particular BOI in which they were involved. In the main, evidence presented to the committee concentrated on the same types of issues that were raised with regard to the Investigating Officer inquiry and the ROG. The committee notes that there is a clear pattern to concerns and defects in the ADF justice processes at all levels as raised with the committee.

12.10 The following section looks at the factors behind a decision to appoint a BOI and then examines particular aspects of the BOI processes including:

- procedural fairness;
- communication with those involved in the BOI;
- the independence and objectivity of the inquiry;
- the competence of the investigating officer and the role of experts; and
- the timeliness of the process.

Decision to conduct a BOI

12.11 Following a Quick Assessment, the appointing authority has the discretion to recommend the type of inquiry appropriate to the matters under consideration. In deciding to establish a BOI, an appointing authority will take account of the significance attached to the incident to be investigated.

12.12 Mrs Janice McNess, whose son was killed in an aircraft accident, was critical of the RAAF's failure to conduct a Board of Inquiry (BOI). She maintained that the decision was a major injustice in the investigation into the deaths of her son and his navigator, Mark Cairns-Cowan. In her view:

Without it there could be no legal aspects to the inquiry, no sworn statements, no subpoenaed squadron members or witnesses and no opportunity for questions to be asked—only the more informal procedure of an accident investigation dependent on the goodwill of people to come forward with relevant information. This immediately downgraded the importance of the lost crew and took from them the chance for justice to be done and, importantly, to be seen to be done. In the years since the accident we have learnt from the families of other accident victims that boards of inquiry do not always provide the answers, but at least they do increase the chances of a fair outcome.⁷

12.13 She argued that as a consequence of not having a BOI:

...we were left with unanswered questions, no possible redress and an unsatisfactory finding of 'probable loss of situational awareness', with too little emphasis on lack of currency, poor crewing, poor choice of exercise for a largely uncurrent Squadron, and too much emphasis on pilot fault—a point that remains unprovable.⁸

12.14 On the basis of the guidance now offered in the Administrative Inquiries Manual, and on a general appreciation of the serious nature of the incident, it would seem that Mrs McNess had strong grounds for her complaint. The accident, which occurred in 1993, involved the crash of an F-111C and claimed the lives of two serving personnel.

12.15 In 1998, the Defence Force Ombudsman found a case where one incident was investigated by a BOI while a very similar complaint was investigated by an investigating officer with significantly lesser powers. In her report, she suggested that this raised a question about the inconsistency in assessing how serious incidents should be treated. She suggested that the ADF consider whether the Defence instructions needed amendment by way of offering more specific guidance which might minimise the problem.⁹

12.16 The Defence Administrative Inquiries Manual now offers such guidance (see following table).

7 *Committee Hansard*, 28 April 2004, pp. 62–4.

8 *Submission P32*, p. 1.

9 Commonwealth Ombudsman, *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, Report of the Commonwealth Defence Force Ombudsman pursuant to section 35A of the Ombudsman Act 1976, para. 2.56.

Table 7.1—Selecting the Most Appropriate Type of Inquiry

	ROUTINE INQUIRY	INVESTIGATING OFFICER	BOARD OF INQUIRY	GENERAL COURT OF INQUIRY
PHYSICAL FACTORS				
Number of witnesses	Small numbers	Best suited to small numbers	Any number	Any number
Commence inquiry	Very speedy	Speedy	Slower	Slow
Length of inquiry	Short	Relatively short	May be lengthy	May be lengthy
Complexity	Simple issues	Moderately complex	Complex issues	Complex issues
Ease of logistics	Easy	Relatively easy	More difficult	More difficult
Appointed by	CO	CO or higher	Delegated Appointment Authority	Minister
GRAVITY FACTORS				
Multiple deaths and injury of personnel	Not to be used	Not appropriate	Appropriate	Appropriate
Deaths or serious injury of personnel	Not to be used	May be used when facts are not complex, when member not on duty or when it arises from a Motor Vehicle Accident on duty but there are no suspicious circumstances	All other occasions	Appropriate
Sexual offences (<i>see</i> Paragraph 4.4)	No. <i>see</i> DI(G) PERS 35-3	No. <i>see</i> DI(G) PERS 35-3	No. <i>see</i> DI(G) PERS 35-3	No. <i>see</i> DI(G) PERS 35-3
Offences against the DFDA or civil criminal law	No, refer to Service police or civil police	No, refer to Service police or civil police	No, refer to Service police or civil police	No
Serious or systemic breakdown of Service discipline or morale	Not appropriate	Not appropriate	Appropriate	May be appropriate if most senior officer involved
Damage, loss or malfunction of major defence assets	Not appropriate	May be used when facts are not complex	Appropriate	May be appropriate
Where a damages claim against the Commonwealth is likely	Yes, if very minor and matter is simple	Yes	Major loss or damage only	Major loss or damage only
Loss or damage to defence property	Yes, if matter is simple	Yes	Major loss or damage only	Major loss or damage only
Motor vehicle accident not involving death or serious injury	Yes	Yes	Exceptional complexity only	Not appropriate
Redress of Grievance	Yes	Only where matter is serious and complex	Yes, where matter is very serious and extremely complex	No
Complaint of	Yes	Yes, if matter is serious	Yes, if matter is	No

	ROUTINE INQUIRY	INVESTIGATING OFFICER	BOARD OF INQUIRY	GENERAL COURT OF INQUIRY
harassment or discrimination		and complex	very serious and extremely complex	
Were there any international ramifications?	Not appropriate	Not appropriate	Yes, but it may have to be a Combined Board of Inquiry	No
Potential for media scrutiny	Yes, but only in unusual circumstances	Yes, but only in unusual circumstances	Yes	Yes
LEGAL AND OTHER FACTORS				
Can Australian Defence Force witnesses be compelled to attend to give evidence?	Yes	Yes	Yes	Yes
Can civilian witnesses be compelled to attend to give evidence?	No	No	Yes	Yes
Is evidence taken on oath or affirmation?	No	No	No, but may be if any person is likely to be affected by injury	Yes
Can witnesses claim the privilege against self-incrimination?	Yes	Yes	No	No
Can witnesses refuse to answer questions if they have a reasonable excuse?	Yes	Yes	Yes, but not on grounds of incrimination	Yes, but not on grounds of incrimination
Penalties specified in the Defence (Inquiry) Regulations can be applied to witnesses who refuse to appear or answer questions?	No	Yes	Yes	Yes
May affected persons be legally represented?	No (but they may seek legal advice prior to being interviewed)	No (Note: this is at the discretion of the Investigating Officer but is not usual).	Yes	Yes
Will a transcript be required?	No	No	Yes	Yes
Is the inquiry to be held in public?	No	No	Yes, as a matter of policy, unless otherwise directed by the Appointing Authority (inquiries involving major accidents normally should be open).	Yes
Is a report of the inquiry required?	Yes	Yes	Yes	Yes

12.17 A number of witnesses also expressed concern about the determination by the appointing authority on whether to hold a BOI. A witness, who lost a relative in an accident, was asked whether she would like an investigation rather than a BOI. She told the committee that:

Basically, an investigation seemed to have a lot more advantages, so I agreed to go ahead with it, until I received an anonymous phone call a few weeks later and someone explained to me the whole process...I was so misinformed in a lot of areas.¹⁰

12.18 A BOI was held into this matter.

12.19 In his issues paper, Mr Michael Griffin referred to the policy applying to decisions regarding the selection of the type of investigation following an incident. He stated:

Annex E to chapter 2 of the Manual indicates that a Court or Board of Inquiry (BOI) is appropriate for death and serious injury. It indicates that an investigating officer (IO) may be used in the case of a single death or serious injury 'when the facts are not complex, when the member is not on duty or when it arises from a Motor vehicle accident but there are no suspicious or unusual circumstances'. The annex notes that an IO is not appropriate for 'serious systemic breakdown of Service discipline or morale' but a BOI is.

12.20 He noted that despite this policy background, it was decided not to hold a BOI into the following recent serious incidents:

- major systemic problems involving brutality and harassment in at least two training schools,
- several suicides including the presence of disturbing ethnic undertones and systemic breakdown of morale,
- two cadet incidents involving female minors,
- major equity problems in a training unit,
- major drug problems in a unit, and
- major systemic morale and security problems.

12.21 He concluded that:

These various incidents amounted to some twenty separate matters which Defence elected to inquire into by appointing an investigating officer rather than by holding a public BOI in which evidence would be given under oath in public and be available for testing under cross-examination. By contrast

10 Confidential *Committee Hansard*, 9 June 2004, p. 5.

the evidence given to the investigating officers was not on oath and not given in public, nor was it tested by cross-examination.¹¹

12.22 Clearly, the more rigorous procedures required of a BOI offer members and their relatives a greater sense of certainty that the inquiry will be an impartial and well resourced investigation and that the interests of any potentially affected person will be appropriately safeguarded. It is important that appointing authorities adhere closely to the stated policies governing the appointment of an administrative inquiry. In a number of cases this clearly has not happened. Again the problem does not appear to be with the guidance offered in the Defence Manuals but with the failure to observe it. The problem is with enforcing adherence to stated policy.

12.23 Despite the standing of a BOI, there is always the option to choose an inquiry with a higher status for incidents of even greater significance. Mr David Richards, a barrister and solicitor, was of the view that the BOI established to inquire into the accident on HMAS *Westralia* should have been elevated to a general court of inquiry. He stated:

...a general board of inquiry would have been constituted to include a civilian Federal Court judge. The fact that there was a civilian judge presiding over a general board of inquiry would have given the public confidence. It would also have given members of the ADF and the families of the deceased, if you are talking about the *Westralia*, confidence that it was conducted independently. My submission continually talks about perceived independence. I am not suggesting that in many cases, even cases before this inquiry, there has not been independence, but perceived independence in a criminal justice system is as important as independence. To answer your question, a general inquiry would have had perceived independence.¹²

12.24 The committee agrees with his observation.

12.25 In its audit of BOIs, Acumen Alliance found that, while ADF policy gives commanders flexibility in selecting an administrative inquiry format or combination of formats suitable to the incident, commanders and legal officers do not appear to utilise this flexibility. It recommended that TDLS further instruct Commanders and legal officers in alternative applications of the administrative inquiry options. Instruction could entail a 'combination of training, briefing sessions and communication'.¹³

11 Michael Griffin, Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, paras 73–75.

12 *Committee Hansard*, 9 June 2004, p. 40.

13 Acumen Alliance, *The Defence Legal Service, Board of Inquiry Management Audit*, October 2003, p. 7.

Committee view

12.26 The committee supports this recommendation. As noted above, however, the committee is more concerned with enforcing policy. It fears that while education may offer some improvement, it is not the complete answer. Again, it would appear that an independent body would have the objectivity and foresight to assess correctly the need to appoint a BOI or a General Court of Inquiry and make such a recommendation notwithstanding possible pressure from the relevant Service to down grade an inquiry to a lower level. This conclusion supports the recommendation for the establishment of the ADFARB as the appointing authority for serious incidents.

The effectiveness and fairness of BOIs

Procedural fairness

12.27 The Defence Inquiries Manual makes clear that certain procedures must be followed to ensure that the principles of procedural fairness are observed during a BOI. It advises that:

- where the President of a BOI considers that any evidence given before the Board may affect a person who was not present or represented before the Board when the evidence was given, the President *may* forward a copy of the relevant evidence to the person (emphasis added);¹⁴
- where the President has forwarded a copy of the relevant evidence to a person who may be affected by evidence, the President *should* inform the person that they have a right to apply to appear before the Board and to submit any written statement (emphasis added);¹⁵
- affected persons must be given the opportunity to be present during the Board hearings;¹⁶
- the Board cannot make adverse findings against a person who has not been given the opportunity to be heard;¹⁷
- a member who comes before the Board late in the proceedings may require an adjournment to familiarise themselves with all the evidence that has already been given;¹⁸
- the Board will be required, at the conclusion of the evidence to give notice to any individual against whom it is contemplated that adverse findings may be made.¹⁹

14 Australian Defence Force Publication, Administration Series, *Administrative Inquiries Manual*, para. 7.56. Emphasis added.

15 *ibid.*, para. 7.56. Emphasis added.

16 *ibid.*, para. 7.49.

17 *ibid.*, para. 7.49.

18 *ibid.*, para. 7.49.

12.28 Matters of procedural fairness were a significant issue in investigating officer inquiries and in the ROG process, and underlined the importance of having sure and definite procedures in place for all administrative inquiries.

12.29 As an added precaution to safeguard the interests of PAPs, the committee recommends that advice in the Inquiries Manual be reworded to convey certainty that affected persons will be afforded their rights.

Recommendation 31

12.30 The committee recommends that the language used in paragraphs 7.56 of the Defence (Inquiry) Manual be amended so that the action becomes mandatory.

12.31 The effect is that the President must forward a copy of the relevant evidence to a PAP and must inform that person that they have a right to apply to appear before the Board and to submit a written statement. This amendment would make the advice consistent with the prescriptive language used in paragraphs 7.49 and 7.52. It removes any uncertainty about the responsibilities of the appointing authority or the President and makes sure that anyone likely to be adversely affected by the inquiry is to be provided with the appropriate safeguards to protect their interests.

Recommendation 32

12.32 Similarly, the committee recommends that the wording of paragraph 7.49 be rephrased to reflect the requirement that a member who comes before the Board late in the proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.

12.33 One matter mentioned with regard to procedural fairness that attracted strong comment was the right to legal representation.

Right to legal representation

12.34 During the course of a BOI, evidence may be presented that reflects adversely on individuals. Procedural fairness dictates that people who are the subject of adverse comment should have the right to refute any such allegations. This does not appear to have been the case in the BOI into the fire aboard HMAS *Westralia*. A member who gave evidence to this BOI was only later to discover during the Coroner's inquest that Counsel assisting the BOI during his address behind closed doors had cast doubt on the conduct of this member and on the veracity of the member's evidence. The member told the committee:

On discovering the BOI's view on my evidence, I cannot begin to tell you the negative effect this has had on myself and my family. After 21 years of devoted service and giving my all to the Navy, I'm now left feeling

betrayed, humiliated and degraded, especially since I was not given the opportunity to defend myself.²⁰

12.35 Given the serious nature of the matters under investigation by a BOI, natural justice would require that members likely to be affected by a BOI should have the right to legal representation. Judging by the comment by Air Commodore Harvey, the ADF's understanding, however, is that the representation of individual people is not an issue. He told the committee that at the time of engaging Acumen Alliance to conduct the audit:

Our experience of recent boards of inquiry at that stage was that there was an extensive process to allow for people to be represented before boards of inquiry if they were affected people.²¹

12.36 Evidence before the committee counters this observation. The BOI inquiring into the *Westralia* incident gave rise to complaints that deceased members had no legal representation. Mr Pelly, whose daughter died aboard the ship, was concerned about the lack of due care and attention given to the needs of family members during a BOI. He was particularly concerned about the lack of representation for those who died in the accident. He told the committee:

There was nobody there who bothered to defend the four dead seamen. There were statements made, and I still believe that some of them were derogatory; one, in particular, towards my daughter. In a normal legal sense, had there been somebody there to protect my daughter's interest, I am sure that that would have been fixed up at that board of inquiry. I believe that the Navy did not think it was in its best interest to defend her.²²

12.37 He explained further:

This [BOI] is the area where I began to fight, when I noticed the way that my daughter had been maligned at the board of inquiry. It was not done openly. To me, it was bloody underhanded. From the way I read the information in the board of inquiry, an observer would have got the impression that (a) my daughter had disobeyed a lawful command and gone into the engine room and (b) had panicked and contributed to her own demise. Both of those things were completely wrong. I had gut feelings about them because I knew my daughter and her character very well and it completely went against her character, so I started to investigate those things. It took me five years to finally get somebody to admit—and it was during the coroner's inquiry—that my daughter was ordered into the engine room.²³

20 Confidential *Submission C11*.

21 *Committee Hansard*, 10 August 2004, p. 16.

22 *Committee Hansard*, 22 April 2004, p. 39.

23 *ibid.*

12.38 The coroner inquiring into the four deaths on board HMAS *Westralia* also observed:

The families of the deceased were not represented before the Board of Inquiry and over an extended period of time they have raised concerns in relation to the circumstances surrounding the deaths. Initially it was the view of the families that an inquest was not the desired means of airing outstanding issues and that a public inquiry or Royal Commission would provide a more suitable forum.²⁴

12.39 Defence regulations and the Defence Inquiries Manual now provide for the legal representation of deceased members. They advise that legal representation is provided to protect the interests and reputation of a member or deceased member during the inquiry.²⁵ The Manual states:

As a matter of policy, a person deemed to be likely to be affected by the inquiry including a deceased member is to be provided with legal representation by a Service legal officer at Commonwealth expense.

12.40 According to the Manual, this arrangement should be authorised by the appointing authority prior to the commencement of the inquiry, or the President where the inquiry has commenced. This guidance is based on subregulation 33(3) of the Defence (Inquiry) Regulations. The wording of this regulation, however, does not necessarily convey the meaning that the right to legal representation for a deceased member is guaranteed but rather is conditional on the President authorising that person to appear.

12.41 The regulation reads:

- (1) Where the President of a Board of Inquiry considers that a person may be affected by the inquiry conducted by the Board, the President *may* authorize that person to appear before the Board.
- (2) Subject to subregulation (3), a person authorized to appear before a Board of Inquiry may appoint another person to represent the first-mentioned person for the purposes of the inquiry and the person appointed is authorized to appear before the Board.
- (3) A person authorized to appear before a Board of Inquiry shall not appoint a legal practitioner to represent that person for the purposes of the inquiry except with the approval of:
 - a. where the inquiry has commenced—the President; or
 - b. in any other case—the appointing authority (emphasis added).

24 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, p. 20.

25 Australian Defence Force Publication, Administrative Series, *Administrative Inquiries Manual*, para. 7.18.

12.42 Air Commodore Harvey indicated that Defence are in the process of amending regulation 33 to enshrine the right of representation.²⁶ During an Estimates hearing on 31 May 2005, the Senate Foreign Affairs, Defence and Trade legislation Committee asked about progress on the redrafting of the regulation. Air Commodore Harvey replied that he was not in a position to answer the question and would get back to the committee with a response.

12.43 To indicate its approval of the proposed amendment to regulation 33, the committee puts on the record a recommendation to that effect.

Recommendation 33

12.44 The committee recommends that the wording of Defence (Inquiry) Regulation 33 be amended to ensure that a person who may be affected by an inquiry conducted by a Board of Inquiry will be authorized to appear before the Board and will have the right to appoint a legal practitioner to represent them.

12.45 Further that a regulation be promulgated by the ADF that a person who has died as a result of an incident under investigation by a BOI will be entitled to legal representation.

Preconceived notions about a BOI

12.46 Much dissatisfaction with an inquiry can stem from notions that may take hold before an inquiry is even established and which in large part derive from the manner in which the initial incident was managed. Ms Joan Gurr's experiences with the Navy following the loss of her son Cameron, from HMAS *Darwin*, provides an example of the sensitivity required in such situations.

12.47 The Navy advised the committee that the Chief of Staff, Maritime Command, had maintained regular personal contact with Ms Gurr since the loss of her son. She was provided with every support. Indeed, Ms Gurr expressed to the committee her appreciation for the level of contact with the Navy, the assistance of the Defence Community Organisation and the fact that during the search for Cameron the Navy 'left nothing to chance'.²⁷

12.48 Navy made arrangements for Ms Gurr and a close friend to travel to Christmas Island and then on to HMAS *Darwin* during the search for her son. This allowed her to meet her son's shipmates and to be briefed personally on the conduct and scale of the search operation. She was also provided with updates of progress on the search operation and was notified about any media statements to be issued or

26 *Committee Hansard*, 10 August 2004, p. 12.

27 *Committee Hansard*, 21 April 2004, pp. 52–53.

interviews to be conducted.²⁸ Provision was also made for Ms Gurr to attend part of the BOI at Commonwealth expense.²⁹

12.49 A Critical Incident Stress Management team consisting of a Navy psychologist and peer support member was sent to the ship while the search was still underway to work with Leading Seaman Gurr's shipmates. The team provided several group debriefings and sessions for individuals as required. The Critical Incident Stress Management team advised HMAS *Darwin* members at that time that they could obtain further follow-up support through the psychology section if they required it.³⁰

12.50 The support and assistance offered to Ms Gurr following the disappearance of her son was in stark contrast to that experienced by the families of those who died in the fire in HMAS *Westralia*. Where Ms Gurr was very appreciative of the support she received from the Navy in terms of assistance from the DFO and the offer to attend the BOI hearings, the families of those who died in HMAS *Westralia* describe a very different experience. As noted previously in this report, one of the most important considerations for next of kin is to be kept informed of all developments in an investigation.

Communication and the provision of information

12.51 Some witnesses believed that the ADF's focus during BOIs can be too narrow: that it does not always appreciate that, while establishing the cause of an accident is important, family members have another set of more personal questions they need answered. The committee noted many examples where bereaved families simply wanted to know the circumstances surrounding the death of their loved one. For example, despite the care and attention given to Ms Gurr following the loss of her son, she was unhappy with the thrust of the inquiry. For her:

...it is the personal issues that involved Cam. They are the answers that I needed. That is why I believe that, in my submission, I have been misunderstood as far as not being informed goes, because I needed to know the answers to the questions about the doona jacket. I need to know about the email that came from one of the other ships that was being queried. The personal things—I needed answers and I did not get them.³¹

28 ADF, *Submission P16*, p. 68.

29 *Committee Hansard*, 21 April 2004, p. 54. In addition, the Navy advised the Committee that the Chief of Staff telephoned her on the anniversary of Acting Leading Seaman Gurr's disappearance and over the following three days as her distress was very evident. He has also been in regular contact with her in relation to plans for a memorial to be erected on Christmas Island. He accompanied Ms Gurr to Christmas Island for the Gurr Memorial unveiling in Flying Fish Cove on 9 September 2003.

30 *Submission P16*, pp. 67–8.

31 *Committee Hansard*, 21 April 2004, p. 48.

12.52 The relative of a member killed in an accident informed the committee that she felt she had 'to continuously fight for information'. She explained that she was informed about the extent of injuries and cause of death by the funeral director on the way to the funeral. She stated:

I feel pity and sorrow for other families who have had to endure a board of inquiry. I am sure that most would have had no military background or experience. The whole process would have been extremely daunting, not to mention being a strain while trying to deal with the grief of the loss of a loved one.³²

12.53 The failure to involve families in the investigative process can also have serious, long-term administrative consequences for the ADF. Some witnesses interpreted the lack of information in a more sinister light. The JSCFADT's 1999 report into military justice procedures in the ADF noted this tendency. It observed:

When relevant information is not forthcoming, it is understandable that next of kin perceive the process as a 'cover up', and an example of the ADF closing ranks to protect itself, or senior officers, from criticism.³³

12.54 Evidence to this committee leads to the same conclusion. A number of submitters, who felt excluded from the inquiry processes into the accident on HMAS *Westralia*, consequently formed the view that there had been a white-wash to protect senior officers. Mr Kevin Herridge, who was a serving crew member in the *Westralia* at the time of the fire stated:

I know that some witness and family members of the deceased felt intimidated by the fact that the BOI was a high profile Naval inquiry being held in a isolated Military establishment with little or no means for the general public to attend, therefore one could argue that the Navy or indeed Defence force for that matter was trying to keep it 'In House'.³⁴

12.55 The father of a deceased crew member told the committee:

...a panel of five was hurriedly bought together to hold an inquiry into the events of the day. Three out of the five were naval personnel so the results they would come up with would show the Navy to be almost blameless.³⁵

12.56 This distrust of the ADF resulted in some family members campaigning for an investigation to be reopened or to have other avenues of investigation taken up, such as the Coronial Inquest.³⁶ Indeed, in response to their dissatisfaction with the conduct

32 In camera *Committee Hansard*, 9 June 2004, p. 3.

33 Joint Standing Committee on Foreign Affairs Defence and Trade, *Military Justice Procedures in the Australian Defence Force*, 1999.

34 Kevin Herridge, *Submission P33*.

35 Victor Meek, *Submission P26*.

36 See for example, *Submissions P51, P3 and P30*.

and outcome of the BOI, the families of those who died in the fire approached the WA coroner to hold an Inquest. The coroner reported on 19 December 2003.

12.57 The evidence indicating a lack of trust and confidence on the part of those who have experienced a military inquiry or investigation was of particular concern to the committee. Indeed, a dominant thread running through this report is concerned with the perceived and real lack of transparency and accountability in the way the ADF conducts an inquiry or investigation.

Conflicts of interest and the independence of the inquiry

12.58 A number of witnesses were troubled by the conflicts of interest that can emerge in routine and investigating officer inquiries. At times the relationships between the appointing authority, investigating officer and the complainant or the person subject of the inquiry clearly compromised the integrity of the process.

12.59 This type of potential conflict did not draw significant comment with regard to BOIs, though Mr Earley told the committee that:

I have written to the relevant people about counsel assisting boards of inquiry not being drawn, wherever that is possible, from the commands that are appointing the board of inquiry—in other words, the command legal officer normally should not be the counsel assisting in a board of inquiry involving that command because his job is to advise the commander.³⁷

12.60 The committee endorses this suggestion. Furthermore, it is of the view that a strict standard of impartiality must apply to all members of a BOI who should have no personal interest in the incident under investigation. The requirement to produce a written statement of independence should apply to Board members (see for example recommendations 28 and 29(c)).

12.61 The main criticism levelled at the independence and impartiality of BOIs was in the broader context where the reputation or public standing of the Service was at stake. For example, Mrs Yvonne Sturgess felt that the investigation into the death of her son, Corporal Jason Sturgess, in a motor vehicle accident had serious flaws, particularly the lack of consideration given to the state of the Armoured Personnel Carrier (APC). She was of the view that the ADF 'is incapable of objectively investigating itself' and stated her belief that the problem could be addressed by:

...the ADF having non-combat related deaths investigated by an independent and adequately resourced and funded authority with the powers to allow it unrestricted access to records, facilities and personnel. Also normal operations such as maintenance of equipment and compliance with procedures should be open to regular audits and investigations by a

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

suitably qualified and independent authority or company engaged by and reporting to parliament not the ADF.³⁸

12.62 Mr Jonathan Ford, an uncle of Corporal Sturgess, was also of the view that ADF members operate under pressures that may cloud their objectivity and supported the proposal for an independent body to investigate such accidents. He stated:

Because of the cultural reasons, even if you are professional enough to put it aside and think that nothing you have said will be taken in a blame culture and it will not affect your career, it has to have an underlying effect. Regardless of what the media might think, people—certainly our family—would have greater faith if there had been either a ministerial inquiry or supervision by a ministerial inquiry or the parliament itself. At least then there is an honest, objective appraisal of the whole accident. That is why we really welcome this inquiry.³⁹

12.63 To Ms Gurr's way of thinking, the investigation into the loss of her son was intended to limit as much as possible any damage to Navy's reputation. She observed:

As laymen it is difficult to grasp the legal complexities of such investigations and the frustration that people have, when it appears that nothing is resolved for the person or his/her family with the concentration of the investigation appearing to have more focus absolving the Defence Department of any blame.⁴⁰

12.64 The highly publicised BOI into the fire aboard HMAS *Westralia*, drew criticism for its lack of objectivity. Mr Pelly in particular was forthright in expressing his views about bias in the BOI. He told the committee:

When we [and Mr Brian Smith] received the BOI report on 17 December 1998, we both knew instinctively that something was wrong. The report was more interested in reducing damage and embarrassment for the Navy than in giving an accurate assessment of what happened on 5 May 1998.

12.65 He stated that the BOI was 'nothing more than a farce' and, in his opinion, 'was not run as an open investigation; it was run as a partially open attempt to reduce the impact of any embarrassment to the Navy'.⁴¹

12.66 In rejecting such views, Vice Admiral Chris Ritchie stated:

It is my personal belief that the *Westralia* board of inquiry was an independent, public and open fact-finding process, particularly in light of the fact that there were two civilian experts on the board. Contrary to the unfounded allegations of some that the inquiry was an internal Navy whitewash, rigged to make predetermined findings, the board in fact judged

38 *Submission P14*, p. 5. See also *Committee Hansard*, 22 April 2004, p. 23.

39 *Committee Hansard*, 22 April 2004, p. 25.

40 *Submission P2*, p. 1. See also Mr Allen Warren, *Submission P5A*, p. 3.

41 *Committee Hansard*, 22 April 2004, p. 38.

Navy's actions by objective civilian standards. It identified the problems and recommended reforms in a way that met Navy's immediate needs, as well as satisfying the external probity standards of the Western Australian coroner.⁴²

12.67 Indeed, the committee notes that the coroner praised the work of the Board and its achievements in promptly identifying a wide range of important safety issues. In brief, the coroner found that the BOI report 'contained an excellent analysis of safety issues'.⁴³ While Navy's clear priority was to identify any systemic failures and prevent any recurrence of the problem, others involved in the inquiry had broader expectations of the process.

12.68 The coroner, in particular, reminded the Navy about the seriousness and extent of its duty of care obligations. He censured the Navy for its 'gross lack of supervision':

In my view the navy has a responsibility for the safety of personnel working on its ships irrespective of any outsourcing arrangements.

...

The fact that no one in the navy had any knowledge of which type of hoses had been contracted for even after they were installed demonstrated a gross lack of supervision of the contract.

...

In my view if the navy is to demonstrate genuine commitment for the safety of its personnel it should ensure that there is some supervision of new parts being installed on its ships. The commonwealth was the purchaser of the hoses and could certainly have checked to ensure that it got what it paid for and that certification and safety issues were adequately addressed.

...while there may be considerable benefits, including safety benefits, associated with outsourcing to competent and skilled organisations, particularly when the navy's competencies in specific fields of knowledge may be limited, that does not mean that there should be no navy supervision.⁴⁴

12.69 Even though senior Navy officers quoted from the coroner's report to support the Board's findings and to uphold the integrity of the process, the coroner's words are a salutary reminder of the important role an independent authority can have in looking objectively at evidence surrounding an incident. The committee has already discussed

42 *Committee Hansard*, 1 March 2004, p. 18.

43 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, pp. 15 and 22.

44 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, pp. 114–115.

the blind spots that committed and dedicated ADF people can develop toward failings in the Forces. With clear vision, the coroner was well placed to identify, and speak freely about, shortcomings in the Service.

12.70 An independent inquiry into the loss of Leading Seaman Gurr may have removed the suspicion from the minds of some people that those responsible for the circumstances leading to the disappearance of the sailor had escaped blame. In this case, where excess drinking was found to have been a contributing factor, those charged over the incident were the sailors Gurr had been drinking with—not the senior officers duty bound to ensure the safety and well-being of those under their command. Ms Gurr told the committee:

...I knew from the word go that any punishment that was dished out would be for the guys breaking the rules who were in the stern the night my son disappeared. That is fair enough, but, as I said, they were doing what they were doing because they were getting away with it and they knew they were going to get away with it. If we need to take a look at anybody we need to take a look up the chain, because somebody needs to make sure the rules are enforced on these younger people.⁴⁵

12.71 The committee is left with the same view that the BIO into the death of Leading Seaman Gurr needed to address the larger question about the accountability of the higher echelons in the chain of command. Junior offices may flout the rules but superiors are ultimately responsible for the conduct of those under their command. In the committee's view, the responsibilities of those in the chain of command warranted the closest scrutiny by a detached and objective body.

12.72 The following observation by Ms Gurr sends a strong message about the possible limited value of a Service investigating itself:

You can make rules and you can keep changing those rules, but you have to enforce them. You have to make sure they are enforced. My feeling is that, five months, 12 months or two years down the track, all the new rules will be in place and all the new signs will be put up, again nobody will be making sure that they are policed.⁴⁶

12.73 It may be the case that an independent body able to focus on areas that the ADF may prefer to avoid is better placed to highlight or expose deficiencies in the Services. In this way, it may also be more effective in having a stronger and longer term influence on changing poor work practices. It certainly would speak with authority on matters such as the responsibility of senior officers to ensure that those under their command abide by the rules and behave appropriately.

12.74 Justice Roberts-Smith acknowledged that one of the problems of BOIs is the 'lack of perception of independence' but, at the same time, recognised the advantages

45 *Committee Hansard*, 21 April, 2004, p. 44.

46 *Committee Hansard*, 21 April 2004, p. 48.

in the inquiry 'being directed and scoped by officers of suitable military experience'. At first he suggested that 'were a properly independent military judiciary to be established, a DFM nominated by the JAG could be appointed to preside at a BOI'.⁴⁷ On reflection and after discussions with former Chief Justice Lamer, he was of the view that this course should be the exception. He made a clear distinction between administrative and judicial procedures, arguing that serving judicial officers should not be on a BOI.⁴⁸

12.75 The committee cannot stress strongly enough the importance of having an investigating body above any suspicion of partiality. Evidence to this committee shows that the credibility of an inquiry comes under immediate challenge as soon as there is any hint of a lack of independence. This evidence supports the committee's recommendation for an independent authority to be responsible for the appointment of members to a BOI type of inquiry.

The competence and conduct of BOIs

12.76 The report has already considered and identified concerns with the level of competence of those conducting administrative inquiries. It has noted that the composition and procedures of a BOI reflect its importance and that higher standards are expected of board members. The following section looks at the gathering, presentation and testing of evidence.

12.77 The BOI into the accident on HMAS *Westralia* drew heavy criticism for the way the investigation was conducted. The committee is not in a position to re-examine the evidence presented at the hearings. It can nevertheless draw attention to areas of concern.

12.78 One ADF member questioned the quality of the basic investigative procedures such as those taken to secure the accident scene on board the *Westralia*.⁴⁹ The competence and judgement of the initial investigating team also came under question for the manner in which it obtained witness statements. Indeed, the initial investigation of the site of an accident or incident has been identified by other witnesses as a major concern for inquiries concerned with suicides. One member contended that the ADF does not possess the expertise or experience for engaging in this type of forensic inquiry and suggested that 'Defence Force personnel should be trained in the correct procedures for handling and preserving crime scenes...'⁵⁰ This matter about the competence of investigations was discussed in chapters 8 and 9. The *Westralia* experience supports the committee's recommendation that, in terms of

47 *Submission P27*, p. 7.

48 *Committee Hansard*, 21 June 2004, pp. 42–3.

49 *Submission P33*.

50 *Submission P33*.

forensic evidence, preliminary investigations into sudden deaths and serious accidents should be in the hands of the relevant police force or the AFP.

12.79 The committee now turns to the hearing process of a BOI to consider whether the level of experience and training of board members is equal to the difficult task of conducting such inquiries. It also looks at whether their performances meet public expectations.

12.80 Both families of the deceased and witnesses in the *Westralia* BOI felt aggrieved by many aspects of the conduct of the inquiry. The committee has already mentioned complaints about the failure to provide legal representation, difficulties in obtaining relevant information and the apparent lack of independence of the investigators. For Mr Lyndon Pelly, whose daughter died in the *Westralia* fire, the inquiry also lacked thoroughness:

Post BOI and during the coroner's inquest, new evidence was revealed and inspections and testing of this evidence was carried out.

One such piece of evidence was a high pressure fuel line with a hole in it, found to be loose and removed from the engine after the BOI, then kept hidden in a cabin on the ship.

From there, this possibly important piece of evidence was handed over to a contractor (ADI) and kept under lock and key for four years. Numerous attempts were made by the families' legal representatives to locate this piece of evidence through the navy without success.

This evidence was finally given up only after the holder (ADI) was challenged by Mr Collaery during the Coroner's inquiry to produce it.⁵¹

12.81 A crew member, who was in the engine room at the time of the fire, also felt that important evidence had been discounted. The BOI had requested that he read from a notepad in which he had written, at the time of the fire, the names of those still in the engine room. The crew member told the committee that he was not required to tender the notepad as evidence but that counsel assisting the BOI, in his closing submission, suggested that the notepad was 'supposedly never found or tendered as evidence'.⁵²

12.82 Whatever the reason behind the confusion about the status of the notepad, the crew member saw it in light of Navy's attempt to protect its image. He told the committee:

It was possible that list, made within seconds of the fireball going up, contained the names of four people which would later be found dead...whereas it had already been widely reported in the Australian media

51 Lyndon Pelly, *Submission P30*.

52 In camera *Committee Hansard*, 22 April 2004, p. 43.

that the captain had ordered the engine room to be sealed and the CO2 drench to be discharged.⁵³

12.83 His interpretation again reinforces the notion that the BOI into the accident on the *Westralia* was compromised by its lack of independence.

12.84 In returning to the matter of the competence of board members, a relative of a member killed in an accident that had been investigated by a BOI, believed that such boards were appropriate but that appointed members should be better trained in how to conduct such inquiries.⁵⁴

12.85 It should be noted that the Defence Force Manual recommends that the appointing authority should appoint a Service legal officer, to be known as 'the Counsel assisting the inquiry', to assist the BOI. Counsel assists the Board 'by identifying the issues, questioning and presenting the evidence, advising on questions of law and procedure, which will enable the Board to concentrate on considering and weighing the evidence presented to the inquiry'.⁵⁵

12.86 Even so, senior ADF members informed the committee that they were aware of the importance of having adequately trained investigators and that measures are in place to improve training, including for members of BOIs. Air Commodore Harvey told the committee:

The training that is provided to people who are non-legal officers is probably better addressed by other people, but I do know from experience and can tell the committee that there is extensive training provided as part of the promotion courses and initial training courses and, more importantly, in relation to pre-command courses. We have invested a fair bit of time in recent years and months in developing and improving the training that is provided to commanding officers—and, in the case of Navy, executive officers—before they take over their command. These courses have components which consist of presentations by members of my administrative law staff, who go through and provide them with details about how to conduct inquiries and about administrative action in general. Although it is not formalised, there is a standing practice that anyone who is appointed to a board or as an investigating officer is able to, and regularly does, seek advice from legal officers. I think one of the recommendations from the Acumen Alliance review is that this process be formalised. We have accepted that recommendation and we are working towards implementing it.⁵⁶

53 *ibid.*

54 In camera *Committee Hansard*, 9 June 2004, p. 5.

55 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual*, para. 7.8.

56 *Committee Hansard*, 10 August 2004, pp. 1–2.

12.87 Clearly, for the ADF, the training of investigators and board members is a high priority and one that it takes seriously. The committee, however, is not convinced that extra courses and the provision of legal advice will suffice. In light of the failings of previous undertakings to improve the training of investigators, the committee has already expressed its strong doubts about the likely success of the new initiatives (see paras 8.86–8.94). To provide greater certainty that BOI members have the appropriate skills and experience necessary to conduct a proper inquiry and have the standing to engender confidence in the proceedings, the committee believes that new arrangements must be introduced for the selection and appointment of such members.

Access to expert advice

12.88 While the evidence before this committee raised certain concerns about the professionalism and training of investigating officers, a particular emphasis with BOIs was on the importance of having expert advice available. A BOI is intended to investigate serious or complex matters and is expected to have the necessary resources and expertise available to inquire into and consider the matters under investigation.

12.89 Considering the significance and complexity of the matters under investigation, expert assistance may be helpful at the early stage of drafting the terms of reference. One witness involved in a number of BOIs told the committee:

As a climber and trekker of 29 years experience, it was apparent to me that by utilising a Subject Matter Expert (SME) during the conduct of a Quick Assessment would have significantly assisted Counsel in identifying key issues and developed a focussed TOR. The British Army, which runs a significantly larger Overseas Adventurous Training program than Australia, deploys a Legal Officer and SME to the incident site of an accident to conduct the Quick Assessment, a practice borne out of previous experience with BOI.⁵⁷

12.90 He recommended that a subject matter expert be brought in to assist with the conduct of a Quick Assessment.⁵⁸ The committee endorses the view that Appointing Authorities must consider calling in relevant independent experts to assist in drafting terms of reference.

12.91 Some people with experiences of a BOI certainly appreciated the value of having relevant experts available to advise the Board during the inquiry. The type of expertise, however, extends beyond legal practice. One witness suggested that, where inquiries investigate matters that are not familiar to Board members and counsel, a subject matter expert needs to be engaged in order to assist the inquiry process.⁵⁹ He told the committee:

57 Confidential *Submission C5*, p. 2.

58 Confidential *Submission C5*, p. 2.

59 Confidential *Submission, C5*, p. 3.

Often, practices in technical areas can be counter-intuitive to the layman. There is a risk that the layman's perceptions may lead into areas of inquiry that ultimately may be fruitless and wasteful of time and effort. This is particularly so in trekking and mountaineering at high-altitude and Big Wall climbing. These activities are foreign to most Australians whose opinion may be shaped by sensationalist and shallow media reporting as well as popular culture.

...

SMEs can also 'educate' the Board on technical matters to assist with their understanding of relevant issues.⁶⁰

12.92 He recommended that 'for inquiries into issues and activities of a technical nature that is unfamiliar to the Board, an SME should be engaged to assist and advise the Board.'⁶¹

12.93 The committee notes that despite the criticism levelled against the BOI into the fire on HMAS *Westralia*, the coroner concluded that the report contained 'an excellent analysis of safety issues'.⁶² The committee acknowledges that the ADF is aware of the advantages in having relevant experts on a BOI. Lieutenant General Leahy stated:

In the administrative sense, there have been examples where we have sought the assistance of very highly qualified people, and I am thinking now of the Royal Australian Air Force reseal and deseal incident, where the president of the board was a civilian reservist lawyer who brought his particular skills to that board. I know of other examples from other courts of inquiry where we sought the assistance of independent authorities—people with particular skills. In inquiries that Army has conducted...we do not just pop out a recommendation and accept it; they are then considered in detail. For the case of the SAS soldier, they were considered in detail by eminent reservists, both as QC, SC, as practising Crown prosecutors and others. I think that brings a sense of impartiality, transparency and objectivity.⁶³

12.94 The committee recognises the importance of having independent experts to assist an inquiry and believes that it would be remiss of any appointing authority to fail to acknowledge the need to provide for relevant expert assistance. It endorses the recommendation that an SME be engaged to assist and advise Board members for inquiries into matters of a technical nature unfamiliar to the Board.

60 *ibid.*

61 *ibid.*

62 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, p. 15.

63 *Committee Hansard*, 5 August 2004, pp. 8–10.

Delays

12.95 The ADF has procedures in place to minimise delays during a BOI. Before completing the terms of reference for a BOI, the appointing authority is to ensure that the scope of an inquiry is determined, that the terms of reference are appropriate and a time line is set.⁶⁴ This exercise should indicate the anticipated schedule for the inquiry and the resources required to conduct it.

12.96 To prevent unnecessary or unexpected delays during the course of a BOI, the Defence Force Manual states that the appointing authority is to monitor the progress of the BOI. This is to ensure that the BOI is not distracted by issues beyond the terms of reference or by taking evidence in connection with matters not strictly relevant to the inquiry.⁶⁵ It directs that:

The Board of Inquiry may inquire into any matter relevant to the Terms of Reference and may visit any place necessary for the conduct of the inquiry. If a line of inquiry is not relevant to the Terms of Reference, then there is no power to pursue it. The inquiry must remain focused on the terms of reference that have been authorised by the Appointing Authority.⁶⁶

12.97 Furthermore, the President is responsible for ensuring that lines of questioning are relevant to the Terms of Reference and it is his or her duty to identify issues that are strictly relevant to the inquiry which are to be pursued to resolution.⁶⁷

12.98 The ADF recognises that protracted BOIs are a major problem and some senior officers openly expressed their concern about the time taken to complete BOIs.⁶⁸ Colonel Ian Westwood, Chief Judge Advocate, identified one of the major difficulties in exercising judgment and discipline when conducting a BOI:

The judgment as to how far an inquiry should legitimately go is very much harder when you are dealing with administrative matters and looking at not just whether an event occurred, to a requisite standard of proof, but why it occurred. You will appreciate that that inquiry is rather like throwing a stone into a pond. The ripples will go out to the edge of the pond and they will then proceed up the various tributaries that feed it. At some point a judgment has to be exercised as to where you stop, but it is a very difficult judgment to exercise.⁶⁹

64 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual*, para. 7.10.

65 Australian Defence Forces Publication, Administrative Series, *Administrative Inquiries Manual*, para. 7.19.

66 *ibid.*, para. 7.27.

67 *ibid.*, para. 7.28.

68 See for example, Air Commodore Harvey, *Committee Hansard*, 10 August 2004, p. 9.

69 *Committee Hansard*, 10 August 2004, p. 11.

12.99 The BOIs into the two climbing accidents are clear examples of where unnecessary delays occurred. One witness involved in the inquiries observed that the 'stop-start' nature of the inquiries was 'totally unsatisfactory from the perspective of a PAP'.⁷⁰ He explained further:

Individuals who are potentially identified for adverse comment suffer a significant amount of stress, irrespective of whether they are faultless or there is blame or criticism made. The prolonged nature of the Inquiry process isolates individuals who have no moral or psychological support for a process that can take years.⁷¹

12.100 His views had the support of four other PAPs. He goes on to state that the period of uncertainty and lack of support continues long after the BOI concludes. Report writing, legal review, appointing authority deliberation, administrative action, redress of grievance procedure can add to the delay which means that the process may close years after the initial inquiry. For example the Everest BOI Report was released in May 2003, two years after the accident.

12.101 Another witness told the committee that the length of time that the BOI took has to be considered. She told the committee that there was a lot of confusion with the BOI in which she was involved:

...due to the fact that it stopped and started. Certain personnel were removed from the original panel and were replaced. There were rumours going around about cover-ups for certain personnel who were selected for the board. All this is yet to be investigated...⁷²

12.102 At the other extreme, the BOI into the fire on HMAS *Westralia*, has drawn strong criticism for being held too quickly. It was convened soon after the accident occurred. A number of people attributed the haste in conducting the BOI to Navy's desire to demonstrate decisiveness. One member observed that the 'quick formation of the BOI was to show that the Navy or Defence did not want to be seen as "dragging its feet"'.⁷³ This statement also reflects the pressures exerted by the potential conflicts of interest created when a Service investigates itself.

12.103 It should be noted that there will be rumour and innuendo surrounding a major incident but effective, transparent and inclusive processes would limit the opportunities for such speculation to gain ground.

12.104 The BOI into the *Westralia* was convened at HMAS *Stirling* and began hearings within a few days of the fire. A number of submitters construed the quick convening of the BOI at a location that was difficult for the public to access as an

70 Confidential *Submission C5*, p. 4; Potentially affected person (PAP).

71 Confidential *Submission C5*, p. 4.

72 In camera *Committee Hansard*, 9 June 2004, p. 12.

73 *Submission P33*, p. 1.

attempt by Navy to protect its interests and those of senior Navy personnel. The taking of statements from those involved in the fire at the same time the funerals for the deceased were occurring further reinforced this perception. Mr Kevin Herridge, a serving a crew member in the *Westralia* at the time of the fire, told the committee:

....it [the BOI] may have been a little premature given the fact that the funerals hadn't taken place and that the families and potential witnesses were still suffering from grief and shock. We can all appreciate the need to get the evidence whilst it is still fresh in people's minds but some people just wouldn't have been up to it.

Three days later, the day of the memorial service I was required to give my statement, this happened shortly after the service had finished and everyone was paying their respects to families and alike while I was detailed off to the administration building to formally give my statement to the lawyers. The timing of this was as you can imagine not the best. I was still suffering from shock and disbelief that this accident had actually happened and I was understandably still confused, in a state of distress trying to come to grips with the death of personnel in my charge. The interview lasted about six hours or so and was very disturbing.

Looking back now at the time of giving my statement I was probably not fit to do so. It wasn't until several days later when things started to sink in and become clearer that I started to remember more things that should have been included in my statement, this meant that I had to amend my original statement to correct the sequence of events.⁷⁴

12.105 The coroner found that the hearings were too close to the events for there 'to have been any realistic expectation that the families could have had sufficient composure to be able to approach the relevant issues in a reasonably analytical manner so as to be able to identify the issues of importance to them'.⁷⁵ He was of the view that some witnesses would still have been struggling with the shock of the horrific accident and grief at the loss of life which may have caused them to block out certain events from their memories. He concluded:

While I have great respect for the work of the Board of Inquiry and its achievements in promptly identifying a wide range of important safety issues, the Board of Inquiry was not ideally placed to determine issues of credibility in this context.⁷⁶

12.106 Vice Admiral Ritchie stated, however:

74 Kevin Herridge, *Submission P33*.

75 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, pp. 23–4.

76 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, p. 22.

Whilst I appreciate the families' concerns, and I certainly share their grief, Navy's duty at the time was to identify the causes as quickly as possible and to prevent recurrence. I was reassured of the soundness of that inquiry process by the coroner's endorsements of our safety analysis.⁷⁷

12.107 In establishing the BOI, the need to make the ship safe and to prevent any further accidents as well as to meet the broader political concerns of the Navy and the Australian public dominated Navy's concerns. With the benefit of hindsight, the committee suggests that Navy may have lost sight of those closely involved in the fire and probably the ones most in need of its attention. Clearly, there are lessons to be learned about the need to balance the immediate safety and political concerns of the day with the duty of care to those affected by the accident. It is the committee's view that persons removed from these immediate pressures would be better placed to take a more sober and thoroughly considered approach to the initial investigation, the appointment of a BOI and the drawing up of the initial terms of reference.

12.108 In addressing the more specific problem of delays, the committee notes the importance that an independent oversight body would have in monitoring the progress of an inquiry and ensuring that, in consultation with Board members, reasonable progress is made.

Reprisals or interference with witnesses

12.109 The committee heard evidence suggesting that some members feared reprisals for reporting wrongdoing and for giving evidence before investigating officer inquiries. This type of behaviour was not mentioned with regard to BOIs. Yet, some witnesses involved in the BOI into the accident on the *Westralia* questioned the advice they received before giving evidence before the board. Ms Munday, who was on board the *Westralia* at the time of the fire, felt that she had come under influence to suppress the truth. She told the committee:

In May last year I made a statement to the coroner of Western Australia, who was holding a coronial inquest into the four deaths on HMAS *Westralia*. I gave evidence that we were pressured by naval hierarchy to mislead the board of inquiry. From the statements made by one of the senior personnel, we were told that, if the civilian lawyers—the contractors—asked us that if we had worked on fuel systems on HMAS *Westralia* we should say no, because we were not qualified to do so, which was not correct. Also we were told that if we were asked whether we used certain tools, such as shifting spanners, on any systems, we should say no that we had not used those either, which was incorrect.⁷⁸

12.110 The coroner, however, found her evidence 'vague and unspecific'. He concluded:

77 *Committee Hansard*, 1 March 2004, pp. 17–18.

78 *Committee Hansard*, 21 April 2004, p. 21.

There is no evidence in the accounts of Lieutenant Commander Crouch, Warrant Officer Bottomley or any of the other navy personnel who were called at the inquest which would support the suggestion that any pressure was applied to witnesses in relation to the evidence which they [Ms Munday and Ms Justice] gave at the Board of Inquiry.⁷⁹

12.111 The coroner could find no grounds for suspecting that witnesses were pressured or influenced with regard to the evidence they were to give before the Board. Ms Munday's interpretation of what occurred, however, is a timely reminder to all ADF personnel of the care that needs to be taken when giving advice either formally or informally to potential witnesses.

Conclusion

12.112 BOIs inquire into serious and complex matters, often where the death of an ADF member is involved. In some cases they involve highly technical matters and may have severe political implications. Public expectations of a BOI are generally high and the next of kin look to the board to answer questions that sometimes cannot be answered. The demands placed on a BOI are heavy.

12.113 The committee notes that a recent audit of BOIs by Acumen Alliance made a number of recommendations to improve the system. While agreeing that they are sensible and designed to improve the inquiry process, the committee believes that they do not address the central issue—the potential for perceptions of a lack of independence which can have the effect of undermining the integrity of proceedings.

12.114 Mr Michael Griffin, in an issues paper prepared for the committee, put forward a proposal that addresses, in particular, this independence aspect of investigations and inquiries into major accidents. He suggested that the responsibility for the investigation of such incidents be conferred on the proposed statutorily independent ADFARB. He noted that his proposal covers matters that would typically be the notifiable incidents which all ADF units are currently required to report to higher command, such as death, serious injury, loss of major equipment and matters likely to attract media interest, whether they occur inside or outside of Australia. He explained further:

The chairperson of the ADFARB would be empowered to decide on the manner and means of inquiring into the cause of such incidents. The legal aspects of the relationship with the State and Territory civil authorities could be settled by overriding Commonwealth legislation or by the putative Memorandum of Understanding (MOU) with the States/Territory Coroners.

The ADFARB legislation would include matters which the chairperson would take into consideration in determining the manner of inquiry. This might involve consultation with the relevant Ministers, State and Federal,

79 *Record of Investigation into Death, Inquest into the deaths of Shaun Damian Smith, Phillip John Carroll; Megan Anne Pelly and Bradley Meek (HMAS Westralia)*, Western Australia, p. 106.

the CDF and Service Chiefs, various civilian authorities and the families and next of kin of ADF members involved. The Minister of Defence would retain absolute authority to appoint a Court of Inquiry...should he deem such to be necessary. The chairperson would determine the appropriate vehicle for the inquiry and, subject to security considerations, publish written reasons for the choice of inquiry vehicle.

If satisfied that an investigation would suffice, the chairperson could select a suitably qualified person from the panel of investigators or from the civilian community. CDF would have the right to nominate a suitably qualified military officer to assist the investigator. The investigator could also come from or be assisted by the ADFARB staff from the ROG area with relevant expertise and experience.

If the chairperson decided that a more formal inquiry process was required, akin to the present Boards of Inquiry, then the chairperson could refer the matter to a military division of the Administrative Appeals Tribunal (AAT). The AAT is a Federal merits review tribunal which has a President who is a Federal Court Judge, several Presidential members who are Federal or Family Court judges, Deputy Presidential members both full and part time who are very senior lawyers and a large number of full and part time members who include several retired senior military officers of one and two star rank.

The AAT has very considerable administrative law expertise and regularly deals with Defence related matters in Veterans Affairs, Military Compensation Scheme, Comcare and Security issues, in its various divisions. It has offices and conducts public hearings in all major cities and can utilise Commonwealth facilities in other places. Its large number of experienced administrative review members are appointed by the Governor-General on fixed terms of appointment. There are sufficient part time members to cope with any surge capacity required for occasional military inquiries.

The cost effect of utilising this existing Federal agency and its state of the art infrastructure would be minimal in contrast to establishing a new agency or continuing with ad hoc BOI. The reputation of the AAT is impeccable and this would be of great importance for perceptions of independence. The members allocated to the military inquiry would be chosen by the AAT President in consultation with the ADFARB chairperson. CDF would have the right to nominate a suitably qualified military officer to sit as a member of the inquiry tribunal. The ADFARB chairperson would appoint the counsel assisting the inquiry from his standing panel of counsel or from the civilian bar. Potentially affected ADF personnel (PAP) would continue to have legal representation at Commonwealth expense, the counsel representing being nominated by the Chief of Defence Trial Counsel.

The AAT has the existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters at no additional cost and it could be established in this role almost immediately.

12.115 The results and findings of any AAT inquiry or other investigation undertaken by reference from the ADFARB would be provided to the chairperson, the CDF and any PAPs. Certain restrictions, based on national security or public interest grounds, as set down in the Act may apply to the release of particular parts of a report to PAPs. Based on the findings of the AAT inquiry, the chairperson would then determine the further disposition of the matter and provide CDF and the minister with his or her findings and recommendations. CDF would be required to provide written reasons for declining to accept any recommendations made by ADFARB. The chairperson would publish an annual report of all matters dealt with by ADFARB, including matters referred to CDF and responses to them.⁸⁰

Committee view

12.116 The committee understands that the proposal to create a military division of the AAT to undertake investigations into serious incidents in the ADF widens the jurisdiction of the AAT. It is a body that reviews, on the merits, a broad range of administrative decisions made by the Australian Government. Since its establishment in the mid 1970s, the AAT's areas of jurisdiction have grown and now include social security, veterans' entitlements, Commonwealth employees' compensation, taxation, migration, freedom of information, corporations, insurance, securities regulation and compensation for land acquisition'. The divisional structures of the Tribunal have been adjusted to accommodate these changes.⁸¹ The committee envisages the proposed military division of the AAT as a further extension of the AAT's jurisdiction. As noted by Michael Griffin, the new division would draw on the Tribunal's 'existing skills, resources, experience and independence to provide an efficient and effective external inquiry process for Defence matters'.

12.117 The committee considers that the AAT is well placed to assume the responsibility for undertaking inquiries into incidents in the ADF involving serious and complex matters for the following reasons:

- the AAT is an independent body that reviews a broad range of administrative decisions—members are appointed by the Governor-General for a fixed term;
- the AAT is not a court and cannot exercise judicial power—consistent with the principles underpinning administration inquiries in the military justice system, a board, constituted under the military division of the AAT, would

80 Michael Griffin, Issues Paper, Senate Inquiry into the Effectiveness of the Military Justice System, paras 91–98.

81 The Hon Justice Garry Downes, President of the Administrative Appeals Tribunal, 'Tribunals in Australia: their Roles and Responsibilities', in the Law Reform Commission's journal, *Reform*, Autumn 2004, and also Administrative Review Council, *Overview of the Commonwealth System of Administrative Review*, <http://www.law.gov.au/agd/www/archome.nsf/AllDocs/7C8BE4EE5BE614C8CA256C...> (3 June 2005).

present its findings and make recommendations but would not determine guilt or innocence or impose a penalty;

- AAT decisions are based in findings on material questions of fact—when giving reasons for its decision the Tribunal shall 'include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based'.⁸²
- the AAT's procedures allow for flexibility, for example the Tribunal 'is not bound by the rules of evidence and can inform itself in any manner it considers appropriate'⁸³—the absence of formality and the technical requirements of the rules, however, do 'not displace due process, natural justice or procedural fairness';⁸⁴
- the AAT prefers to conduct open hearings⁸⁵ but has the authority, where it is satisfied that for confidentiality reasons restrictions should operate, to direct, inter alia, that a hearing or part of a hearing shall take place in private or give directions prohibiting or restricting the publication of evidence given before the Tribunal;⁸⁶
- AAT members have expertise in areas such as 'accountancy, actuarial work, administration, aviation, engineering, environment, insurance, law, medicine, military affairs, social welfare, taxation and valuation' and members are assigned to the relevant Division according to their area of expertise.⁸⁷

82 Section 43, *Administrative Appeals Tribunal Act 1975*.

83 Administrative Appeals Tribunal, *Introduction to the AAT*, AAT website, <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm> (3 June 2005).

84 The Hon Justice Garry Downes, President of the Administrative Appeals Tribunal, 'Tribunals in Australia: their Roles and Responsibilities', in the Law Reform Commission's journal, *Reform*, Autumn 2004, p. 4.

85 Section 35 states that the hearing of a proceeding before the Tribunal shall be in public, *Administrative Appeals Tribunal Act 1975*.

86 Section 35—Hearings to be in public except in special circumstances, *Administrative Appeals Tribunal Act 1975*.

87 Administrative Appeals Tribunal, *Introduction to the AAT*, AAT website, <http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm> (3 June 2005). See also Michael Sassella, Senior Member, AAT, 'Reviewing Particular Decisions made by ASIO: the Security Appeals Division of the Administrative Appeals Tribunal', Attorney-General's Department, Security in Government 2002 Conference.

- the AAT'S process allows for the involvement of experts in the subject under consideration and recognises that 'experts contribute substantially to the quality of decisions',⁸⁸
- sittings of the Tribunal are held from time to time as required and may sit at any place in Australia or in an external Territory;⁸⁹ and
- a party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

12.118 Generally, the Tribunal is required to provide a copy of its decision to each party to the proceeding. For reasons of transparency, the committee anticipates that a similar provision would apply to the Military Division of the AAT which would provide a copy of its findings to the chair of the ADFARB, the CDF as well as PAPs. It accepts that an additional provision may need to be inserted in the AAT Act to allow certain restrictions to apply to the release of parts of the report on grounds of national security or public interest. The Act has been amended along such lines to accommodate the special requirements of the Security Appeals Division.

12.119 The committee believes that the Government must take firm and decisive measures to enhance the independence of the current BOI process and therefore supports Mr Griffin's proposal.

Recommendation 34

12.120 The committee recommends that:

- **all notifiable incidents including suicide, accidental death or serious injury be referred to the ADFARB for investigation/inquiry;**
- **the Chairperson of the ADFARB be empowered to decide on the manner and means of inquiring into the cause of such incidents (the Minister for Defence would retain absolute authority to appoint a Court of Inquiry should he or she deem such to be necessary);**
- **the Chairperson of the ADFARB be required to give written reasons for the choice of inquiry vehicle;**
- **the Government establish a military division of the AAT to inquire into major incidents referred by the ADFARB for investigation; and**

88 The Hon Justice Garry Downes, President of the Administrative Appeals Tribunal, 'Future Directions ', Speech to the Australian Institute of Administrative Law's Forum, 'Administrative Law: Problem areas—Reflections on practice', Annual Dinner, 4 July 2003.

89 *Administrative Appeals Tribunal Act 1975*, section 20A.

- **the CDF be empowered to appoint a Service member or members to assist any ADFARB investigator or AAT inquiry.**