

**Senate Foreign Affairs, Defence and Trade
References Committee**

SUBMISSION COVER SHEET

Inquiry Title: Effectiveness of Australia's Military Justice System

Submission No: P20

Date Received: 10.02.04

Submitter: Mr Clark

Organisation:

Address:

Phone:

Fax:

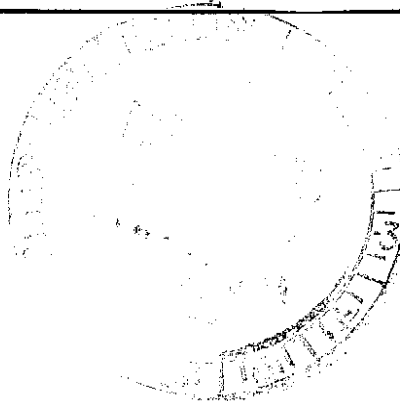
Email:

Name/Contact: Mr J.G Clark

Date Authorised:

6 February 2004

The Secretary
Senate Foreign Affairs, Defence and
Trade References Committee
Suite S1.57
Parliament House
CANBERRA ACT 2600



Effectiveness of Australian Military Justice System
(Terms of Reference 30 October 2003)

I enclose three documents which form the basis of my submission to the Committee.

The first document announces an Efficiency and Management Audit for Legal Support to Broads (sic) of Inquiry's (sic).

The second document contains the Terms of Reference for the audit.

The third document is my 13 page response to the two documents referred to above.

I am willing to assist the committee by appearing and giving oral evidence so that matters identified in the third document can be elaborated on for the benefit of the Chair and the Committee, having regard to the Terms of Reference.

If I am invited to attend a Committee meeting to give evidence then I would be appearing in a private capacity.

Yours faithfully

J.G. CLARK

Deal, Jennifer

From: Smith5, Michael
Sent: Friday, 16 May 2003 11:36
To: DCS - TDLS - National
Subject: SEC: UNCLASSIFIED - Legal Reserve Matters - Shaping the Future

Colleagues: I need to bring two matters to your attention, particularly to members of the Legal Service Reserve.

Efficiency and Management Audit of legal support to Broads of Inquiry's

I have informed CDF, Secretary, Service Chiefs, CSIG management, the Inspector General of Defence and the Inspector General of the Australian Defence Force that a management audit of the effectiveness of legal support and adequacy of legal services in the Board of Inquiry (BOI) process will be conducted focussing on concluded BOIs. I am concerned to ensure that the use of legal resources in support of this command function is as efficient as possible, particularly given the degree of parliamentary oversight that is maintained from Defence's internal inquiry system. This audit will seek to extract best practice from a number of concluded BOIs conducted over the last 7 years. As approved by Head of National Operations Division this audit will most likely be undertaken by an independent audit firm assisted by permanent policy staff from TDLS. In parallel, the Attorney General's Department has been asked to advise on the interpretation of Determination 2000/1 in relation to the amount of sessional fee that is payable in relation to BOIs, what type of work should attract the sessional fee and to seek confirmation from the Australian Taxation Office of the taxation status of the sessional fee.

Expressions of interest in ongoing contribution to Reserve Legal Service

Now that the review of the Reserve has been concluded and Col Noga has been appointed to implement the review, I have decided that it is time to take stock of the size, composition and future contribution of members of our Reserve. Accordingly all members of the Defence Legal Service Reserve Panels are to without exception submit to me by COB 30 June 2003 (for information, Col Robert Noga) no longer than one page a clear indication of whether they wish to continue their Reserve Service, and in what capacity, and indicate how they consider they are able to best contribute to future Reserve Legal Service in the Australian Defence Force. Those who would wish to take the opportunity to indicate that for what ever reason they are not able to commit whole heartedly to service in the Defence Force (in the full sense of that term) may care to take the opportunity to inform me of that decision. Following receipt of your letters COL Noga will approach each of the Services to work with them in determining the future of individual officers. I will write now personally to each officer immediately in the same terms as in this e-mail.

Correspondence is to be addressed to:

CDRE Michael Smith AM, RAN
Director General
The Defence Legal Service
R8-2-044
Russell Offices
CANBERRA ACT 2600

For Information

COL Robert Noga
Deputy Director General Reserves (TDLS)
Anglesea Barracks
Building A91
Davey Street
HOBART TAS 7000

S

Risk

Examine recent Boards to identify the factors which contribute to efficient and effective Board performance.

Determine the factors or combination of factors which escalate the risk* of poor performance with particular reference to:

- Mix (permanent, reserve, civilian) of Board members
- Number of affected parties
- Complexity of incident
- Format of inquiry
- Terms of Reference/Scope

(* Risk in this case refers to: (a) the likelihood of an extended investigation with an associated escalation in time and resources expended; or (b) public criticism.)

Structure

Determine whether Boards are structured appropriately with particular reference to:

- Mix of capabilities/background
- Selection process
- Appointment process
- Frequency of appointment
- Briefing protocols

The issues to be examined will lead to an enumeration of the factors which contribute to or inhibit efficient and effective Board performance. In summary, the object of the management audit is to contribute to a description of 'best practice' Boards.

TERMS OF REFERENCE—OPERATIONAL

The Acumen Alliance proposal to conduct the management audit of The Defence Legal Service (TDLS) sets out the requirement, the assignment scope and Acumen's approach in relation to the audit. In short, the proposal provides the assignment Terms of Reference.

The following presents the Terms of Reference at an operational level; that is, the specific questions or issues to be examined in the course of the assignment.

General

Conduct a management audit to assist in identifying, assessing and validating the practices and processes which facilitate the efficient and effective functioning of Boards of Inquiry and the associated legal services provided by TDLS.

Policy

Examine instructions/determinations/regulations relevant to Board formation and management.

Determine whether those instructions/determinations/regulations facilitate the efficient and effective functioning of Boards, with particular reference to:

- Selecting the appropriate inquiry format
- Appointing Board Members
- Drafting Terms of Reference
- Monitoring/managing Board performance
- Facilitating 'value for money' (eg, Sessional Fee Determination)

Governance

Determine whether an appropriate accountability framework is in place with particular reference to:

- Who is responsible for monitoring Board progress
- Is there an established monitoring/management process?
- Are resources in place to carry out the monitoring/management process?
- Who is accountable for Board outcomes?

TOR – BOARDS OF INQUIRY

Policy

Instructions, Determinations, Regulations

- A. ADFP 202 – Administrative Inquiries Manual – Dated 15 May 2000.
- B. DEFENCE (INQUIRY) REGULATIONS – commenced 3 July 1985.
- C. Financial Determination 2000/1.
- D. SENATE Standing Committee Report into Military Justice.

Comment

1. There is little doubt that the above references provide adequate guidance as to when a BOARD OF INQUIRY (BOI) is to be constituted. Ref A details the occasions an Appointing Authority will initiate a BOI. (see Annexure, Ch. 2). The Appointing Authorities are not lawyers and rely on our legal advice when striking an Instrument of Appointment (see Reg. 23 D(I) Regs.) which incorporates Terms of Reference (TOR), Composition of Board (Reg. 23), President (Reg. 27) and Counsel Assisting the Board (Reg. 51).

Selecting the Appropriate Inquiry Format

2. As mentioned above, Ref A provides guidance to Appointing Authorities (with the assistance of service lawyers). There are many factors which need to be taken into account.

a. Lawyers – must be educated as to what is contained in Ref. A. There is currently a lack of knowledge about the importance of the Ref. and how it should be applied. There has already been an inquiry by a District Court Judge into conflict of interest and any lawyer who works within a functional command who may be the subject of a BOI, (either in terms of criticism, witnesses or Potentially Affected Persons (PAP),) must never be appointed formally to a BOI (either as a Board Member, Counsel Assisting or Counsel Representing a PAP).

Comment: A service lawyer with the requisite knowledge could be tasked to provide a brief for inclusion in SOP's or deliver a paper at major centres in order to assist ADF lawyers to discharge their responsibilities when advising Appointing Authorities.

b. Commander's Decision – will be based on the type of incident, public interest (e.g. Blackhawk, EVEREST, Westralia), potential for political fallout and transparency of the process. The Commander (Appointing Authority) is completely dependent on competent (not convenient) advice – hence the importance of the service lawyer.

Appointing Board Members

3. Ref. D provides very good guidance in the form of recommendations as to the appointment and composition of Board Members. There needs to be transparency in the process and in order to conform with Refs. A, B and D, a National Register of eligible persons to be President (and members) of a BOI needs to be established.
 - a. National Register – DOCM (A) and Navy and RAAF equivalents, have the ability, through database search, to determine by geographical region, persons of appropriate rank and experience (whether Regular or Reserve Officers) who are eligible to be appointed as President (and Members) of a BOI.
 - b. President – There is little point in having Ref. B if it is going to be ignored (especially Reg. 35) by the Appointing Authority either on the grounds that: "no-one of the requisite rank is available" or "my legal advice is that I can rely on Ref. 35(3)(b)." The former ground can be ameliorated by appropriate use of the National Register and the second ground should then not arise. The difficulty with a Presidential appointment of inferior rank to a PAP (as happened in BIG WALL BOI), is the perception that the President will defer to the PAP, make adverse finding to demonstrate his/her "independence" or that the Appointing Authority sends the wrong message to other PAP's.

There are sound reasons why the President should not have legal qualifications (see paragraph 3.25 of Ref. D). The perception of a legally qualified President not accepting the advice of Counsel Assisting (CA) or providing "private legal advice" within the confines of the Board offices is a strong area and is anathema to transparency of the Board processes.

Comment: The Chief of Army and other senior officers through delegation, is the Appointing Authority for BOI. There is a geographical proximity between Chief of Army and TDLS. The latter organization should be utilized to the maximum extent possible in providing advice to the Chief of Army. However, there is an inherent conflict of interest if TDLS purports to implement the DGTDLs directive of 16 July 2003. Appointments are made pursuant to Ref. B - by the Appointing Authority not DGTDLs. TDLS is able to mandate and/or regulate the employment of legal officers. This cannot be at the expense of procedural fairness and natural justice requirements which must be afforded to PAP's as their careers and reputations are inexorably linked to the quality of Counsel Representing their interests. DGTDLs can advise the Appointing Authority about procedural requirements, the law and Parliamentary recommendations. It is also appropriate to take into account the potential for public criticism, the potential "sensitivity" of the propose inquiry and adverse publicity. What DGTDLs (or his/her subordinate) must not do is permit appointment to be made as

Board Members, persons who are either related to or personally known to TDLS staff. This occurred with appointments to the EVEREST BOI and BIGWALL BOI. This practice is contrary to the principles of accountability and proper Governance which form part of the TOR for the management audit. Commanders (Appointing Authorities) have a vested interest in establishing a BOI within the established legal framework, receiving a completed report and ensuring that appropriate recommendations are implemented. Commanders are not interested in a process that lacks transparency, takes an inordinate amount of time or appears wasteful in terms of resources (either administrative or monetary).

Drafting Terms of Reference

4. There are many examples given in reference A of the terms of reference and how they are to be drafted for consideration of the Appointing Authority. It is essential that whenever terms of reference are drafted for approval by the Appointing Authority that precedent is not slavishly followed. Although there have been criticisms from time to time of the scope of the particular terms of reference, generally they have been drafted in an appropriate manner which achieves the aim set out by the appointing authority to determine the how, what, when, where and why a particular incident occurred.

Monitoring/Managing Board Performance

5. Performance can have many meanings. It can relate to the competence of individuals or the group. Equally it could be assessed in a subjective manner by highlighting deficiencies in the process after the event when the board of inquiry is completed. Current legislation prohibits interference with the board in any manner once it has commenced its inquiry although there is quite properly provision for the appointing authority to monitor the board's progress. Performance can be and is achieved by ensuring that the President and members who are appointed to and constitute the board have the appropriate skill sets, general service knowledge and experience to be able to discharge their functions competently.

Facilitating Value For Money (e.g. sessional fee determination)

6. Reference C has been the subject of inordinate discussion for many years. The current rates of remuneration were set in 1995 but the application of that rate of payment has been problematic. There is currently with the Australian Government Solicitor a request from TDLS for an opinion as to the appropriate rate to be paid to Counsel representing on the BIGWALL board of inquiry as Ref. C, in its current format, is capable of being interpreted in a number of ways. Clearly the reference needs to be written in unambiguous terms and there is

the opportunity for revision of the existing sessional fee payments to be undertaken.

Comment: Regular service lawyers are remunerated at a substantial rate and if there is an emphasis on value for money then as a matter of policy permanent legal officers should be appointed as counsel assisting and as counsel representing. This has a beneficial effect both in cost savings and exposure and experience levels for permanent legal officers. The disadvantage of implementing such a policy is the ability to secure the release of permanent legal officers from their postings for extended periods of time, the lack of desire of some permanent legal officers to undertake advocacy work and the abrogation of the rules of natural justice because potentially effected persons will not be able to be appointed to their lawyer of choice. Ultimately Boards report to appointing authorities and if the outcomes and recommendations of Boards are found to be inadequate and/or flawed through inexperience of those advising the President and Board Members, then the Board's findings will be overturned with the accompanying embarrassment that this entails. There is always the option of striking a rate and encapsulating this within the determination and specifying that the following rate is to apply if appointment is made to a Board of inquiry. For example, a Colonel who was appointed as counsel assisting or counsel representing may have specification that they will be paid \$1,400 per day, a Lt. Colonel \$1,200, a Major \$1,000 per day and a

Capt. \$800 per day. Those rates of course would be applicable to Reserve legal officers and there is nothing either in theory or practice to prevent the Determination being worded in such a way that it applies to **all** Reserve legal officers. This approach has the advantage of ensuring that there is a mix of experience in either representation or assistance to the Board of Inquiry and the notion of equity at least amongst Reserve legal officers would be achieved. A third approach would be to determine that all Reserve legal officers were to perform such duties at, for example a nominal rate of \$250 per day. Some Reserve legal officers may be more than willing to appear before such a Board if such a rate was set the exception being those Reserve legal officers in private practice who clearly could not afford to abandon their practice for such a rate. Another approach would be to initiate a tender process on a case for case basis. All of these approaches and more I am sure have been considered previously. It is just a matter of adopting a particular approach.

Governance

7. The short answer to all of the above is the appointing authority. An undeveloped approach has been taken to providing administrative support to Boards of Inquiries. Almost without exception the administrative support has been inadequate which leads to lawyers spending much of their time on administrative tasks instead of

devoting their full attention to the particular role that they have been allocated.

Risk

8. There have been many Boards conducted throughout the history of the Australian Defence Force which have not attracted public criticism, have not taken an inordinate amount of time and have been conducted efficiently. The reason for the success of those Boards which have not come to public notice can be traced to the genesis of the formation of those particular Boards. That is, the selection of the correct personnel both as Board members, counsel assisting and counsel representing who have then gone about their business in an efficient and professional manner.

Comment: The RAAF Deseal/Reseal Board of Inquiry was conducted in a manner which bears close scrutiny. A number of counsel assisting were appointed and each of those counsel were allocated a particular part of the terms of reference to scope and apply all of the relevant context management issues. At the completion of this exercise the various counsel assisting reported to senior counsel assisting and in consultation appropriate evidence was able to be presented to the Board of Inquiry. This approach could be successfully adopted to future Boards of Inquiry with the proponderous of time being spent in scoping with a resultant shortening of time of public hearing. There

appears to be little doubt that the length of time that recent Boards of Inquiries have taken has been directly attributable to inadequate time being allocated for scoping the Inquiry. Extended Boards of Inquiry occur for a number of reasons some of which have been set out above but fundamental to the Inquiry process is the selection of the appropriate personnel. All of those problems either real or perceived can be overcome by the establishment as mentioned earlier of a national register.

Structure

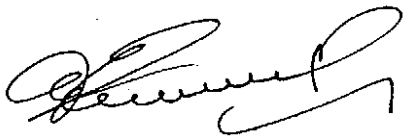
9. Perhaps the best way to address this sub heading of the Terms of Reference is by way of personal experience and background. In 1994 I was asked by counsel assisting the Pulada Board of Inquiry to represent a Private Ventura. Colonel Scarlett asked me if I was available because Private Ventura had been driving a vehicle in Malaysia and an accident resulted in the deaths of five ADF personnel. On enquiry as to why I had been approached I was told that my background as an infantryman and infantry officer was conducive to assisting the Board in understanding how soldiers went about their business and performed their duties. The President of that Board was an artillery officer (now a Brigadier) and the members were an infantry officer and a medical officer (because of the Terms of Reference which directed the cause of death to be established). In 1996 when the Black Hawk tragedy occurred on the 12th of June at High Range training area

I was asked by the Commanding Officer of the Special Air Service Regiment if I was available to represent the interests of Major Hunter who was the Squadron Commander at the time the tragedy occurred. This approach was made because I have a background in Special Forces having been a member of the Special Air Service Regiment and I understood the processes involved in counter terrorist activities. In 1998 a soldier was killed as a result of a grenade exploding in Malaysia at the Guran training area. The Chief Safety Officer and Warrant Officer Ferguson was named as a potentially affected person and upon being so named he contacted me and asked me if I was available to represent him. Upon further inquiry it transpired that he knew of my infantry background and expressed confidence that my legal and service experience would result in him being best represented by me. In 2000 an Australian soldier on exercise wounded a Malaysian officer by discharging a ball round through a blank firing attachment. Land Commander Australia convened a Board of Inquiry and the Chief Legal Officer at Land Headquarters, Lt. Colonel Abbott, approached me and asked as to my availability as counsel assisting this Board of Inquiry. Lt. Colonel Abbott expressed confidence in my ability to undertake this task, adhere to the Terms of Reference and properly scope the extent of the inquiry before public hearings commenced. Because of further incidents relating to the discharge of ball ammunition during a blank firing exercise, I was tasked by the appointing authority to rescope and redraft Terms of Reference and the Board of Inquiry initially for

Exercise Hurangaru was extended and a further Board of Inquiry was conducted into Exercise Warrior Dawn and subsequent to that a further Board of Inquiry was conducted into Exercise Faith Restored. Those Boards were examples where closely related subject matters could be considered by the same Board as constituted by the appointing authority, the same counsel assisting and some additional counsel representing to protect the interests of those people subsequently identified. I was approached by Lt. Colonel Cameron, the Chief Legal Officer at Headquarters Training Command as to my availability to represent the President of the Army Alpine Association during the EVEREST Board of Inquiry. I enquired of Lt. Colonel Cameron why I had been approached and he informed me that he had e-mailed the Defence Legal Service and asked for names of people who would be suitable as counsel representing and he had received no reply. Accordingly, Lt. Colonel Cameron, who was to be counsel assisting, approached myself and others to enquire as to our availability to appear as counsel representing before the EVEREST Board of Inquiry. In 2002 the BIGWALL Board of Inquiry was constituted and the President of the Army Alpine Association Brigadier Lambert asked me if I would continue to represent him before the BIGWALL Board of Inquiry as I had represented him before the EVEREST Board of Inquiry. As can be seen, although I have related it in a personal manner, I have had involvement in Boards of Inquiries in 1994, 1996, 1998, 2001 and 2002. In no case have I ever (nor would I)

approached anyone seeking appointment and the circumstances of my appearances have been as set out above.

Further Comment: Could I respectfully suggest if there is to be a complete audit conducted of Boards of Inquiries and the associated legal services provided by the Defence Legal Service, that comment be sought from appointing authorities, potentially affected persons and those counsel who have represented potentially affected persons before Boards of Inquiries. This will then enable Acumen Alliance to develop a broader perspective before they deliver their findings. I trust the above is of some assistance to you and if I am able to assist in any other way please do not hesitate to contact me.



J.G. Clark
Lt. Colonel
DALs Consultant

28 July, 2003