

Chapter 4

Administrative system

4.1 The administrative system is the second component of the military justice system. It is concerned with non-DFDA matters, such as boards of inquiry (BOI), CDF commissions of inquiry, administrative investigations, redress of grievance (ROG) and complaint handling, adverse administrative action and review of command decisions.

4.2 The disciplinary and administrative components of the military justice system are 'essential to maintaining a disciplined and operationally effective military force'.¹ The systems, however, are quite distinct and separate. The administrative system has a different legislative source and serves a different purpose from the disciplinary system.² Whereas the discipline system is largely informed and controlled by the rules and principles of the criminal law, the administrative system is 'subject to administrative law principles, especially the fundamental principles comprising natural justice, also called procedural fairness.'³

Delays in the redress of grievance system

4.3 In its 2005 report, the committee identified delays and other organisational failures that frustrated the timely completion of an investigation in resolving grievances as a major problem. To tackle these problems, the references committee recommended that all complaints lodged with a commanding officer and being investigated within the chain of command be referred to the proposed Australian Defence Force Administrative Review Board (ADFARB) if the matter was not resolved 60 days from lodgement.⁴

4.4 The government did not accept the committee's recommendation. It proposed instead to reform and streamline the complaints and redress of grievance management system. The Fairness and Resolution Branch was established on 30 January 2006 as the central management body outside the normal line management. This initiative combined a number of former separate units within the department. In effect, it re-structured, renamed and brought together the Complaint Resolution Agency, the Defence Equity Organisation and the Directorate of Alternative Dispute Resolution

1 Air Commodore Harvey, *Committee Hansard*, Inquiry into the effectiveness of Australia's military justice system, 1 March 2004, p. 54.

2 Department of Defence, *Submission P16* to the Inquiry into the effectiveness of Australia's military justice system, p. 22 and *Submission P16F*, p. 3.

3 *Submission P16* to the Inquiry into the effectiveness of Australia's military justice system, paragraph. 2.58.

4 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2006, paragraph 8.114.

and Conflict Management.⁵ The new system allows Defence 'to streamline the complaints and redress of grievance system in line with the recommendations of the 2004 joint Defence Force Ombudsman and CDF redress of grievance system review'.⁶ The Fairness and Resolution Branch now has responsibility for addressing the problem of delays and other operational failings in the administrative system.

4.5 Early in the implementation period, the committee was encouraged by the results from the restructuring. In June 2006, the Defence Force Ombudsman informed the committee that there had been a substantial improvement in the processing of complaints, notably a reduction in the time for handling ROGs and in the number of complaints about delay that flow through to his office.⁷ He explained:

Our experience a year ago was that it was common for matters to have been within the Complaint Resolution Agency, or within the redress of grievance process, for six or nine months and sometimes longer before it came to our office.⁸

4.6 Professor McMillan attributed the better and faster handling of grievances to sounder structural coordination by the merger of the different branches.⁹ He was of the view that the reduction in processing time was a positive improvement in the way that matters were handled within Defence and that it represented a more professional approach to handling complaints.¹⁰

4.7 He also noted that in the past his office sometimes experienced difficulty in having its requests to Defence receive priority but that the process in investigations was 'proceeding much more efficiently in discussion with the Defence department'.¹¹ Overall, he observed 'a general improvement in responsiveness of the Defence portfolio to our requests'.¹² The positive results have enabled the Office of the Defence Force Ombudsman to reduce their number of open cases and brought about a 'much more efficient dispatch of complaints about the defence portfolio'.¹³

5 *Committee Hansard*, 19 June 2006, pp. 2 and 11.

6 *Committee Hansard*, 19 June 2006, p. 11.

7 *Committee Hansard*, 19 June 2006, pp. 2 and 6.

8 *Committee Hansard*, 19 June 2006, p. 7.

9 *Committee Hansard*, 19 June 2006, pp. 2 and 9.

10 *Committee Hansard*, 19 June 2006, p. 9.

11 *Committee Hansard*, 19 June 2006, p. 7.

12 *Committee Hansard*, 19 June 2006, p. 9.

13 *Committee Hansard*, 19 June 2006, p. 2. At this hearing in 2006, the Deputy Defence Force Ombudsman, Mr Ronald Brent, predicted a reduction of approximately 10 per cent in the number of complaints in the current financial year as against the previous one. *Committee Hansard*, 19 June 2006, p. 9. See also Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, pp. 22.–23.

4.8 At that time, he suggested that to avoid any slippage in quality it was 'necessary to implement quality assurance processes and regular monitoring and auditing of the way complaints handling and investigation are undertaken'.¹⁴

4.9 The complaints handling system has continued to undergo further reforms. The ADF's June 2008 progress report noted that substantial work had been completed in reforming and streamlining the complaints and redress of grievance system. The CDF explained:

...The Defence Force regulations took effect last month and now provide an updated process for members of the ADF to submit complaints regarding certain matters relating to their service. The amendments introduce time frames relating to the process for submission on, inquiry into, and referral to a higher authority of redresses of grievance. I believe the revised arrangements will substantially improve ADF complaint handling processes.¹⁵

4.10 As an indication of this improvement, the Defence Force Ombudsman received 252 approaches and complaints from serving and former members of the ADF in 2006–2007 compared to 303 in the previous year. It drew attention to:

- greater timeliness in the way Defence handles complaints from serving members;
- the positive effect that recent quality assurance mechanisms have had on the ADF's redress of grievance process; and
- Defence's willingness to involve the Ombudsman's office in ADF training courses and seminars.¹⁶

Referral to service chief—delays

4.11 The committee notes the success that the 90-day time limit for addressing a redress of grievance at the unit level is having in minimising delays. While recognising the improvement that this measure has had in expediting the handling of complaints, the Defence Force Ombudsman did note, however, that there was no 90-day time limit imposed for referrals to the Service Chiefs. Information available to the Ombudsman's office indicated that such referrals were taking about 6 months before the matter is then allocated to a case officer within complaints resolution. He explained:

Then, of course, it can take several weeks more for the complaint officer to investigate and prepare a report for the service chief and then for the service

14 *Committee Hansard*, 19 June 2006, p. 5 and Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006, pp. 22–3 and 26.

15 *Committee Hansard*, 20 June 2008, p. 22.

16 Commonwealth Ombudsman, *Annual Report 2006–2007*, Section on Defence in Chapter 7 http://www.ombudsman.gov.au/publications_information/annual_reports/ar2006-07/index.html.

chief to address it. Admittedly, it is more important in many ways to have the resources and effort focused at the primary stage and to ensure that the time lines are met at the primary stage. But the fact that there are such strict time limits being met there and then, if there is an appeal to a service chief that it is taking so long...¹⁷

4.12 He stated further:

Given that an important principle in the design of the system is that there should be a 90-day turnaround at the primary stage, one would like a similar time limit at the appeal stage. In many ways, that could be a shorter period because the basic investigation has already been done and so the issues have been clarified.¹⁸

Committee view

4.13 The committee recognises the efforts of the ADF to improve its ROG process. It especially notes the success achieved in reducing the time taken to process these grievances. It draws attention, however, to the potential for delay where a grievance is referred to a service chief. The committee believes that a timeframe imposed on this stage of a ROG would be desirable.

Recommendation 5

4.14 The committee recommends that a specific time limit, for example 90 days, be imposed on referrals of ROGs to the service chiefs.

Reporting of complaints

4.15 The importance of having a mechanism that allows ADF members to make a complaint with confidence in the integrity and fairness of the process is central to an effective and fair administrative system. The Defence Force Ombudsman noted that from an institutional viewpoint, individual complaints are 'a valuable resource for highlighting problems and improving and reforming administrative systems'.¹⁹ He stated:

Regular high-volume complaint handling provides a constant message to everybody in the system that dealing with problems is core business—that it is not a sign of malfunction or that people have issues. The underlying principle of the redress of grievance system is that the absolute devotion and loyalty expected of defence members has to be matched by a system that formally allows them to lodge a grievance and have it redressed. In many ways, the redress of grievance system is more integral to defence culture than is often thought to be the case. The idea that people can lodge a

17 *Committee Hansard*, 26 June 2008, pp. 4–5.

18 *Committee Hansard*, 26 June 2008, p. 5.

19 *Committee Hansard*, 26 June 2008, p. 6.

complaint by a formal process is a necessary feature of a system that otherwise demands complete loyalty in all other circumstances.²⁰

4.16 In 2005, the committee highlighted its concern about the tendency of ADF members to balk at reporting improper conduct or to lodge a legitimate complaint. The committee's 2005 report devoted a chapter to impediments to reporting wrongdoing or making a complaint in the ADF.

4.17 In its view, there was an anti-reporting ethic in some areas of the ADF. It argued that 'a fundamental change in the ADF mindset must be achieved to overcome the stigma attached to lodging a complaint'. Indeed, the committee recognised that this reluctance to complain was part of an entrenched culture within the ADF that, if allowed to continue, had the potential to frustrate the efforts of the ADF to reform its military justice system. It contended that the failure to report wrongdoing meant that responsible commanders were not well placed to detect and correct wrongdoing and hence unsafe practices or inappropriate conduct continued unchecked. The committee was particularly concerned about the reporting of wrongdoing in ADF's training establishments. It found:

The very fact that two young soldiers at Singleton were not prepared to pursue their right to make a complaint about cruel and abusive treatment, and that the wrongdoing came to light only through the determined efforts of their parents, speaks volumes about the inadequacies of the administrative system. They were not alone in their experiences. This failure to expose such abuse means the system stumbles at its most elementary stage—the reporting of wrongdoing.²¹

4.18 In his recent 2007 report on the management of unacceptable behaviour, the Ombudsman referred to ADF personnel and their disinclination to make a complaint. According to his findings:

Almost two thirds of members responding to the survey advised that they would feel comfortable lodging a complaint of unacceptable behaviour. However, almost half did not consider that the complaint process was fair and transparent. Reservations expressed about using the system included possible repercussions such as adverse effects on promotion, peer pressure, being considered a 'dobber' or other adverse treatment.²²

4.19 He explained further:

...there is probably a popular view that, in a disciplined, uniform force, having to complain is a sign of failure or weakness. And yet, as I say, the redress of grievance system historically was regarded as an essential and

20 *Committee Hansard*, 26 June 2008, p. 3.

21 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxiii.

22 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, paragraph 2.47.

critical part of Defence values and Defence principles. If people are being told to follow orders and directions that can lead to their death or injury, then an essential corollary is that they should be able to formally lodge a grievance and have it investigated. My impression is that that philosophy is probably not known as widely as it should be in relation to the Defence redress of grievance system, so there is work to be done both in and outside Defence in promoting that philosophy about complaint handling.²³

4.20 The committee notes the Ombudsman's suggestion that Defence may wish to consider additional research into the reasons for a significant proportion of ADF members surveyed not feeling confident 'to make a complaint about unacceptable behaviour, and identify whether there are particular barriers to making a complaint'.²⁴

4.21 The ADF's June 2008 progress report recognised that fear of reprisal by respondents is 'common to many complainants'. It stated that Defence has introduced a training course for commanders, supervisors and managers which includes information on providing support to all parties to a complaint.²⁵

Committee view

4.22 The committee notes the Ombudsman's suggestion that Defence could benefit from inquiring into why a significant proportion of ADF members surveyed do not feel confident making a complaint about unacceptable behaviour, and whether there are barriers to lodging a complaint. The committee believes that this proposal is very sensible and would provide the ADF with a better understanding of the reasons for the reluctance to report unacceptable behaviour. The training programs mentioned by the CDF may then be better targeted to address the causes.

4.23 Compelling evidence is already available, however, indicating that one of the primary factors discouraging ADF members from reporting wrongdoing stems from elements within the ADF culture that tolerate bullying and harassment and other forms of victimisation of those who are perceived to be weak or who report wrongdoing.

Learning culture in the ADF

4.24 In November 2005, the CDF appointed a team of three to investigate the culture of ADF schools and training establishments. They were to determine whether the culture was 'inappropriate, in particular, whether a culture of harassment and bullying exists; and in general, whether irregularities against established policies and

23 *Committee Hansard*, 26 June 2008, p. 6.

24 Executive Summary, Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, p. 1 of 43.

25 Department of Defence, *Report on the Progress of Reforms to the military justice system*, 5 June 2008, p. 6.

processes of administration occur'.²⁶ The inquiry team reported in July 2006. In recording its findings, the team 'did not find evidence of a culture that supports bullying or harassment'. Even so, it went on to state that 'there is still some way to go before the underlying culture will firmly oppose harassment and bullying, and firmly support explicit policies on such issues as Equity and Diversity'.²⁷

4.25 The committee was struck by the similarity in language and use of phrases in the recent audit report and in the investigators' reports into the suicide deaths of Private Jeremy Williams and Gunner John Satatas, cited in its 2005 report. For example, the report into the death of Private Williams found no evidence to support the view that a culture of brutality, bullying and standover tactics existed at the School of Infantry. It noted that there seemed to be 'isolated incidents from differing individuals that highlighted inappropriate behaviour by individuals rather than a culture'. It wrote of 'negative reinforcement' and 'disparaging and negative comments' but found that 'a culture of denigration is not proved'.²⁸

4.26 Concerned that some of the recent findings were reminiscent of those from earlier investigations into the suicides of young soldiers such as Private Williams and Gunner Satatas, the committee sought additional information from Defence. For instance, the committee was concerned about statements recorded by the team such as:

One trainee said: '*People become victims because they let the team down.*' Another said: '*There needs to be a change of culture where we can ask for help with a discipline problem. Now I feel I have failed my job if I ask for help.*' Those who were not contributing to the team tended to be isolated and ignored (with the risk of being bullied), rather than being assisted and supported by their peers, or their peers seeking assistance. The culture seems to encourage trainees to be negatively judgmental about their peers as demonstrated by the frequency of terms such as 'chitters', 'malingerers', 'marginals', 'jack', 'gobbing off' and 'bludgers'.²⁹

4.27 To assist the committee understand the context and significance of these views, Defence explained that the inquiry team in the ADF's learning culture had advised that its findings were based:

...on its assessment of all the evidence it gathered from visits, focus groups, surveys and documentation. The majority of responses to survey questions and in focus group discussions were positive, but there were significant

26 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, Attachment A.

27 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, Executive summary, p. v.

28 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, pp. 116–120.

29 Department of Defence, *Final Report of the Learning Culture Inquiry: Inquiry into the learning culture in ADF schools and training establishments*, July 2006, paragraph 54. See also paragraph 108.

exceptions that demonstrated there is still some way to go to manage the risk of bullying and harassment by developing a culture that firmly opposes such behaviour and supports explicit policies on equity and diversity.³⁰

4.28 Specifically, the committee also sought information from Defence on the inquiry team's 'strong impression' that 'the level of direct bullying of those perceived to be performing poorly by trainers or trainees is generally low now, given the rules on inappropriate behaviour, but other forms of more subtle abuse are not uncommon'. The committee sought clarification on the meaning of the term 'subtle abuse'. The inquiry team, through Defence, explained that in its report it had drawn attention to practices such as the tendency to isolate those who are perceived to be performing poorly or not contributing sufficiently to the team'. It noted:

This can become a form of abuse, particularly if the trainee concerned perceives that his or her peers have collectively taken such a stance, particularly if derogatory terms are used towards the individuals concerned.³¹

4.29 This report coupled with the committee's findings in 2005 underline the need for the ADF to take a firm stand against 'isolated incidents' and to be mindful that they may signify a deeper problem. It is crucial that incidents of inappropriate behaviour are reported without fear of reprisal, investigated thoroughly and remedied quickly: otherwise, the potential for such practices to take root in ADF culture is great.

4.30 In 2005, to address a number of problems such as fear of reprisal for reporting wrongdoing, the committee recommended that the government establish an independent Australian Defence Force Administrative Review Board (ADFARB). Under certain circumstances, it would, *inter alia*, receive reports and complaints directly from ADF members, for example, if the person making the submission felt he or she would be victimised in some way for making the report.

4.31 As noted earlier in this chapter, the government rejected the committee's recommendation and decided to restructure the system with the Fairness and Resolution Branch assuming responsibility for address organisational failures in the administrative system. Under this revised system, all complaints must be registered with the agency, which has the authority to take over the management of all cases unresolved by commanders 90 days after lodgement. The government also indicated that improved training of commanding officers and investigating officers would resolve some of the problems identified with the management of complaints. It noted further:

30 Defence answer to written question on notice W13 following committee hearing 26 February 2007.

31 Defence answer to written question on notice W14 following committee hearing 26 February 2007.

For those ADF personnel who, for whatever reason, do not wish to use the chain of command, there will remain two alternative avenues of complaint—IGADF and the Defence Force Ombudsman.³²

4.32 It should be noted that the CDF has given his commitment to ensure that Australia's military justice system is underpinned by values that promote 'productive and constructive' behaviour. Soon after becoming CDF in 2005, Air Chief Marshal Angus Houston informed the committee:

During my tenure as CDF I will invest a great deal of personal effort to ensure that our values are at the heart of the way we do our business in Defence and, most importantly, that we are emphasising values based leadership at all levels. There have been some instances where our people have not been treated very well. I have made it very clear that I expect everybody in Defence to be treated with respect and to get a fair go. That is the Australian way and that is the Australian Defence Force way. I expect to see that right across the three services and right across the whole defence organisation.³³

4.33 In 2008, the CDF informed the committee that implementation of 46 of the 47 agreed recommendations from the Inquiry into the learning culture in ADF schools and training establishments 'was progressing satisfactorily'. He noted the following milestones:

- defining the optimal learning culture (now pending incorporation into Australian Defence Doctrine);
- defining the difference between tough training from bullying and providing principles for the conduct of tough training;
- rules for the development of codes of conduct across ADF training;
- aligning the ADF fraternisation policy, within ADF training, with contemporary standards; and
- the development of principles for the conduct of focus groups that promote open and honest communication while preserving command authority and discipline and ensuring accountability.³⁴

4.34 He noted:

The implementation plan builds on several initiatives already underway. As part of the process of continuous improvement it is expected to influence

32 Government response to the Senate Foreign Affairs, Defence and Trade References Committee, *Report on the effectiveness of Australia's Military Justice System*, October 2005. See appendix 3 in Foreign Affairs, Defence and Trade Legislation Committee, *Reforms to Australia's military justice system, First progress report*, August 2006 or appendix 3 in this report.

33 *Committee Hansard*, 2 November 2005, p. 8

34 Department of Defence, *Report on the Progress to the Military Justice System*, June 2008, p. 5. See appendix 3.

changes to ADF training well after achievement of the last of its endorsed milestones. Good progress has been made to date and this progress is being reported to me quarterly, with achievements contained in a specific section of the Defence annual report.³⁵

4.35 The committee notes the measures taken to improve the Defence's learning culture such as developing policies, codes of conduct and training programs. The committee commends such measures but believes that their success in promoting a fair and effective system needs to be assessed regularly. Indeed, on a number of occasions the committee has expressed its concern that to achieve lasting change in the military justice system, a 'major shift' is required in the attitudes of ADF personnel. The committee understands that reform will take time and persistence and that the ADF faces a significant challenge.

Measuring changes in attitude

4.36 The committee sought information on the 'performance indicators' used to monitor changes in attitudes and behaviour. The CDF cited the Defence attitude survey as a way of benchmarking the attitudes of Defence personnel. He said:

Through that we can pick up how people are travelling and how their morale is. There are other mechanisms also available to us, but most of those are what I would call qualitative assessments by commanders...whether we have specific benchmarks against cultural change as a consequence of this report, no we do not. But I do think we have got a number of other mechanisms out there whereby we can measure how things are going.

I think it is more a question of using the learning culture report to change the way we do our training—the way we do the basic training and the training of NCOs and commanders—to emphasise the importance of establishing the right culture through the organisation. All three services have done that very effectively. Obviously, it is something that takes time and we are proceeding pretty well at this stage.³⁶

4.37 In its 2005 report and subsequent reports on the implementation of reforms to the military justice system, the committee voiced strong concerns that if the culture within the ADF is not addressed, it may well undermine any reforms.

Committee view

4.38 The committee believes that the effective monitoring of attitudes in the ADF is critical to the success of the implementation of reforms to Australia's military justice system. The recent inquiry into the learning culture of the ADF underlines the need for another independent and comprehensive review at some time in the near future. Such a review is particularly important to ensure that the recommendations

35 *Committee Hansard*, 20 June 2008, p. 22.

36 *Committee Hansard*, 20 June 2008, p. 36.

made in the 2006 review of the learning culture in the ADF have been implemented and to determine whether additional measures need to be taken.

Recommendation 6

4.39 The committee recommends that the ADF commission an independent review of the learning culture in the ADF, along similar lines as the investigation conducted in 2006. The main purpose of the inquiry would be to assess whether the recommendations contained in the 2006 report have been effectively implemented and whether additional measures need to be taken to improve the learning culture in the ADF. This review should take place within five years and the report on its findings should be made public.

4.40 In the mean time, Defence's Attitude Survey is one way that the ADF, the government and the parliament can keep track of developments in the attitudes of ADF members. The committee suggests, however, that if the ADF and the parliament are to rely on such surveys to benchmark developments in the military justice system, the surveys would need to provide a greater level of detail and critical analysis than that provided in the recent publication *2006 Defence Attitude Survey, Summary of Results*.

4.41 The committee suggests that the published findings of Defence's attitude survey not merely report on the statistics collated but provide robust analysis and commentary on these indicators and what they mean for the effectiveness of Australia's military justice system.

Recommendation 7

4.42 The committee recommends that the findings of Defence's attitude survey contain a greater level of detail and analysis than that provided in the most recent publication

Investigating complaints

4.43 Encouraging ADF members to report unacceptable behaviour is an important first step but ADF members must also have confidence in the competence of those investigating complaints and the fairness of the process. It should be noted that administrative investigations tend to be routine inquiries conducted at the unit level and not by members of the ADFIS.

4.44 In its inquiry in 2005, the committee underlined the central importance of the inquiry process to the overall effectiveness of the administrative system. It recognised that any shortcomings or failings during the early stage of an inquiry have the potential to set an administrative proceeding on a long and troubled course that could drag through the system for years. The integrity of the inquiry process and its ability to protect the fundamental rights of those involved in the process are crucial to its credibility and its effectiveness. The Burchett Report observed that:

...if an investigation is conducted carelessly or incompetently, so as to miss the real point, or if it is conducted in such a manner that, although its actual conclusions are realistic, the persons most concerned are left with a feeling that they have not been treated fairly, no decision dependent upon the investigation is likely to be received with general satisfaction...the person it is important to convince that all arguments have been fairly and fully considered is the party who loses.³⁷

4.45 During the 2005 inquiry, the Defence Force Ombudsman also underlined the importance of getting the investigation right from the beginning. He made the observation that 'if the initial handling, investigation or whatever of a complaint is defective then it establishes a bad platform which is reflected at every subsequent stage of the process...'³⁸ Mr Neil James, Executive Director, Australian Defence Association, strongly endorsed this view. In his words, 'an ounce of prevention is worth a pound of cure'.³⁹

4.46 In 2005 the committee found, however, that there were serious flaws in the investigation stage of an administrative inquiry. It described a system where:

There were alarming lapses in procedural fairness: failure to inform members about allegations made about them, failure to provide all relevant information supporting an allegation, and breaches of confidentiality. Indeed, the committee heard numerous accounts of members suffering unnecessary hardships due to violations of their fundamental rights.

Poorly trained and on occasion incompetent investigating officers further undermined the effectiveness of administrative investigations. The committee found that missing or misplaced documentation, poor record keeping, the withholding of information, lack of support in processing a complaint and investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry, contributed to unnecessary delays and distress. Many of those subject to allegations have endured long periods of uncertainty and anxiety.⁴⁰

4.47 One of the most corrosive influences undermining the principles of natural justice and one of the most commonly cited concerns stemmed from conflicts of interest and the lack of independence of the investigator and the decision-maker. Many witnesses to the 2005 inquiry called for an independent adjudicator so that a

37 Report into Military Justice in the Australian Defence Force, conducted by Mr J.C.S.Burchett, QC, An Investigating Officer appointed by the Chief of the Defence Force, under the Defence (Inquiry) Regulations 1985, p. 116.

38 *Committee Hansard*, 9 June 2004, p. 10.

39 *Committee Hansard*, 9 June 2004, p. 32.

40 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxiii.

neutral and unbiased investigation could take place free from contamination by self-interest or third party influence.⁴¹

4.48 As noted earlier, the Fairness and Resolution Branch is now the central management body responsible for overseeing the management of complaints in the ADF. The Acting Director of the branch, Ms Diane Harris, told the committee in June 2006 that the branch had the capacity to look at a complaint when it is submitted and to determine whether the best process is being used to resolve the matter. She explained:

For example, if that complaint is around what might be a very difficult workplace relationship, it may well be that an alternative dispute resolution process is better suited to it. So we are in a position as a branch to go back to a CO right in the early stages and say, 'Well, yes, this is a formal complaint but have you considered this as an alternative approach,' and so they can use that instead. If it does not succeed, of course the individual still has the formal complaint on the books and it can then be proceeded with as a formal complaint, but sometimes that is not the best way to get the outcome that the individual wants.⁴²

We also have an enhanced advisory role. As of 1 July it will be mandated that all COs, on receiving a complaint, have five days to do their quick assessment to determine what their course of action is going to be and then to submit all of that to the Fairness and Resolution Branch where it will be reviewed. We will have our legal officer look at it, we will have an experienced case officer look at it and we will then provide advice to the CO in terms of the approach that has been proposed.⁴³

We would expect that in most cases that approach will be fairly sound, but in some cases it will not be. We might go back, for example, and say: 'You have nominated Lieutenant Smith to be the inquiry officer. In this case we believe the issues are too complex for a junior officer. We recommend that you appoint a more senior officer to do it.' We might also, for example, say: 'This is a very complex issue. It will be quite involved.' So we might recommend a different inquiry officer altogether and we may put forward to the CO the name of somebody else from outside the unit who might be able to be the inquiry officer for the purposes of that complaint.⁴⁴

4.49 As early as June 2006, the Defence Force Ombudsman, Professor John McMillan, noticed an improvement in the operation of the system. He welcomed the requirement for the central unit to be notified when a complaint or redress of grievance is first lodged. According to the Ombudsman, the unit then takes a quick look at the complaint and can give 'guidance and direction to the unit level

41 Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, p. xxiii.

42 *Committee Hansard*, 19 June 2006, p. 16.

43 *Committee Hansard*, 19 June 2006, p. 17.

44 *Committee Hansard*, 19 June 2006, p. 17.

commander who will be investigating it'. In his view this early management of complaints is 'important and is improving the result'.⁴⁵

4.50 In June 2007, an Ombudsman's report confirmed the earlier positive impressions about the operation of the system:

...Defence currently provides an effective complaint-management mechanism that ADF members can readily access. We observed that ADF members consider there have been improvements in the complaint-handling process in recent years and that members have a reasonable level of confidence in the complaints system.⁴⁶

Committee view

4.51 The committee recognises that the restructuring of the ROG process under the direction of the Fairness and Resolution Branch was a definite improvement. While early indications are promising, the system will require continuing surveillance and adequate staffing.

Managing complaints of unacceptable behaviour

4.52 Although in his 2007 report, the Ombudsman acknowledged a much improved complaint-handling system, he nonetheless made 15 recommendations intended to enhance ADF's administrative system. They were based on suggestions made by members of the ADF and related to recordkeeping, training, reporting, data collection, the role of inquiry officers and equity advisers, and quality assurance. In the view of the Ombudsman, further consideration of these recommendations would:

...improve support to, and accountability of, those involved in making, managing and responding to complaints of unacceptable behaviour. They will also further integrate Defence values of equity and diversity into cultures across the ADF.⁴⁷

4.53 Defence agreed to all the recommendations. A number of matters contained in the report, however, have been of continuing concern to the committee since its major report on Australia's military justice system in June 2005 including fear of reprisal and recordkeeping. The committee has already discussed fear of reprisal.

45 *Committee Hansard*, 26 June 2008, p. 5.

46 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, Executive Summary, p. 1.

47 Executive Summary, Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, p. 1 of 43.

Recordkeeping

4.54 On a number of occasions the committee has expressed concern about poor recordkeeping in the ADF and its implications for the military justice system. In its 2005 report, the committee found that:

Missing or misplaced documentation, poor record keeping, recourse to the Freedom of Information legislation, conflicts of interest, lack of support in processing a complaint, investigating officers who lack the necessary skills, experience or training to conduct a competent inquiry all contribute to unnecessary delays.⁴⁸

4.55 The Ombudsman in his June 2007 report on the management of unacceptable behaviour also referred to deficiencies in ADF recordkeeping. He noted the possibility that deficient recordkeeping may be 'indicative of record-keeping standards more generally in the ADF, rather than being limited to the management and investigation of complaints of unacceptable behaviour'.⁴⁹

4.56 He noted that he had raised concerns about the quality of records of conversation with the FRB (Fairness and Resolution Branch) on previous occasions during the investigation of complaints from members of the ADF. In his view:

Inadequate record keeping not only has the potential to adversely affect decisions made by the commander/manager on resolution of the complaint but can hamper the resolution of complaints which are pursued through the review process in the Instruction, the ROG process, legal proceedings, or an Ombudsman or HREOC [Human Rights and Equal Opportunity Commission] investigation.⁵⁰

4.57 In response to the Ombudsman's recommendations relating to recordkeeping, the CDF explained that the IGADF undertakes monthly audits of selected units to assess the quality of quick assessments, inquiries and recordkeeping in incidents of complaints of unacceptable behaviour.

4.58 The committee notes, however, that the Ombudsman's concern goes beyond recordkeeping relating to the handling of a complaint to recordkeeping more generally in the ADF. In this regard, the committee has received complaints, for example, from former ADF members about medical documents that the ADF could not locate, or would find too difficult to discover among metres of documentation. According to some members, ADF's inability to produce documentation hampers the initial claim process but more particularly any appeal process that the member pursues, for

48 Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, paragraph 8.113.

49 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, paragraph 2.73.

50 Commonwealth Ombudsman, *Australian Defence Force: Management of Complaints about Unacceptable Behaviour*, Report 04/2007, June 2007, paragraph 2.73.

example, in the Administrative Appeals Tribunal. In this way, poor recordkeeping may adversely affect the ability of complainants to press their claims thus denying them natural justice. The committee notes a recent finding by Justice Crispin in *Vance v Air Marshall McCormack*:

It is inescapable that the defendants have already had almost five and a half years to find the documents relevant to the retirement of a single officer. An earlier generation of military officers waged the First World War in substantially less time. No plaintiff should be forced to endure such an extraordinary delay in the litigation of his or her claim due to the sustained default of a defendant...⁵¹

Committee view

4.59 The committee is of the view that, as part of the IGADF's monthly auditing, the IGADF also take account of any difficulties experienced by a complainant because of missing or incomplete documentation. Furthermore, the committee suggests that in analysing and reporting on the matters referred to the Office of the IGADF, the IGADF note whether poor recordkeeping has been cited by the complainant as an impediment or frustration in pursuing redress.

4.60 Along similar lines, the committee suggests that the Defence Force Ombudsman also take particular note of, and report on, the complaints he receives from members of the ADF that relate to difficulties complainants may have experienced in pursuing their claims because of poor recordkeeping. These matters would include unnecessary delays or costs because the ADF could not locate documents.

CDF commissions of inquiry (COIs)

4.61 In its 2005 report on Australia's military justice system, the committee raised concerns about administrative inquiries into grave and complex matters such as sudden death or serious accidents. At that time, it could not stress strongly enough the importance of having investigating authorities 'above any suspicion of partiality'. It recommended that all notifiable incidents including suicide, accidental death or serious injury be referred to its proposed Australian Defence Force Administrative Review Board (ADFARB) for investigation or inquiry. Although the government agreed that there was a need to demonstrate that ADF inquiries into serious incidents were independent and impartial, it rejected the recommendation to establish such a review board. Instead, it undertook to establish Chief of Defence Force Commissions of Inquiry (COIs) to meet the objectives of independence and impartiality.⁵²

51 Supreme Court of the ACT, *Russell Vance V Air Marshall Errol John McCormack* in his capacity of Air Force and Commonwealth of Australia, 28 September 2007, p. 10 of 15.

52 Government response to committee's recommendation 34 in Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005.

4.62 The Defence Legislation Amendment Act 2006 allows the Governor-General to make regulations in relation to the appointment, procedures and powers of CDF commissions of inquiry. Regulations enabling the appointment of COIs were passed by the Federal Executive on 21 June 2007 and commenced on 26 June 2007.

Role of COIs

4.63 The CDF made clear that COIs are intended to inform internal military decisions. They:

...determine the facts and circumstances surrounding an incident so an informed decision can be made regarding how and, if possible, why an incident occurred, to help avoid a similar occurrence in the future. This is vital for the safety and reputation of our people and the maintenance of our capability. So far, these new arrangements have worked very well.⁵³

4.64 He explained further:

COIs are not carried out with the intention of meeting the requirements of any other organisation or person outside of Defence. Defence is nevertheless committed to supporting the families of deceased ADF members throughout the COI process and beyond.⁵⁴

4.65 Captain Willee, who has been appointed to the CDF's panel of presidential members for the conduct of CIOs, also explained the importance of Defence inquiring into serious incidents:

...one has to go back to the fundamental reason for inquiries—that is, that defence and most disciplined forces, such as fire brigades and police services, need to get to the answer to the problem as quickly as they possibly can, whether it be a blown gasket on an engine in an engine room or a rifle that consistently misfires, to establish a cure so that it does not happen again. In that sense it is sometimes seen that that need brings about a lack of impartiality.⁵⁵

4.66 He acknowledged, however, that these inquiries:

...will never deal with the fundamental difficulty...that is, the grief which afflicts those whose loved ones have been taken from them in whatever way and the constant theme that runs through all those sorts of inquiries that something more can be done or that something has not been done properly. We can only address that in the best possible way and as sympathetically as possible, but it will never resolve or assuage the initial grief, the bitterness

53 *Committee Hansard*, 20 June 2008, p. 23.

54 Department of Defence, *Report on the Progress of Reforms to the Military Justice System*, 5 June 2008, p. 6 and *Committee Hansard*, 20 June 2008, p. 23.

55 *Committee Hansard*, 20 June 2008, pp. 43–44.

and the concern that often arises from that that not everything has been discovered.⁵⁶

4.67 The committee recognises the importance of Defence inquiring into mishaps or accidents in the ADF causing serious or fatal injuries. It is also aware of the importance of such inquiries being removed from undue influence, especially from command, and being conducted by competent investigators.

4.68 To address this problem of perceived partiality, the Defence (Inquiry) Regulations stipulate that the president of a COI must be a civilian with judicial experience and he or she must not be a permanent or reserve member of the ADF. Captain Willee stated:

I would hope that those inquiries that have been conducted to date, which have been studied by those who are concerned, would have already helped to dispel any notions of lack of impartiality. As we go forward, we will continue to improve the transparency and openness of the proceedings so that people can be assured.

It is certainly not a case of the Defence Force investigating itself. The act requires that those who are appointed as presidential members to conduct those inquiries not be members of the ADF. Some ill-informed people might think that, because we have been members, that would have imbued in us a love of the service to such an extent that we would continue to want to curry favour with the force.⁵⁷

4.69 It should be noted that a CDF commission of inquiry has the power to make recommendations arising from its findings. The CDF must also, at the end of the financial year, prepare a report to be included in the Department's annual report on the operation of the regulations governing the commissions.⁵⁸ This requirement provides an opportunity for the parliament to examine the ADF on the conduct and effectiveness of CDF commissions of inquiry.

4.70 Under the regulations, a commission of inquiry must not conduct an inquiry in public.⁵⁹ The CDF, however, may direct that a commission of inquiry conduct all or

56 *Committee Hansard*, 20 June 2008, p. 42.

57 *Committee Hansard*, 20 June 2008, p. 44.

58 Regulations 110 and 125, *Defence (Inquiry) Regulations 1985*, (accessed 16 September 2008).

59 Regulation 117 reads:

- (1) Subject to subregulation (2), a Commission of Inquiry must not conduct an inquiry in public.
- (2) The appointing authority (CDF) may direct
 - (a) that a Commission of Inquiry conduct all or part of an inquiry in public; or
 - (b) that a person, or persons included in a class of persons, specified in the direction may be present during all or part of an inquiry.

Defence (Inquiry) Regulations 1985, (accessed 16 September 2008).

part of an inquiry in public. The committee understands that in some circumstances an inquiry or part of an inquiry should not be held in public. The regulations allow for the president of a commission under certain circumstances to direct that the inquiry conduct all or part of its proceedings in private. In the interests of transparency and accountability, the committee can see advantages in requiring commissions of inquiry to be conducted in public but allowing the president, as he or she now has, the power to determine to hear the inquiry or parts of it in private.

Committee view

4.71 The committee recognises that the introduction of CIOs presided over by a civilian with judicial experience has in some way removed the perception of Defence inquiring into itself. It would like to see the regulations governing the operation of the commissions changed to provide greater transparency such as the presumption that commissions will be conducted in public. Furthermore, where proceedings are to be private, the committee suggests that the regulations require the president to make a statement outlining the reasons for this decision (see recommendation 11 paragraph 5.57).

4.72 It accepts, as noted by Captain Willee, that such commissions cannot address the 'grief which afflicts those whose loved ones have been taken from them'.

Arrangements with coroners

4.73 Since its first report in June 2005, the committee has been trying to get a clearer understanding of the arrangements for coronial inquiries relating to a death in service. In June 2008, the CDF informed the committee that Defence has protocols in place with the state coroners of Victoria, Queensland and Tasmania and anticipated that eventually agreements would be reached with the ACT, Northern Territory and New South Wales.⁶⁰

4.74 The most recent published reports by ADF investigating officers make observations with regard to the involvement of a coroner. In January 2008, the investigation into the death of Sergeant Matthew Locke in Afghanistan recommended that State Coroners be informed of the need to conduct post-mortems following combat death incidents. The inquiry into the death of Trooper David Pearce, who also died while serving in Afghanistan, noted that an autopsy was not conducted by the Queensland coroner. The investigating officer stated further, 'Whilst I consider an autopsy to not be necessary in this case, I am unaware why such a decision was made'.⁶¹

60 *Committee Hansard*, 20 June 2008, pp. 23 and 25.

61 *Inquiry Officer's Report into the Death of 8229246 SGT MR Locke in Afghanistan on 25 Oct 07*, paragraph 51 and *Inquiry Officer's Report into the Death of 8298024 TPR DR Pearce and Injury to...in Afghanistan on 8 Oct 07*, paragraph 53.

4.75 In response to questions about formulating protocols for the relevant state or territory coroner to hold an inquest into an ADF sudden or unexplained death, Air Vice Marshal Austin, Defence Health Services Division, explained:

It is fair to say that we do not, in fact, have formal written agreements in place with the two states that you have mentioned [South Australia and Western Australia]. However, what we have done is improve the personal relationships that exist and nominate ADF liaison people with those jurisdictions. We believe that the relationship has been greatly enhanced as a consequence of that, and certainly there has been no evidence that, in any of the jurisdictions, we are now having the problems that we had experienced in the past.⁶²

4.76 The committee is not impressed with the progress made by Defence in developing protocols with all state and territory coroners for the inquiry into the sudden or unexplained death of an ADF person. It understands that the function and responsibilities of coroners are governed by their respective legislation and in no way should their independence be compromised. Even so, the committee remains unconvinced that the arrangements between Defence and state coroners are sufficiently robust to ensure that the rights of the all deceased and next-of-kin are appropriately protected.

4.77 Because of the confusion surrounding the relationship between the ADF and state and territory coroners, the committee believes that the newly appointed review team could consider this matter. The committee's main concern is with ensuring that the rights of the deceased and the next-of-kin are the same as those of civilians and are fully protected.

62 *Committee Hansard*, 20 June 2008, p. 25.