

3 Inquiries pursuant to the Defence (Inquiry) Regulations

General

- 3.1 Several inquiries pursuant to the Defence (Inquiry) Regulations 1985 were examined closely during the hearings and are analysed in Part Two of this report. These included an Inquiry Officer's Inquiry conducted by a naval officer (CMDR Neil Wark) assisted by a Reserve Legal Officer (paragraphs 2.11 to 2.42 of Part Two), an Inquiry Officer's Inquiry conducted by an external lawyer (Mr John Weber) (paragraphs 5.9 to 5.11) and an Inspector General Australian Defence Force Inquiry (paragraphs 5.18 to 5.20). I did not detect any systematic or endemic failure or problem associated with the conduct of those inquiries. The Defence (Inquiry) Regulations and ADFP 06.1.4, as it applied to those inquiries, are generally sound. There will always be differences in the precise way an inquiry is carried out, and there will be differences of opinion later about how well it was carried out. Provided this is within normal bounds, there is no cause for concern.
- 3.2 In its report⁵² the Working Group the Chief of the Defence Force established in 2010 to review the ADF's system of administrative inquiries posed a question on page 22: 'Should Inquiry Officer Inquiries into serious or complex incidents be a specialist function?' The report then noted, in paragraph 85, perceived problems with Inquiry Officer Inquiries, including apprehended bias on the part of appointing officers, a lack of inquiry officer independence and experience, lapses in procedural fairness, lapses in the gathering of evidence, and lapses in the analysis of that evidence.
- 3.3 The experience of this Commission of Inquiry into HMAS *Success* did not expose the types of problems outlined in the Working Group's report. As a result, it is not appropriate for me to make firm recommendations in relation to the options canvassed in that report. I do, however, make the following general observations.
- 3.4 I can see the benefit of having a pool of trained, accredited and experienced inquiry officers available to be appointed to conduct Inquiry

⁵² Report of the Review of the Australian Defence Force System of Administrative Inquiries, 19 November 2010.

Officer Inquiries into serious or complex incidents and complaints.⁵³

I can also see that there might be occasions when it would be useful to have individuals not subject to ordinary command available for the purpose. Once detached from active duties, however, these individuals would become increasingly out of touch with operational circumstances, and that would affect their capability and the credibility of the result. Both direct costs and indirect costs would be incurred in removing experienced personnel from active duties. I have assumed that the pool would not consist of lawyers. There is an ample supply of external lawyers, including Reserve Officers, capable of conducting inquiries where the choice of a lawyer is appropriate. Furthermore, an external lawyer can act as an inquiry assistant, as was the case in the Wark inquiry.

- 3.5 There are distinct strands in the Working Group's proposals for change. One is expertise. Another is administrative convenience. Another is independence. It is the last of these that is prompting the proposal for external control of inquiries. The reaction to such a proposal will be influenced by the philosophy of the audience. Some will be instinctively against the military investigating the military; others will be instinctively against civilian interference in military affairs.
- 3.6 I am not able to judge whether the deficiencies in the present arrangements are sufficient to justify such a policy change. A word of caution might not be out of place. Much of the impetus for change of this kind has come as a result of agitation by those who claim to have been badly treated and who have persuaded others outside the military to take up their cause. It is possible that undue attention to such cases skews proper perspective: the squeaky wheel usually receives the oil.
- 3.7 In considering this subject, it is possible to misunderstand the nature and purpose of inquiries pursuant to the Defence (Inquiry) Regulations. Such inquiries are not part of a complaints or discipline system. Their primary purpose is to determine the relevant facts and circumstances so that command can take the necessary action and learn lessons for the future. They are designed to assist command in securing the proper functioning of the Defence Force; they are not about individuals as such.
- 3.8 There is also debate about the auspices under which the specialist cell would lie if there were to be specialisation. As I understand it, the broad choice would be between the command structure, the Inspector

⁵³ In this regard I note that the Army has developed a dedicated cell called the 'Army Administrative Inquiries Cell', which consists of experienced trained officers who could be used as investigating officers. Serious and complex matters within the Army, as defined in CDF Directive 04/10, are required to be referred to the cell for assessment and, where necessary, allocation of an appointing officer. The appointing officer is responsible for drafting terms of reference. Draft inquiry reports are sent for initial legal review before delivery. See also Chief of Army Directive 17/11.

General ADF or a new body such as ADFARB (the ADF Administrative Review Board proposed by the Senate Foreign Affairs, Defence and Trade References Committee in June 2005) or a combination of one or more. The proposal currently favoured is a cell within the command structure but with access to the Inspector General ADF in certain circumstances.

- 3.9 It is unlikely that there would be any compelling reason to move the cell out of command for expertise, assuming that the cell is properly resourced and led. The Inspector General ADF would add some advantage in expertise because of the experience of his officers in auditing inquiries and in conducting IGADF inquiries. In Appendix D I express doubts about the statutory base for the activities of the IGADF in relation to, inter alia, administrative inquiries (paragraphs D.26 and D.27). Leaving that aside, if the IGADF is to be given operational functions in relation to the conduct of inquiries, there arises a possible conflict between those functions and the oversight functions set out in s. 110C of the *Defence Act 1903*.
- 3.10 A new, independent body would have considerable difficulty recruiting and retaining a pool of Defence Force personnel with current operational experience. It is more likely to be staffed by lawyers or administrators and might well not have expertise relevant to Inquiry Officer Inquiries.
- 3.11 The other factor is independence. Some see the IGADF as not being truly independent of command. Whether that gives sufficient weight to the statutory provisions is debatable, and there is a proposal to increase the independence of the office.
- 3.12 Be that as it may, the need for independence is not self-evident. I have said on more than one occasion that Defence (Inquiry) Regulations inquiries are an important aspect of command of the Defence Force. Those with the greatest need to know are those in command.
- 3.13 An inquiry can, however, relate to matters that could bring discredit on the Defence Force and members of the Defence Force. Hence the argument for the independence of the inquirer. If the matters involve high-level command or are of potential public concern, however, an Inquiry Officer's Inquiry would not be suitable: a higher level inquiry under the Regulations, where independence is not in question, should be used in those circumstances.
- 3.14 The case for independent conduct of inquiries would be compelling if there were evidence of a cover-up by those who have conducted inquiries, by high-level command or by the civilian administration of the Defence Force. I am not aware of such evidence.

Some reform proposals

- 3.15 The experience of conducting this Commission of Inquiry leads me to make some recommendations for reform in relation to Chief of Defence Force commissions of inquiry. Other suggestions are presented in Appendix E, which outlines the conduct of this Commission.

Appearances and representation

- 3.16 Regulation 121 of the Defence (Inquiry) Regulations is as follows:

Appearances and representation

- (1) If the President of a Commission of Inquiry considers that a person (person A) may be affected by the inquiry conducted by the Commission, person A is authorised to appear before the Commission.
- (2) If the President of a Commission of Inquiry considers that the record or reputation of a person who has died (person B) may be affected by the inquiry conducted by the Commission, a single representative of person B is authorised to appear before the Commission.
- (3) Person A, and the representative of person B, may appoint another person (person C) (who may be a legal practitioner) to represent him or her for the purposes of the inquiry, and person C is authorised to appear before the Commission.
- (4) If a legal practitioner appointed under subregulation (3) is an officer in the Defence Force, his or her services must be made available at the expense of the Commonwealth.

This Regulation—which is similar to r. 33 in relation to boards of inquiry—is to be contrasted with r. 15, relating to general courts of inquiry:

Appearances

- (1) The Chief of the Defence Force or a service chief is authorized to appear before a General Court of Inquiry.
- (2) Where the President of a General Court of Inquiry considers that a person may be affected by the inquiry conducted by the Court, the President may authorize that person to appear before the Court.
- (3) A person authorized to appear before a General Court of Inquiry may appoint another person to represent the first-mentioned person for the purposes of the inquiry and the person so appointed is authorized to appear before the Court.

Neither Part 6, Inquiry Officers and Inquiry Assistants, nor Part 7, Inquiries by the Inspector General Australian Defence Force, refers to appearances and representation.

- 3.17 Although no part of ADFP 06.1.4 deals expressly with a Chief of Defence Force commission of inquiry, it can be gleaned from various references that the view is that a potentially affected person is one in respect of whom the findings of the inquiry are likely to have an adverse effect on the career or military reputation of that person (including a person whose conduct, performance or standards might be criticised) as well as where there is a possibility of administrative action or disciplinary investigation resulting against a person. There is an argument that the terms of r. 121 are not limited in that way. The person might, arguably, be affected by the conduct of the inquiry rather than its outcome. In the case of an inquiry in public, witnesses might be subject to damage to their reputation even though adverse findings as to conduct are unlikely to be made.
- 3.18 A typical instance would be the position of a person making an allegation of unacceptable conduct against another. He or she could be subject to hostile cross-examination and submissions challenging his or her honesty, either by counsel assisting or by counsel for a represented party. This is consistent with the development of administrative law as it relates to procedural fairness. For example, it is established that reputation is an interest protected by procedural fairness, at least in many circumstances (*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Independent Commission against Corruption v Chaffey* (1993) 30 NSWLR 21 per Gleeson CJ at 27E; *Apache Northwest Pty Ltd v Agostini* (No. 2) [2009] WASCA 231).
- 3.19 Whether r. 121 is so limited or not, in an inquiry such as this current one the net was cast very wide: 20 individuals were authorised to appear, and all were legally represented; 31 individuals received notice of possible adverse findings after the hearings were completed.
- 3.20 This poses great difficulties for the conduct of a Chief of Defence Force commission of inquiry, as is recognised in paragraph 7.58 of ADFP 06.1.4:

On the one hand, the more people who are represented before the Board, the more cumbersome the proceedings and the longer the inquiry will take to complete. On the other hand, the Board cannot make adverse findings against a person who has not been given the opportunity to be heard. If an affected person is notified of their PAP [potentially affected person] status late in proceedings, they will, if they request, be granted an adjournment to allow a reasonable opportunity to familiarise themselves with the evidence. Further, they may require witnesses to be recalled so that additional matters can be put to them. This will cause

significant delays if there are a number of witnesses involved.
Fewer delays will occur if affected persons can be identified early
in the proceedings or before proceedings commence.

- 3.21 Granting the status of party to a person with a right to be present, particularly if there is a legal representative, inevitably affects the course of proceedings. Although the consequences of being a party are not spelt out, the reality is that, since the person is likely to be present or represented, they must be involved in the arrangements that are made and supplied with information, and they will tend to become a focus of the hearings. This has the potential to turn a wide-ranging inquiry into a series of cases against the represented parties, which would complicate the conduct of the inquiry and have the capacity to distract the inquiry from its real purpose. What is more, the represented parties have an advantage over unrepresented parties.
- 3.22 This Commission's Practice Note Number 1 broadly followed the lines of the matter upheld in *Kinghorn v Cole* (2002) 190 ALR 679; [2002] FCA 45—with particular emphasis on the limits to the right to cross-examine in an attempt to avoid unnecessary disruption. That proved difficult to achieve in practice.⁵⁴
- 3.23 A right to appear and be represented goes well beyond the obligation to afford procedural fairness. Some perspective needs to be kept. It is not the function of a commission of this kind to find that a disciplinary or criminal offence has been committed by any person. The essential purpose of such a commission is to determine the facts and circumstances that fall within the scope of the terms of reference and make recommendations based on the findings. The extent to which any report of a court of inquiry or an Inquiry Officer's Inquiry is made public, and the form in which it is made public, are matters for the Minister.⁵⁵ Any adverse disciplinary or administrative action against a person requires a separate proceeding in which that person has the opportunity of meeting the case made.
- 3.24 The combined impact of rr. 121 and 122 constitutes a considerable source of obligation to individuals who might merely be criticised for conduct that is of little consequence in the broad sweep of the inquiry or, indeed, might be said to be affected when all that happens is that poor conduct by that person is revealed by the evidence and noted in a report. These protections might make good sense when viewed in the context of an inquiry into a fatality, where the hearings are more focused than in a broader inquiry such as the present one, but even in that case the conduct of individuals concerned with a chain of events will vary from minor to major. Regulation 122 (as with r. 121) goes

⁵⁴ Appendix F shows a copy of Practice Note Number 1.

⁵⁵ See ss. 63 and 78 of the Defence (Inquiry) Regulations.

beyond the requirements of common law natural justice or procedural fairness.

3.25 In summary, witnesses in a Chief of Defence Force commission of inquiry have greater protections than do witnesses in civil or criminal litigation. The latter are very often criticised for one thing or another and have discreditable conduct exposed without representation. In my view, the objective of having a Chief of Defence Force commission of inquiry to determine relevant facts and circumstances and so allow lessons to be learnt and corrective measures taken is hampered by too great a concern for the rights and interests of witnesses.

3.26 I **recommend** that r. 121 of the Defence (Inquiry) Regulations be amended so as to achieve the following:

- make it clear that the relevant potential adverse effect on a person must be the result of the findings or recommendations of the commission on the career or military reputation of the member, not the conduct of the inquiry
- provide that appearances and representation should be at the discretion of the inquiry president, along the lines of the situation pursuant to r. 15 of the Defence (Inquiry) Regulations in the case of a general court of inquiry. Consideration could be given to the same course in relation to courts of inquiry
- provide that the right of appearance may be general or limited, at the discretion of the president.

Confidentiality

3.27 The ability to take evidence confidentially or to keep evidence confidential when an inquiry is to be conducted in public was another problem that emerged in the course of this Commission of Inquiry. Regulation 117(3) of the Defence (Inquiry) Regulations is as follows:

- (3) If the President of a Commission of Inquiry that is conducting all or part of an inquiry in public is satisfied that it is necessary to do so in the interests of the defence of the Commonwealth or of fairness to a person who the President considers may be affected by the inquiry, the President may:
 - (a) direct that all or part of the inquiry must be conducted in private and give directions as to the persons who may be present; or
 - (b) order that a person, or persons included in a class of persons, specified in the order not be present during the hearing of all or part of the inquiry.

- 3.28 The Regulation refers to fairness to a person who might be affected by the inquiry—normally somebody accused of poor conduct—but not to fairness to others, such as those who give evidence about that conduct, including those who might have reported the conduct with assurances of confidence. That problem was exacerbated in the present case because of the party status of a number of individuals against whom allegations of intimidation were made, with their lawyers present and seeking to cross-examine and with the alleged wrongdoers present in the hearing room. Furthermore, some of the evidence given by young and inexperienced sailors, mostly female, concerned matters that would normally be kept private. Two witnesses simply refused to give evidence in public and implicate others: they feared repercussions.
- 3.29 These difficulties were managed by the Commission taking a wide view of what was necessary in the interests of the defence of the Commonwealth. That view was not tested. It is an unsatisfactory basis for management of a Chief of Defence Force commission inquiry. In ordinary litigation where there is a strong public interest in proceedings, a judge has wider power to preserve confidentiality than does a president under the Defence (Inquiry) Regulations. This is another example of the interests of the person who is accused of wrongdoing being preferred over other interests and the inquiry being regarded as akin to a disciplinary proceeding. That approach pervaded much of the conduct of the matter by counsel representing potentially affected persons.
- 3.30 **I recommend** that the president of a Chief of Defence Force commission of inquiry be given express power to control who may be present when evidence is given.
- 3.31 **I recommend** that r. 117 of the Defence (Inquiry) Regulations (and cognate Regulations in relation to other inquiries) be redrafted to expressly grant discretion to preserve the confidentiality of evidence and of witnesses for proper cause.
- 3.32 The Working Group established in 2010 to review the ADF's system of administrative inquiries made a number of recommendations concerning Chief of Defence Force commissions of inquiry. I deal earlier with Recommendations 11 and 12, relating to people who might be adversely affected and the right of appearance. The question of confidentiality to which I refer was not the subject of a recommendation. Many of the recommendations deal with matters into which I have no particular insight arising out of my conduct of this Commission. But in some instances I do.

3.33 Recommendation 6 is as follows:

6. The Defence (Inquiry) Regulations should be amended to provide for an additional format of COI which would include a civilian Commissioner, who has judicial experience, but would conduct its inquiries in private ...

Recommendation 20 is as follows:

20. The Defence (Inquiry) Regulations should be amended to empower CDF COI assistants to gather evidence outside of formal COI hearings ...

3.34 Those recommendations effectively prescribe something akin to an Inquiry Officer's Inquiry, pursuant to Part 6 of the Regulations, but with a civilian with judicial experience conducting the inquiry. I would be inclined to hasten slowly about that. I am concerned that the recommended change to the character of the inquiry would affect its credibility and would deter some qualified individuals from accepting appointment.

3.35 I understand there is concern about the time, cost and adversarial nature of a Chief of Defence Force commission of inquiry conducted under the present regime. I am, however, confident that adoption of the recommendations I make about confidentiality and the limits to the right of appearance and representation would substantially diminish the adversarial nature of an inquiry and reduce time and costs. Nevertheless, the reality is that a thorough inquiry into complex matters, be it held in public or in private, will probably be lengthy and costly.

3.36 It also should be borne in mind that r. 115 provides that the appointing authority may direct the procedure and r. 116 provides that the inquiry president may inform himself or herself on any matter relevant to their inquiry. The default position at the moment is that a Chief of Defence Force commission of inquiry must not be conducted in public (r. 117).

3.37 The subject of empowering Chief of Defence Force commission of inquiry assistants to gather evidence outside formal hearings is controversial. An assistant acting in such a capacity would give rise to questions about procedure and perception. The commissioner or commissioners would be receiving second-hand evidence. It is not clear whether the assistant would be able to compel answers and administer an oath. The appointment of counsel assisting is the normal manner of proceeding and is within the procedures the appointing authority can direct pursuant to r. 115. Any lack of cooperation with counsel can be met by using the compulsory powers of the commission. Counsel assisting prepares evidence but does not act as a delegate of the commission.

