

ENCLOSURE A: DEFENCE INQUIRY INEQUITIES

A snapshot of the shortfalls in the current application of Defence Inquiries, which

1. **are not mandatory.** If a Defence member has a complaint, it is only heard at the Chain of Command's discretion.
2. **are not independent.** Officers conducting the inquiries are not independent as they are all under the same command.
3. **lack of transparency:** Freedom of Information can be obtained but is heavily redacted. Transcripts of evidence are contradictory as oral evidence does not match written transcripts.
4. **are conducted in secrecy.** Defence members who participate in a Defence Inquiry are not permitted to make public the outcome of their complaint or disclose the findings (similarly witnesses). This may be seen to conflict with the principle of open justice, a fundamental rule of common law that binds to the concept that abuses flourish when undetected.
5. **involve evidence that is selective.** Witnesses are consulted on a specific condition where the terms of reference are decided by the service chiefs. The full extent of a complaint can never be heard. (*See Afghanistan Report*).¹
6. **involve the exclusion of evidence.** Defence Inquiry Officers are not technically obliged to submit evidence provided by the Defence member.
7. **are founded upon permissible hearsay.** Evidence that is not taken under oath. By allowing Defence Inquiry Officers to consider circumstantial evidence and hearsay, without the rules of evidence being bound by legal technicalities, prevents Defence members from having access to a *fair or just hearing* of their complaint.
8. **allow witness collusion.** Some Defence Inquiry Officers have been known to consult witnesses on the terms of reference and give witnesses running updates over the course of the Inquiry.
9. **allow witness bias.** In some cases, witnesses are offered the promise of immunity. Therefore, they can say anything they like and are given guarantees that anything they say, or documents they provide to a Defence Inquiry Officer, are protected from possible prosecution or civil suit. (*See Afghanistan Report*).²
10. **permit false witness testimony.** Evidence from previous cases, including the findings of a 2019 Senate Committee investigation (Report on Military Justice Procedures in the ADF, Chapter 5, Administrative Action) into ADF administrative actions, have shown there have been incidents where witnesses have deliberately provided false information, false accusations and misleading statements to Defence Inquiry Officers.³

¹ IGADF, 'Afghanistan Inquiry Report.' (2020). <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

² Ibid.

³ Senator D J MacGibbon, (2011). Chapter 5, Report on Military Justice Procedures in the Australian Defence Force. (Administrative Action) Inquiry into the Review of the Defence Annual Report 2011-2012. *Parliament of Australia*. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/military/MJ_ch_5.

11. **are undermined by unreliable witnesses.** Some Defence Inquiry Officers have been known to cherry-pick witnesses who will give testimony that best serves the ADF's interests and discount credible witnesses who give testimony in support of the complainant.
12. **are not timely.** A Defence Inquiry is a long and painful drawn-out process, resulting in significant anxiety and emotional trauma for the Defence member and their family.
13. **are conducted with a lack of governance.** Defence Inquiry Officers are protected from prosecution and other civil proceedings.
14. **are conducted by untrained Defence Inquiry Officers.** Defence Inquiry Officers are selected because they have: 'appropriate management and/or research and analytical skills, communication and report writing skills.' They may undertake four days of non-mandatory training. They are not legally trained. Reviews by the Commonwealth Ombudsman and other external organisations have found recurring problems that are not remedied despite recommendations.⁴ Inquiry Officers were:
 - inadequate in planning investigations.
 - failed to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed.
 - pursued irrelevant questioning techniques and failed to put contradictory evidence to witnesses for a response.
 - failed to record evidence properly, and possibly, preparation of witnesses and unauthorised questioning of witnesses.
 - failed to analyse evidence objectively and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made; and
 - inadequate record keeping.
15. **allow Inquiry Officer bias.** The no bias rule requires the Defence Inquiry Officer to be neutral and act impartially, honestly and without prejudice, and be above suspicion that they are interested in the outcome of the matter or have prejudged it. On the contrary, several reviews of Inquiries suggest that military members can never properly investigate military members because of the intensely hierarchical nature of the ADF.⁵ (See examples where two very experienced investigating Officers listened to hours of evidence and considered their findings carefully, only to have all their findings that were in the Defence member's favour overturned by the Appointing Officer, whilst the same individual endorsed all their conclusions that protected either the office of the Chief of the Air Force or the Commonwealth's interests.)⁶ To eliminate bias in Inquiries, the Inquiry Officers should be selected from outside the affected Headquarters, corps or service.
16. **are conducted by unskilled Defence Inquiry Officers.** IGADF is staffed by some career service police, and of these, some rarely interview real offenders, rarely if ever give evidence in court or deal with serious crime and are rarely held accountable for their actions or

⁴ Parliament of Australia, (2007), Chapter 8 – The administrative system -investigations. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2004-07/miljustice/report/c08.

⁵ Parliament of Australia, (2007). Chapter 10- Adverse Action, appeal processes and external review of administrative procedures. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2004-07/miljustice/report/c10.

⁶ Ibid 10.40

investigations (e.g., by an independent court, the media, or experienced internal investigators), or career public service lawyers who have never been in a courtroom. The training, skills and knowledge of some investigators in IGADF may be well below that of a civilian police force or prosecution service.

17. **are conducted by some Defence Inquiry Officers who ignore policy directives:** In legal terms, administrative inquiries *may not investigate criminal conduct*. Suppose an inquiry uncovers conduct that may be criminal. In that case, the regulations state that the Inquiry Officer must cease the Inquiry immediately and hand over to the lawful authorities.⁷ This inequity has been recognised in numerous inquiries into the effectiveness of Australia's military justice system and continues to present in contemporary inquiries because recommendations are not upheld. Commanders are able to gatekeep information to protect the ADF from much-needed reform because the Australian government does not enforce recommendations made by Royal Commissions and other instruments of inquiry into Defence Inquiries. The Administration Inquiry Manual states at Annex 4B at paragraph 50:

If, at any time during an inquiry, you conclude that an offence may have been committed in breach of either civil, criminal law or the Defence Force Discipline Act 1982 (DFDA),⁸ this aspect of the inquiry must be immediately suspended, and the issue reported to the Appointing Officer or Authority in writing.

18. **condone inaccurate interpretation.** Defence Inquiry Officers can *interpret events* according to their own *opinion* and not as events actually occurred. They have the freedom to use their own discretion to decide what information shall inform their proposed findings. This is true, regardless of if it is focussed heavily on unsubstantiated hearsay and disregards credible witness testimony, as is often the case.
19. **allow defective investigation conduct.** Poor record-keeping and communication, lack of support, conflicts of interest, and privacy breaches can exacerbate the Inquiry of a complaint and trigger mental health risks.
20. **encourage withholding of evidence.** Some Defence Inquiry Officers select only certain parts of a complainant's evidence to inform the final findings. They prevent full disclosure from the complainant.
21. **are unethical.** Defence Inquiries are not independent or ethical because they allow complainants to be victimised and publicly humiliated (See David McBride Case⁹ and Lawyer and former ADF soldier Mick Bainbridge's story).¹⁰

⁷ Parliament of Australia, 'The Effectiveness of Australia's Military Justice System, Chapter 2, Australia's military justice system: an overview' (16 June 2005). < https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2004-07/miljustice/report/c02#:~:text=The%20Administrative%20Inquiries%20Manual%20provides%3A%20A%20General%20Court,of%20the%20most%20senior%20officers%20of%20the%20>.

⁸ *Defence Force Discipline Act 1982*, < <https://www.legislation.gov.au/Details/C2021C00458>>.

⁹ Nick Xenophon. 'If moral courage matters, this whistle-blower needs defending.' *The Age Newspaper*. November 17, 2020. <https://www.theage.com.au/national/if-moral-courage-matters-this-whistleblower-needs-defending-20201116-p56ey4.html>.

¹⁰ Australian Broadcasting Commission. 'When the war is over. *Australian Story*, 2018. <https://www.abc.net.au/austory/mick-bainbridge/9619396>.

22. **lack procedural fairness.** Defence Inquiry Officers are not obliged to accept or report any written, adversarial evidence in their final findings. Defence members are rarely given full access to evidence that Inquiry Officers have relied upon in concluding their findings.
23. **rely on cogent evidence and a lesser standard of proof.** Defence Inquiry Officers assume an investigator's role to determine whether there is a sufficient amount of evidence to prove allegations. They are not trained, investigators. The amount of proof required is known as the 'standard of proof.' In civil cases, the standard of proof is the balance of probabilities, a lesser standard than the proof required (beyond reasonable doubt) in criminal matters. The balance of probabilities is determined by whether an alleged event is 'more probable than not' or which version of an allegation is more probable.' Inquiry Officers make recommendations that are not technically admissible as evidence in a court or tribunal. In most cases, the findings are flawed because they are not always supported by evidence that establishes the truth of something.
24. **force a waiver of Constitutional Rights.** The Defence Inquiry process forces Defence members to waive their Constitutional right to protections, as Australian citizens under Commonwealth Law, despite that they are not legally obliged to waive such protections. Expanding civilian police and courts' involvement in areas where they have the expertise and structures to better handle such matters and creating a court that reflects principles enshrined in the Commonwealth Constitution, Defence members could enjoy the same rights and have the same safeguards as all Australians. Thus, provide Defence members with a process that will provide impartial, rigorous and fair outcomes and one that is transparent and accountable.
25. **are immune to scrutiny by a system of self-protection.** ADF uses the full weight of its resources, human, legal and financial (taxpayer funds), to minimise liability and reputational harm to itself. Adverse comments are often left on the Inquiry findings even when proved to be false. This is to discredit the complaint to validate the flawed Inquiry findings.
26. **is a process presently concealing Commonwealth Law violations.** *Defence Force Discipline Act 1982 (DFDA 1982)* is an act of Parliament - A decree proclaiming the law passed by the legislature and given Royal Assent by the Crown. Defence Inquiry Officers must follow ADF policies, instructions and directives as a 'general order.' (DFDA 1982 Part 1 Sect 3 – "general order"). If they do not follow the policy or instruction (*Defence (Inquiry) Regulations 2018*, then they are failing to comply with a general order (*DFDA 1982 Part 3, Division 3, Sect 29*) and should be subjected to disciplinary action, as stated in the *DFDA 1982*. Defence Inquiry Officers have concluded findings based on comments not supported by facts or documents.
27. **often misleads Ministers reviewing or commenting on Defence Inquiry findings.** Defence Ministers are not always fully informed with an accurate account of the complaint. Defence Inquiry findings frequently omit key evidence, and there are many recorded instances where Defence Inquiries contain false evidence.
28. **lack of corrective action:** Current policy inequities compound existing detriments because the ADF does not have any corrective action policy.

29. **creating financial detriments.** A Commanding Officer can issue a Defence member with a Notice To Show Cause.¹¹ The Defence member has only 14 days to represent why they should not be the subject of the proposed administrative action by way of a written reply. That representation is then submitted to the same individual who issued the Notice to Show Cause. The person who believes there is a problem is also the investigator and authorised decision maker! This allows for complete abuse of power in totality and misfeasance. This is a significant contributor to why there are so many young Veterans prematurely out of the ADF and being managed by DVA. This point is frequently overlooked. Some Veterans are too young to access their Superannuation which creates a financial detriment on top of existing administrative liability.
30. **allow unequal access to financial resources.** Past reviews have shown a distinctly unequal position to the party making the allegation.¹² The Defence member responding to a notice to show cause or preparing their appeal against a decision is pitted against the considerable resources of the ADF. Moreover, its authority, status, and influence of senior Officers often defend their own judgment.
31. **creates an unfair legal advantage.** The role of a legal Officer appointed to assist the member in the preparation of their complaint is to provide specialist advice concerning the grounds for complaint. The legal Officer is not there to conduct an inquiry or investigation into the complaint or make negotiations on behalf of the member, expressly without authorisation from the legal office, which will only be given in exceptional and complex cases.¹³
32. **exclude external collaboration.** Independent decision-makers almost always invariably default to the ADF's decision (e.g., Commonwealth Ombudsman, IGADF, Defence Minister, Attorneys General, DVA). This is despite key evidence substantiating that Defence Inquiry Officers may not have adhered to ADF policy or common law. External decision-makers have no legal authority to enforce any of the recommendations they make as the ADF is governed by its own autonomy.
33. **lack independence.** The Australian Government established the IGADF as a statutory appointment outside the Chain of Command to independently monitor and assess the military justice system's health and effectiveness. Typically, IGADF are former Army Officers who hold a range of military justice roles. All appointed under the IGADF are also typically ADF Officers. Many are of the opinion that this casts serious doubts over the legitimacy of a Defence Inquiry being independent.
34. **have been subjected to policy reform over decades.** Past Senate inquiries into Australia's military justice system's effectiveness have continually recommended administrative reviews to put a policy in place that gives greater independence, transparency and accountability to Defence members.¹⁴ Recommendations are seldom implemented in their entirety.

¹¹ AustLII, 'Defence Regulation 2016 – REG 41 Manner of making a complaint.' *Commonwealth Consolidated Regulations*. https://austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_reg/dr2016147/s41.html.

¹² Ibid 10.44.

¹³ Ibid.10.45.

¹⁴ Parliament of Australia, (1999). Completed Inquiry: Military Justice in the Australian Defence Force. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/military/reptindx.

35. **institutional abuse.** Institutional mismanagement, failure to provide due process, military suicide, self-harm, addictive behaviours, and ADF administrative failures go hand-in-hand.¹⁵ A petition was submitted to the House of Representatives in 2021 asking the House to support changes to the *Defence (Inquiry) Regulations 2018* so that Defence Inquiries are subject to legal technicalities, rules of evidence, principles of open justice and common law; Defence Inquiry Officers undertake legal training; witness testimony is taken under oath/affirmation; introduce an appeal process outside the Chain of Command and corrective action policy to ensure procedural fairness, and access to genuine mediation for Defence members to resolve workplace complaints. The Petition EN2256 - Apply ADF Policy Reforms to include corrective action collected 3015 signatures over four weeks.¹⁶ The petition was passed to the Defence Minister for a response on February 10, 2021.
36. **are conducted with intimidation.** Former Defence Legal Officer responsible for conducting Defence Inquiries, David McBride, is on the record upholding that ADF intimidates and prosecutes whistle-blowers. He has been threatened with long prison terms for exposing alleged ADF misconduct in Afghanistan. McBride is on the record, publicly expressing grave concerns about the impunity and cover-up culture set by the ADF leadership.¹⁷ For that exposure, he is ridiculed and victimised. It seems absurd to continue politically motivated charges against the former Defence Legal Officer, notably since the IGADF has reported on those same allegations raised by McBride. Defence Inquiries are commonly known as adversarial proceedings where the Defence member becomes the focus of the complaint instead of the actual complaint. Hugh Poate also gave evidence to a Senate Committee hearing about ADF intimidation of families.¹⁸
37. **are not accessible.** The complaint process should be easy to access and understand, and everyone should participate equally. For example, a Defence member may require a lawyer to help them prepare their complaint. Often Defence Inquiries are complex matters that require a fuller understanding of the law. In some circumstances, Defence members may be entitled to assistance from an ADF Legal Officer (paid for out of the Army reserve budget) when seeking to redress a grievance. Still, such are not permitted to prepare complex legal defences for Defence members. As stated previously, the legal profession is concerned that Defence members will eventually be stopped altogether from accessing legal representation of their choosing. Pursuant to a 2020 Chief of Defence Force Directive,¹⁹ serving or former Defence members seeking judicial review of administrative decisions are not permitted to access lawyers of their choosing if those lawyers happen to be ADF Reservists of any variety.
38. **is a process that is not free from victimisation.** Defence members who raise a complaint are often fighting their perceived injustice from within the workplace, often alongside their abuser. Absent, incomplete or missing file notes resulted in all the responsibility being placed on the

¹⁵ Ben Wadham and Deborah Morris, (2019) **Enough inquiries that go nowhere – it’s time for a royal commission into veteran suicide.** *The Conversation*. <http://theconversation.com/enough-inquiries-that-go-nowhere-its-time-for-a-royal-commission-into-veteran-suicide-119599>

¹⁶ Kerry and Kay Danes, ‘Petition EN2256 – Apply ADF Policy Reforms to include corrective action.’ House of Representatives. January 14, 2021. https://www.aph.gov.au/petition_list?id=EN2256.

¹⁷ Nick Xenophon. ‘If moral courage matters, this whistle-blower needs defending.’ *The Age Newspaper*. November 17, 2020. <https://www.theage.com.au/national/if-moral-courage-matters-this-whistleblower-needs-defending-20201116-p56ey4.html>.

¹⁸ Hugh Poate, ‘Senate Committee Inquiry into Australia’s Engagement in Afghanistan Submission by Hugh Poate,’ *Parliament of Australia* (21 October 2021) < file:///C:/Users/the_d/Downloads/Sub57%20Poate.pdf >.

¹⁹ Department of Defence, *Joint Directive 03/2020 by Chief of the Defence Force and Secretary, Department of Defence: Management of Conflicts of Duty-ADF Members Who Are Also Legal Practitioners* (EC20-000702, 13 March 2020).

person who believed they were the victim rather than on the alleged aggressor/offender. (See *Committee Hansard*, 28 April 2004, pp. 29-30), and (*Submission P13A*, p. 2) which states medical information detailing a beating was not placed on a file (See *Submission P52*, pp. 2–3) refers to an event not reported but which left long-term effects on one of the witnesses. Defence members say they have suffered reprisals for complaining or providing evidence, leaving them feeling ostracised and without support. (See statement by Mr Southam: ‘These have caused me to be medically discharged as a result of psychological issues, and I have attempted suicide along the way after some three years of trying to find some resolutions in relation to these submissions’ - *Committee Hansard*, 09 June 2004, p. 64; *Submission P50*).

39. **fail to adequately provide a duty of care to ensure the well-being and mental health of Defence members.** During an inquiry, many cases show that the ADF fails to meet its duty of care administratively, as reflected in the increased number of complaints and suicide and self-harm cases relating to Defence members and Veterans.
40. **have ramifications whereby adverse findings impact civilian identity.** Defence members who are qualified in a particular profession may incur additional professional ramifications. For example, medical Officers may incur reputational harm if Inquiry Officers or Commanders influence contact between Joint Health Command to the Australia Health Practitioner Regulation Agency. Similarly, legal Officers could be disbarred, and pilots could have licences revoked.

This is not an exhaustive list. Moreover, upon completion of an inquiry, a report must be submitted to the Appointing Authority (AA), who then considers the report and ensures that it adequately addresses the terms of reference (TOR) and that the evidence supports the findings and the recommendations. As part of this initial review process, the AA must obtain advice from a Legal Officer. The Legal Officer must review the report and consider whether the investigation satisfactorily addresses the TOR, whether the conclusions are supported by the evidence, and any other relevant matters. At no time, however, does the Administrative Inquiries Manual provide any advice in the event Inquiry Officers fail to ensure the evidence that supports their findings and recommendations is accurate, or if all the evidence taken has been made available, for review, by those who could be impacted by those findings and recommendations. As the enclosures to this submission have found, many instances of inaccurate findings and recommendations prevail, but there is no policy to remedy the detriment to the Defence member when that occurs. It is apparent that decisions rely on the assumption that the Defence Inquiry Officer’s ‘investigations’ are infallible.

Historically, there is evidence of a range of problems experienced in the conduct of Defence Inquiries, and these failings have been raised many times by external organisations, such as the previous findings of the Commonwealth Ombudsman, which include the following:

- Inadequate planning of investigations,
- Failure to interview all relevant witnesses and assumptions made about the credibility of witnesses interviewed,
- Pursuit of irrelevant issues in witness interviews, use of inappropriate questioning techniques and failure to put contradictory evidence to witnesses for a response,
- Failure to record evidence properly and, possibly, preparation of witnesses and unauthorised questioning of witnesses,
- Failure to analyse evidence objectively and to weigh evidence appropriately, thereby leading to flaws in the way conclusions were drawn and findings made, and

- Inadequate record keeping.²⁰

As argued in previous Inquiries, utilising military police to investigate complaints of ‘Unacceptable Behaviour’ is recommended on the basis of good practice. Military police frequently participate in up-to-date military and civilian police training courses that enable them to maintain the capacity to investigate offences and manage investigations. Alternatively, the recruitment of reservists from the civilian police force could resolve the shortfall in inexperienced Inquiry Officers and serve to increase the professionalism of investigators or by engaging Special Duties Police Officers. Either of these options would remarkably improve the standard applied to Defence Inquiries. Thus far, this recommendation has not been implemented.

Arguably, the Defence Inquiry process, and in fact, the military justice system can never be effective until its leadership give policing and law enforcement the prominence that it rightly deserves, and in so doing, put in place a consolidated, independent and professional investigative service to afford Defence members a duty of care.

²⁰ Australian Government, ‘Chapter 3—Disciplinary investigations,’ <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed%20inquiries/2004-07/miljustice/report/c03>.