

Re-thinking systems of inquiry, investigation, review and audit in Defence

Report on Stage A (Research & Analysis stage)

1 August 2012

for the Secretary and Chief of the Defence Force

Executive summary	3
Introduction	5
Inquiry, investigation and review in Defence—definitions, scope and context	7
<i>Definitions</i>	7
<i>Inquiries in Defence</i>	7
<i>Investigations in Defence</i>	8
<i>Review in Defence</i>	9
<i>The scope of inquiry, investigation and review in Defence</i>	10
<i>Informing decisions – the broader decision-making framework</i>	10
<i>Inquiry, investigation and review as integrity functions</i>	12
<i>Other purposes of inquiry, investigation and review</i>	13
Activities during Stage A	15
Survey of line managers and commanders	17
Analysis of legal framework	21
Outcomes of previous relevant inquiries	25
Commonwealth best practice	27
<i>Handling Misconduct: a human resources practitioner’s guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct (Australian Public Service Commission, 2008)</i>	27
<i>Better Practice Guide to Complaint Handling (Commonwealth Ombudsman, 2009)</i>	29
<i>Administrative Review Council Report No 44, Internal Review of Agency Decision Making (2000)</i> 30	
<i>Not just about process: the review of actions scheme – a human resources practitioner’s guide to responding to and managing employee complaints and disputes (Office of the Merit Protection Commissioner, 2012)</i>	32
<i>Making inquiries report – a new statutory framework (Australian Law Reform Commission, Report 111, 2009)</i>	33
Costing/resources	34
Key strengths and weaknesses of the current system	36
<i>Major strength</i>	36
<i>Major weaknesses</i>	37
Essential components of an optimal system	44
<i>Functions effectively in the integrated environment</i>	45
<i>Facilitates sound and timely decision-making</i>	46
<i>Promotes flexibility in response options including in deployed environments</i>	47
<i>Governed by lawful procedures that are simple and easy to use</i>	48
<i>Provides transparency in processes and outcomes</i>	49
<i>Incorporates safeguards for individuals</i>	50
<i>Delivers cost-effective outcomes in an adequately resourced system</i>	52
<i>Incorporates co-ordinating and monitoring mechanisms to ensure consistency</i>	53
Next steps – Stage B: develop options for a new system	55
<i>Timeline for Stage B</i>	55
<i>Related reform activity</i>	56
<i>Comparison with coalition partner systems</i>	59
<i>Risks to project</i>	59
Recommendation	61
Annexes	61
Enclosures	61

Executive summary

Defence has experienced a high level of scrutiny in recent years in relation to its culture, military justice arrangements, complaint-handling and inquiry processes, and lack of individual accountability. Recent inquiries, including the DLA Piper review and the reviews leading to the Pathway to Change strategy, have highlighted that there is considerable room for improvement in inquiry, investigation and review systems, processes and structures. Each of these activities supports integrity in Defence decision-making. Ensuring that the system of inquiry, investigation and review is functioning in a clear, decisive and co-ordinated manner will support cultural change.

The aim of the *Re-thinking systems of inquiry, investigation and review* project is to develop models for an optimal system that will function in this way. The system must operate effectively in relation to a vast array of subject matters, such as safety, unacceptable behaviour, procurement and fraud. It must also operate in a diverse range of environments, including deployed environments. In light of this, the question that the project will answer is: if the system were built from the ground up, what would an optimal system look like in the resource-constrained environment?

During Stage A of the *Re-thinking systems of inquiry, investigation and review* project a range of activities have been undertaken, including a survey of line managers and commanders. This information was used to inform the key deliverable for Stage A, a list of the essential components for an optimal system of inquiry, investigation and review. The essential components identified in Stage A will now be used to develop models for a new system of inquiry, investigation and review for consideration by the Secretary and the Chief of the Defence Force in February 2013.

For the purposes of this project, the following definitions have been adopted:

- An **inquiry** is any fact-finding process to inform administrative and command decisions within Defence—including decisions to prevent recurrence of an incident, to change systemic problems, or to refer an individual for investigation.
- An **investigation** is a fact finding process that underpins a determination of individual criminal, civil or disciplinary liability.
- A **review** is a reconsideration of decisions or actions that have already been made.

In the survey, 1678 line managers and commanders at the APS EL1-2 and ADF WO1 and O4-O6 level provided their perspectives on the operation of inquiries, investigations and reviews. The survey revealed that 76.3% of survey respondents are currently involved in managing and overseeing these processes across Defence, reinforcing the fact that inquiries, investigation and review are an integral part of day to day business in Defence. Consequently, the risks associated with the shortcomings and increasing complexities of these processes are significant.

The survey reveals that while line managers and commanders believe that inquiry, investigation and review processes are useful in the sense that they ultimately deliver an outcome, this comes at the cost of simplicity, flexibility and timeliness. These features were identified as best practice in a number of reports produced by key

Commonwealth agencies and as persistent shortcomings in past Defence inquiries into complaint-handling, culture and military justice arrangements. However, it is important not to lose sight of the legal and policy framework that Defence operates within, including the specific frameworks that are relevant to each type of inquiry, investigation and review. Stage A analysed each of these sources of information which led to the conclusion that Defence's current complex, restrictive and time-consuming processes require fundamental reform.

Based on this analysis, eight essential components for an optimal system of inquiry, investigation and review in Defence have now been identified:

- functions effectively in the integrated environment
- facilitates sound and timely decision-making
- promotes flexibility in response options including in deployed environments
- governed by lawful procedures that are simple and easy to use
- provides transparency in processes and outcomes
- incorporates safeguards for individuals
- delivers cost-effective outcomes in an adequately resourced system
- incorporates co-ordinating and monitoring mechanisms to ensure consistency

Unless these components are accepted as essential to an optimal system, and used as the basis for an overhaul of existing arrangements, processes and structures, Defence will never be able to escape the cycle of piecemeal reform. Continuing to address broader, systemic rationalisation is necessary and overdue in Defence's unique integrated work environment.

The current resource-constrained environment makes this process even more important. One concern that has emerged from Stage A is the inability to cost the current system. While survey respondents appear to consider there are adequate resources, given the consensus that the current system is complex and not capable of producing timely outcomes, Defence is almost certainly not achieving best value for money. This is not tenable in the ongoing resource-constrained environment.

Looking ahead, Stage B work will focus on developing models for an optimal system that contains the eight identified essential components and that represent best value for money.

Introduction

On 8 November 2011, the Secretary of Defence and the Chief of the Defence Force commissioned Mr Mark Cunliffe (Head Defence Legal), Mr Geoffrey Brown (Chief Audit Executive) and Major General Gerard Fogarty (Head People Capability) to conduct a review of all investigation, inquiry, review and audit systems, processes and structures across Defence.

The objective of the review is to make recommendations regarding the establishment of a system that is fair, timely, simple to implement, provides whole of Defence outcomes and which takes into account legislative requirements, with the initial step being to:

- summarise current structures, demonstrating key strengths and weaknesses;
- outline the key factors that prevent quick, decisive, whole of Defence outcomes; and
- identify the essential components of an optimal system for the future.

A preliminary analysis of the review was provided in December 2011, after which the decision was made to postpone work in relation to audit until a later phase of the project. In May 2012, a progress report was provided (see Enclosure 1).

The review is being managed as a project, divided into two phases. The first phase considered inquiry, investigation and review, while the second phase will consider audit in Defence. The first phase has been further divided into two stages:

Stage A – collect, collate and analyse information in relation to the current system of inquiry, investigation and review in order to develop a definitive list of the essential components of an optimal system.

Stage B – use the outcomes of Stage A to develop models for a new system of inquiry, investigation and review for presentation and consideration by the Secretary and the Chief of the Defence Force in November 2012.

There are a number of advantages to the two-stage approach for the first phase.

First, the list of essential components of an optimal system will be used as criteria to objectively assess the outcomes in Stage B. The quality of the models developed in Stage B can be evaluated against these essential components

Secondly, obtaining endorsement from key stakeholders of the essential components should carry over to a greater level of endorsement of the models developed in Stage B. Many aspects of the inquiry, investigation and review system in Defence are the product of historical adaptation and responses to a range of pressures including political responses. While mindful of this history, the intention is to step back from the system as it currently exists in order to design a new system that meets Defence's needs, from first-principles.

Finally, an endorsed list of essential components can continue to be used beyond this project. The essential components can be used as a baseline against which to

assess the value of any future recommendations or proposals to change the system of inquiry, investigation and review. The list will be a set of principles to guide future reform in this area.

Stage A is now complete, and outcomes contained in this report, for consideration by the Secretary and Chief of the Defence Force. Senior internal stakeholders and the Defence 100 Reference Group (Corrective Processes lever) have been engaged and their input has been incorporated where appropriate.¹ Importantly, stakeholder consultation has confirmed that there is broad support for the essential components identified.

¹ The report was sent to the following internal stakeholders: CJOPS, CN, CA, CAF, CEO DMO, CCDG, CFO, DEPSEC I&S, DEPSEC S, DEPSEC SRG, DEPSEC PSP, DEPSEC DS, CIO, CDS, IGADF, CJHEALTH, IG DEFENCE, DSA, PM ADF, DGFR, CMC, COO. The report was sent to the following Defence 100 members: CDS, ICT REFORM, BPC, DCN, MSC, DSG – PEOPLE SOLUTIONS, DMO – GMP, DMO – SPECIAL COUNSEL, PSP – HR, DSTO – CLO, CTO, CRESO, DP AIRFORCE, HEAD IMPLEMENTATION TEAM US FORCE POSTURE REVIEW. Comments on the draft Stage A report were received from: CJOPS, CN (working level comments only, not endorsed by CN), CAF, CEO DMO, CCDG, DEPSEC I&S, CIO, CDS, IGADF, CJHEALTH, IG DEFENCE, DSA, PM ADF, DGFR, DSTO.

Inquiry, investigation and review in Defence—definitions, scope and context

Inquiries, Investigations and Reviews appear to the normal worker to be a hodge podge of reports compiled to please different bosses, in different views, and always displaying the same data.²

Definitions

The terms ‘inquiry’ and ‘investigation’ can (and often are) used synonymously to describe a wide variety of fact-finding and associated analytical activities that are designed primarily to inform decisions and actions (including decisions not to take action). In contrast, a ‘review’ involves ‘looking again’,³ or a reconsideration of decisions or actions that have already been made—often informed by some type of inquiry or investigation. While the words ‘inquiry’ and ‘investigation’ mean the same thing, they have been distinguished in this report in line with the practice developed by Defence (and especially the ADF) over recent years.⁴

For the purposes of this project, the following definitions apply:

- An **inquiry** is a fact finding process to inform administrative and command decisions within Defence, including decisions to prevent recurrence of an incident, to change systemic problems, or to refer an individual for investigation.
- An **investigation** is a fact finding process that underpins a determination of individual criminal, civil or disciplinary liability.
- A **review** is a reconsideration of decisions or actions that have already been made.

Inquiries in Defence

Inquiries in Defence are most usually undertaken as ‘administrative inquiries’. They are administrative in the sense that they find facts to inform decisions and actions within the executive arm of government. Administrative inquiries conducted within Defence are used to inform a myriad of decisions and actions that might variously be described as ‘formal’, ‘informal’, ‘routine’, ‘operational’ or, in the military context, ‘command’.

Administrative inquiries are not an exercise of judicial power. Rather, they are inquisitorial in nature and do not and cannot adjudicate disputes between parties. When conducted by a person who does not have executive decision-making authority, inquiries are non-determinative in the sense that they do not directly determine rights and liabilities of individuals. Their primary task is to furnish a report to a decision-maker who requires the information to make a decision or to take action which may or may not affect an individual’s rights and liabilities.

² Free text comment from a survey respondent

³ Macquarie dictionary

⁴ The question of whether or not this linguistic and arguably artificial distinction should be maintained will be considered in Stage B.

The term ‘inquiry’ is often associated with statutory inquiries conducted under the *Defence (Inquiry) Regulations 1985*. However, it encompasses a much broader and extensive range of fact-finding and analytical activities that are frequently, informally and routinely conducted in Defence, on a day-to-day basis. Most inquiries in Defence are not conducted under the Regulations. A far greater proportion are conducted outside of the statutory framework.

Inquiries serve a practical purpose and are not ends in themselves. Decision-makers at all levels in Defence—be they ADF commanders or APS managers—use inquiries to assist in making decisions on an almost limitless range of issues associated with their official duties and responsibilities. These include the conduct of military operations, the development of capability, as well as issues concerning safety, resource allocation, personnel issues, equipment, training and policy. The ability of decision-makers to obtain relevant information in a timely manner is vital for the proper functioning of Defence, the safety of Defence personnel and the maintenance of Defence capability which is a foundation of Australia’s security. Without the ability to conduct or appoint inquiries, decision-makers in Defence would not possess the most fundamental ingredient of good decision-making—the capacity to obtain accurate and timely information.

As a matter of principle, an inquiry can be undertaken personally by a decision-maker or be tasked to a subordinate or another person to conduct. In this context, the person conducting the inquiry can be seen as an agent of the decision-maker. The decision-maker remains accountable for the inquiry outcomes and actions taken as a result.

Investigations in Defence

Investigations in Defence are conducted to either a criminal standard or an administrative standard.

Criminal standard investigations are conducted within Defence by the Defence Investigative Authorities. Defence Investigative Authorities include the Service Police (or the ADF Investigative Service) in relation to possible breaches of the *Defence Force Discipline Act 1982*; the Inspector General - Defence in relation to fraud related criminal offences; and the Defence Security Authority in relation to security related criminal offences.⁵ These investigations are designed primarily to ascertain whether offences have been committed and are part of a broader criminal justice, civil penalty or military discipline system. Their conduct is based on a criminal law investigative model.⁶ Evidence gathered as part of investigations into offences is primarily designed to be used in adversarial proceedings before civilian courts and service tribunals where guilt must be proven beyond reasonable doubt.

Administrative standard investigations are conducted to determine whether or not an Australian Public Service (APS) employee has breached the APS Code of Conduct, and the nature of any disciplinary action that should be taken. These investigations apply a lower standard of proof (essentially, a balance of probabilities standard), and

⁵ DI(G) ADMIN 45-2 *The reporting and management of notifiable incidents* identifies the Defence Investigative Authorities.

⁶ DI(G) ADMIN 45-4 *Defence Investigative Standards*

the rules of evidence do not apply when making decisions on the basis of these investigations.

Review in Defence

In this project, 'review' refers to a reflective process that reconsiders decisions and actions. The word 'review' is sometimes used to describe a form of systemic inquiry, for example the 'Burchett Review' or the 'DLA Piper Review' – 'reviews' of this nature are considered as 'inquiry' processes in this project as they are not a reconsideration of a decision.

Effective review processes are important in any organisation because they promote fairness to individuals affected by substandard decisions and because they provide an opportunity for officials within the organisation to draw lessons and make improvements to systems and processes that may have caused or contributed to the sub-optimal decisions or actions. Review processes also provide positive feedback, confirming and reinforcing good decisions.

Reviews may be initiated on the basis of a complaint made by an individual adversely affected by a decision or action (or failure to act). Reviews may also be commenced on the initiative of a person not personally affected by a decision or action: such as a more senior official superior in the chain of command or line management, or an official whose function it is to scrutinise decisions and actions made by an organisation (for example, the Inspector General of the ADF or the Defence Force Ombudsman).

Review processes may be formal or informal. Informal reviews take place as a matter of routine in all workplaces and organisations. They are an inherent aspect of the leadership, management or command function and most minor complaints or problems are reconsidered or revisited using informal review processes. Informal review processes have the advantage of being inherently flexible and capable of being adapted to a wide range of situations. Placing rules around informal review processes would limit these benefits. This informality and flexibility also facilitates prompt decision-making to address problems or complaints. However, informal review is also almost entirely discretionary on the part of the reviewer and there are limits on the capacity of reviewers to change certain types of decisions.

A number and range of formal review mechanisms (both statutory and non-statutory) exist within Defence. Two examples are: the ADF redress of grievance process and the APS review of actions scheme. These mechanisms are complaint-initiated and permit ADF members and APS employees to seek review of a wide range of issues that affect an individual's Service or employment, as the case may be. Aside from such general review mechanisms, Defence also has subject-matter specific review systems and processes, both statutory and non-statutory: for example, in respect of complaints or representations about the military justice system (the Inspector General of the ADF), Service housing, performance appraisal, Freedom of Information decisions and ADF health care.

Aside from internal review mechanisms, there are also a range of external review processes and systems that scrutinise decisions made within Defence. These external review mechanisms supplement, complement and sometimes duplicate internal ADF review mechanisms. Examples of external review processes include the Defence Force Ombudsman (for ADF members), the Merit Protection Commissioner

(for APS employees), the Australian Human Rights Commissioner (as well as related discrimination commissioners), the Information Commissioner, the Inspector General for Intelligence and Security and the Administrative Appeals Tribunal (in respect of some decisions).

The scope of inquiry, investigation and review in Defence

The range of inquiry, investigation and review activities conducted by or affecting Defence is extensive. Based on the questionnaire responses from senior internal stakeholders, early in the project a master list was compiled of all types of inquiry, investigation and review conducted throughout Defence.⁷

Types of inquiry, investigation and review are divided into two categories: first, mechanisms and tools used to conduct inquiry, investigation and review; and secondly, inquiries, investigations and reviews into particular subject matters. For example, a safety investigation is an investigation identified by subject matter (the safety incident), while an inquiry conducted under the *Defence (Inquiry) Regulations 1985* is a particular tool or mechanism that may be used to inquire into any subject (including a safety incident).

In some cases, the distinction between subject matter and mechanism is blurred. For example, an APS Code of Conduct investigation is identified by subject matter (APS Code of Conduct breach), but also refers to the particular mechanism used to investigate (investigation by an APS Code of Conduct delegate).

The distinction between subject matter and mechanism is important, as **the ultimate aim of this project is to ensure that there are suitable inquiry, investigation and review mechanisms available regardless of the subject matter.**

This approach differs significantly from past reviews and reform work, which have tended to focus on shortcomings of mechanisms in light of a particular subject matter. This focus has resulted in change that has led to increased complexity and duplication. For example, processes that have evolved to address concerns about unacceptable behaviour are not necessarily applicable across other subject areas.

Informing decisions – the broader decision-making framework

In order to determine the strengths and weaknesses of the current system, and in order to identify essential components of an optimal system, inquiry, investigation and review must be understood as being part of a broader decision-making framework. The questionnaire responses consistently identified 'inform decision-making' as one of the primary functions of inquiry, investigation and review.

Figure 1 illustrates the decision-making framework in which inquiry, investigation and review exists.

⁷ Annex A to Enclosure 1, pages 6-7

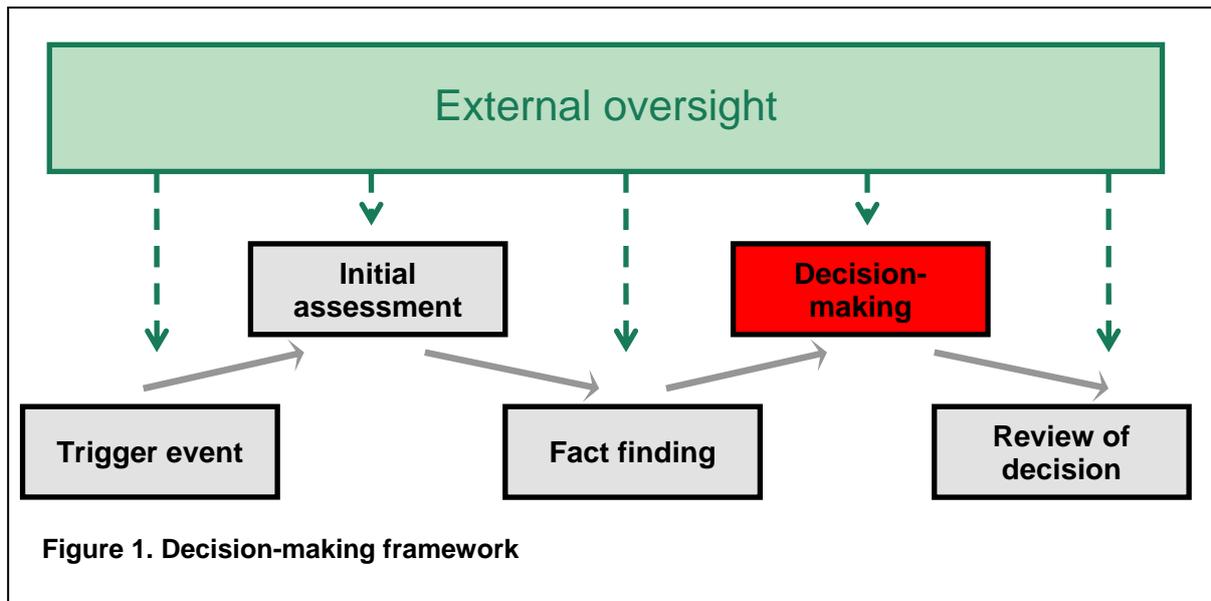


Figure 1. Decision-making framework

It is considered that this framework is a generic model for the way decisions should be made and dealt with, and is used in this project as the basis for understanding inquiry, investigation and review in Defence. The elements of the decision-making framework are:

- **Trigger event.** This is an event or circumstance that requires an individual within Defence to make a decision. Common trigger events include a complaint, an incident (such as a safety incident), or a direction from higher in the chain of command.
- **Initial assessment.** This process involves determining what is known about a trigger event, what is not known, and what needs to be discovered in order to make the relevant decision. It may also involve some immediate decision-making, for example to mitigate against the immediate risk of recurrence or to report the incident to appropriate authorities. One such process is through the use of a Quick Assessment conducted in accordance with DI(G) ADMIN 67-2.
- **Fact finding.** This is the process through which a decision-maker informs him or herself of relevant information necessary to make a decision. This may be through a formal inquiry or investigation, although is frequently conducted through an informal fact finding process. 'Inquiry' and 'investigation' fit within this stage of the decision-making framework.
- **Decision-making.** This is the point at which the Defence decision-maker determines what action, if any, will be taken in relation to issues associated with the trigger event. Examples include changing processes to prevent recurrence of an incident, deciding to refer an individual for possible prosecution or taking no action.
- **Review of decision.** This is the process by which a decision is re-considered within Defence. Re-consideration may include an element of further fact finding or the making of a new decision. Commonly used review mechanisms in Defence include the ADF redress of grievance system and the APS review of action process. In addition, decisions are frequently reviewed using informal processes.
- **External oversight.** External oversight can include processes for independent review of particular decisions or actions, as well as broader functions to review the way the system is working as a whole. At present, external oversight is

provided in a number of ways, including by the Defence Force Ombudsman and Merit Protection Commissioner, through review by Commonwealth tribunals and courts, and by parliamentary scrutiny.

The decision-making framework in Figure 1 is significantly simplified, but illustrates the role of inquiry, investigation and review as part of the larger decision-making process. Conceptually this framework is the same, regardless of the environment in which the decision is being made – including deployed, single Service and integrated environments.

Inquiry, investigation and review as integrity functions⁸

The functions of inquiry, investigation and review can each be described as ‘integrity functions’. They each play a role in supporting integrity in Defence at both the institutional and individual levels.

When considering the meaning of ‘integrity’, words like ‘honesty’, ‘accountability’ and ‘responsibility’ immediately come to mind. These are all elements of integrity, but do not provide a complete picture of what is meant in this report. Integrity means whole, unaffected, intact, upright or reliable. It is the conceptual opposite to corruption, which connotes more than the idea that officials must not take bribes, but in the broader sense of observing proper practice.⁹ Integrity is concerned with the way the power and authority entrusted to Defence is being exercised – is it being exercised in a reliable, whole and uncorrupted manner? This question is answered by reference to the values, purposes and duties for which power or authority has been entrusted.¹⁰

The exercise of power or authority (or the making of decisions) within Defence encompasses individual and institutional elements – individuals within Defence make decisions, but do so within the context of Defence as a whole. For this reason, individual and institutional integrity are both essential.¹¹

The integrity system in Defence is ‘the sum of institutions, laws, procedures, practices and attitudes that encourage and support integrity in the exercise of power’ in Defence.¹² Inquiry, investigation and review each play a role. Inquiries inform decision-making, and so support integrity in the exercise of decision-making powers from the outset. Investigations deal with individual behaviour, and support processes to hold people in Defence to account for their behaviour. Reviews support integrity in decision-making to ensure that mistakes can be corrected, new evidence can be considered, and individuals are accountable for the decisions they make.

⁸ This discussion of integrity draws significantly on the National Integrity Systems Assessment Final Report, 2005, which outlined the results of the Australian Research Council-funded project *Conceiving and Implementing National Integrity Systems Assessments (NISA)*, conducted in 1999-2005 by Griffith University and Transparency International Australia. Other work on integrity, such as Hon J J Spigelman AC, ‘The integrity branch of government’ (2004) 78 *Australian Law Journal* 724 is also relevant. The NISA report considers integrity, and the institutions that support it, at all levels of government and in private business. Integrity in Defence is clearly on a much smaller scale than considered in the NISA report, but its observations are pertinent in the current context.

⁹ Spigelman page 725

¹⁰ NISA report page 9

¹¹ A failure to demonstrate individual integrity in this context is not necessarily a personal failure, but may simply mean that the integrity of a decision that an individual has made is flawed.

¹² NISA report page 1

However, integrity in Defence faces unique challenges. For example, ADF members are entrusted with unique powers,¹³ which have significant potential for abuse, most obviously the power of command over subordinates and powers associated with armed conflict. Another example is the large, complex and high-risk procurement activities that Defence is required to undertake – there are severe consequences for flawed decision-making in terms of, for example, capability, value for money and safety. Integrity challenges such as these must be faced in an organisation that, unlike most other Government departments, has diverse cultures stemming from the integration of the three Services, Australian Public Servants and contractors.

Inquiry, investigation and review are by no means the only integrity functions in Defence. Audit, which will be considered in Phase 2 of this project, is an obvious example of another integrity function. These types of processes, however, are only a small part of any integrity system. For the most part, integrity is achieved through 'ongoing self-discipline and good management, relying on leadership, professionalism, self-reflection by individuals and organisations, and the simple intuitive adherence to relevant fundamental values'.¹⁴ The Pathway to Change strategy is dealing with integrity holistically in Defence, by looking at the underlying cultural aspects of integrity, in addition to the structural and procedural aspects that are the subject of this project. An optimal inquiry, investigation and review system is not the whole answer to integrity problems in Defence, but would provide valuable support to a broader integrity system underpinned by other elements such as leadership and culture.

Other purposes of inquiry, investigation and review

Apart from the underlining purpose of fact finding to inform decision-making, other purposes identified in the questionnaire responses, such as determining individual accountability, reflect that inquiry, investigation and review are integrity functions. Other aims and benefits identified in the questionnaire responses included:

- to manage personnel disputes and other complaints
- to ensure there has been compliance with relevant policies and procedures
- to respond to submissions and complaints
- to provide a record of evidence
- to maintain discipline
- to provide a fair and safe workplace
- to resolve workplace conflict
- to maintain public confidence in the integrity of Defence's process and practices

All identified purposes clearly associate inquiries, investigations and reviews as part of the broader decision-making framework. That is – inquiry, investigation and review are not, and should not be, an end in themselves.

One risk in focusing unduly on accountability, rather than the broader concept of integrity, is that the fundamental purpose of informing decision-making can be

¹³ In comparison to civilians in Australia

¹⁴ NISA report page 9

undermined. Maintaining public confidence in Defence's process and practices is important. Inquiry, investigation and review can serve the dual purpose of both informing decisions and providing accountability for the decisions that are made. As well as accountability to the public, decision-makers need to be accountable for their decisions to their superiors, to affected individuals, and to senior command and management in Defence. However, accountability should not be a goal of an inquiry, investigation or review in and of itself – rather the goal should be integrity of decision-making. Ultimately, it is the decision-maker who is accountable, not the inquiry, investigation or review process in isolation from the decisions that are made. While greater formality in inquiry, investigation and review processes can heighten expectations of independence and accountability, if this impedes the ability of the processes to effectively inform decision-making then integrity is lost, and the desired accountability gains in elevating the formality of these processes are illusory.

Activities during Stage A

During Stage A, the following activities were undertaken in order to derive the essential components of an optimal system:

Questionnaire to key internal stakeholders. In November 2011, key internal stakeholders were asked to complete a questionnaire designed to obtain information in relation to the types of inquiry, investigation, review and audit conducted throughout Defence, views on the aims, benefits and problems associated with these processes, views on the essential components of an optimal system, and information about the resources and costs associated with the current system. The analysis of responses from stakeholders was reported in the progress report.¹⁵

Survey of line managers and commanders. An anonymous survey was conducted by the Directorate of Strategic Personnel Policy Research (DSPPR) in May / June 2012 to obtain the perspectives of line managers and commanders at the APS EL1-2 and ADF WO1 and O4-O6 level on the operation of existing arrangements for inquiry, investigation and review in Defence. The survey was sent to a random 25% sample of this group. The response rate was 43%, providing a total of 1678 respondents. This is a higher response rate than is typical in surveys conducted within Defence, possibly indicating significant interest in the survey topic. The survey was designed to gauge the nature and degree of exposure that participants have had with these arrangements and to seek their opinions on issues such as resourcing, flexibility, timeliness, and the overall utility of existing arrangements. Survey respondents were also invited to provide free-text comment about the subject. Survey results are referred to throughout this report. The survey was not intended to collect conclusive findings about the system, but rather to inform the development of the essential components of an optimal system based on the experience of users of the system. DSPPR's analysis of the data is at Annex A.

Legal framework. Relevant legal and policy frameworks have been identified in relation to various types of inquiry, investigation and review in order to identify mandatory legal and policy obligations. This activity has isolated the obligations Defence is required to adhere to as a Commonwealth Government department on the one hand, and legislation and policy for which Defence is administratively responsible on the other. Defence is likely to have a more limited capacity to influence and change whole-of-government requirements compared to legislation and policy for which it is responsible. The full analysis of the legal framework is at Annex B.

Previous related inquiries. Previous inquiries relevant to this project have been identified and analysed, considering the particular context of each inquiry and its conclusions and recommendations. The inquiries have provided guidance and assistance in understanding the current system, and its strengths and weaknesses. The analysis considers the feasibility of the direction proposed in this project in light of these inquiries. The full analysis of previous inquiries is at Annex C.

¹⁵ Annex A to Enclosure 1

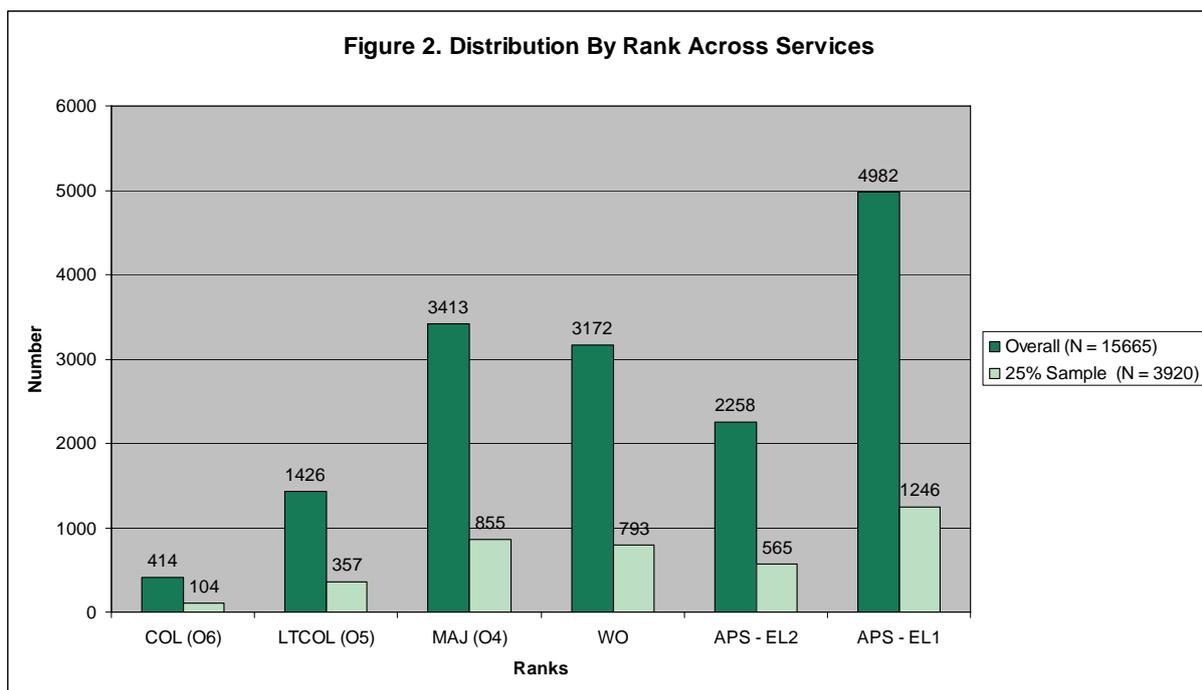
Commonwealth best practice. Various Commonwealth agencies have produced good practice guides in relation to, for example, complaint handling, internal merits review, and the APS review of action scheme. Guides from the Commonwealth Ombudsman, Merit Protection Commissioner and APS Commissioner, as well as reports from the Australian Law Reform Commission and Administrative Review Council were considered to determine their relevance to this project. An analysis is presented below of the key points drawn from each guide.

Costing. Questionnaire responses included some information about the costs and resources used in the inquiry, investigation and review system, but this information was far from complete. Further work has been done on understanding the economic costs of inquiry, investigation and review activity, with a view to developing a costing methodology to apply to options for a new system developed in Stage B of the project. There has never been any rigorous costing of the system as a whole or many processes within it. It may not be possible to completely cost existing processes on the basis of information available in current databases. This is concerning, and needs further investigation.

Survey of line managers and commanders

They currently take far too long to resolve, are insufficiently resourced and rarely result in an adequate solution for any parties.¹⁶

A survey was conducted by Defence's Directorate of Strategic Personnel Policy Research. It was directed at a random 25% sample of APS employees at the EL1-2 level and ADF members at the WO1 and O4-O6 level. Figure 2 illustrates the number of individuals at these ranks, and the number of individuals surveyed. This group was considered the most likely to be involved in managing or overseeing matters that are typically the subjects of inquiry, investigation and review.



The data generated by the survey provides information about the views and perceptions of those who are required to use the inquiry, investigation and review system to inform decisions on a day to day basis. The survey outcomes, as well as other information collected, have been used to identify the major strengths and weaknesses of the current system. The survey was not intended to collect conclusive findings about the system, but rather to inform the development of the essential components of an optimal system based on the experience of users.

Survey respondents were asked to identify which of a list of 14 types of matters they had been involved in managing or overseeing within the last 12 months.¹⁷ These subject matters identified on the basis of the key internal stakeholder responses to the questionnaire. The 14 categories were:

- fraud

¹⁶ Free text comment from a survey respondent

¹⁷ The full survey instrument appears at Annex A, pages 42-45

- unacceptable behaviour (including unacceptable sexual behaviour)
- disciplinary or criminal misconduct / offences (other than fraud and unacceptable behaviour)
- significant operational incidents (including combat-related)
- procurement complaints
- personnel disputes and conflict
- complaints about personnel decisions (eg postings, promotions, duties)
- poor work performance
- complaints about entitlements (including housing related complaints)
- ADF health care complaints (including complaints about MEC)
- safety accidents / incidents (including aircraft accidents)
- security incidents
- equipment malfunction or failure
- decisions to raise or write off debts

In compiling this list, it is recognised that these topics are by no means a complete list of all subjects that might be managed through inquiry, investigation or review processes. In addition, some incidents could involve more than one of these topics. For example, a particular incident could fall within the 'unacceptable behaviour' category as well as the 'personnel disputes and conflict' category. It was considered, however, that the list provided a reasonably comprehensive summary of the types of subject matters identified in the questionnaire responses. Additionally, given that different policies can apply to the same incident and can require different processes to be followed concurrently, the project recognised that there may have been multiple inquiry, investigation or review processes in relation to the same incident in any case.

The number of survey respondents' involved in managing or overseeing each type of matter in the last twelve months is illustrated at Figure 3.

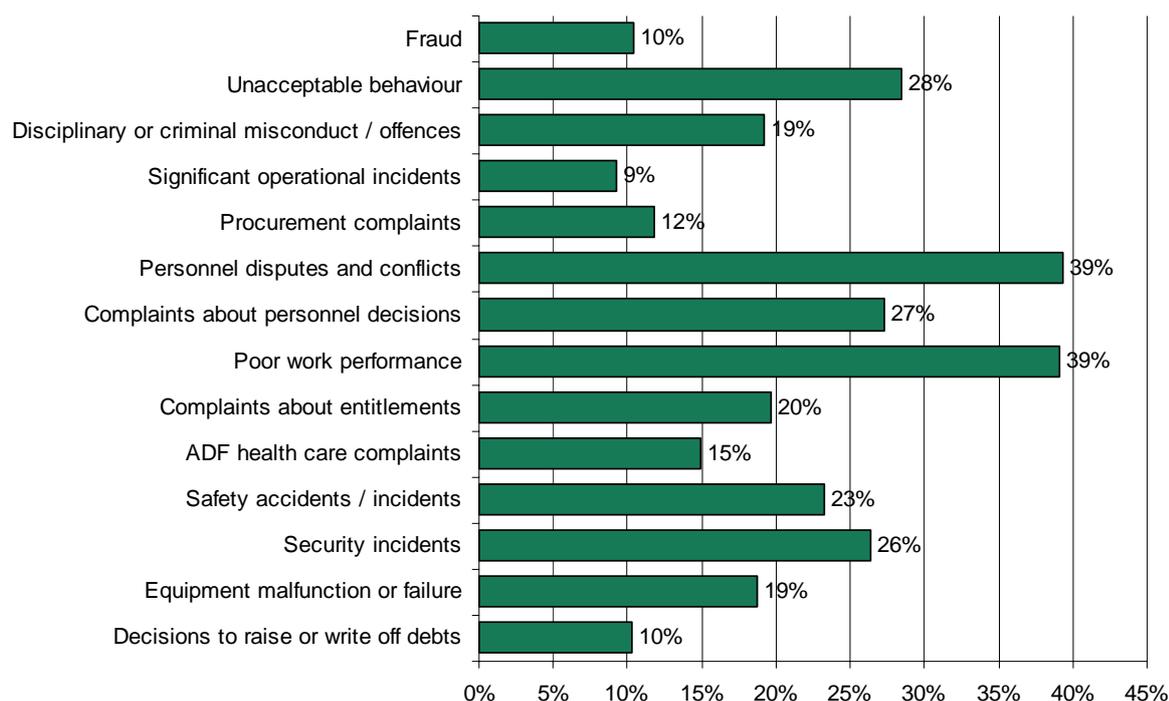


Figure 3. Proportion of respondents that have overseen or managed matters¹⁸

A significant majority of survey respondents (76.3%) were involved in managing or overseeing at least one type of these matters in the last twelve months.¹⁹ This is indicative of the fact that managing and overseeing these matters is part of day to day business for many people throughout Defence, although this is not always recognised in duty statements or job descriptions. Inquiry, investigation and review are integral processes in the decision-making associated with these matters, often through informal fact finding and informal problem solving. Inquiry, investigation and review must be considered as part of day to day business in Defence.

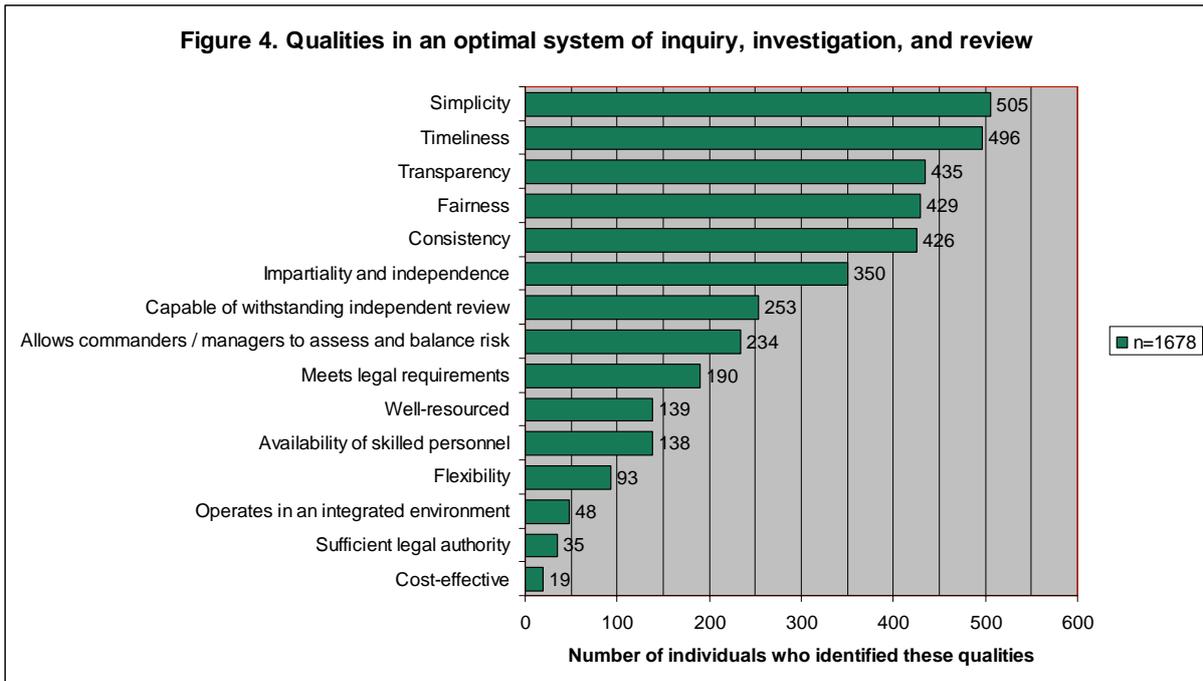
The survey went on to ask survey respondents about the particular inquiry, investigation and review processes they were aware had been used in relation to each type of matter in which they had been involved. This was to ensure that the survey took into account the fact that one incident may give rise to many different inquiry, investigation and review processes which are managed by different areas within Defence. Survey respondents were also asked for their views about availability of resources, whether processes were too restrictive, whether processes allowed decisions to be made in a timely manner, and whether processes were useful. This was to determine whether respondents view the inquiry, investigation and review processes as being effective in the overall decision-making process.

Survey respondents were also asked to identify the three most important qualities of an optimal system of inquiry, investigation and review (from a list of 15). The outcomes to this question appear at Figure 4.²⁰

¹⁸ Annex A, page 7

¹⁹ Annex A, page 5

²⁰ Based on data at Annex A, page 9



The full survey analysis, prepared by the Directorate of Strategic Personnel Policy Research, is at Annex A.

Analysis of legal framework

The current system is onerous in regard to prescription of steps required to deal with complex, time sensitive and generally sensitive matters that should be dealt with using common sense rather than a formulaic process which has the unintentional effect of delaying the systemic fixes and procedural fairness outcomes the system is designed to provide.²¹

Defence's system of inquiry, investigation and review is governed and influenced by a wide range of whole-of-government and Defence-specific legislation and policy. This includes legislation administered by other Government agencies, legislation administered by Defence, policy promulgated by other Government agencies, policy Defence has promulgated to meet legislative obligations, and policy Defence has promulgated to meet its own unique requirements that has no corresponding legislative basis. It is important to understand the legal and policy framework in which Defence operates. The minimum mandatory features with respect to different types of inquiry, investigation and review have been identified. This is compared with existing arrangements within Defence in order to identify opportunities for reform. Annex B contains this detailed analysis.

A significant number of inquiry, investigation and review processes were identified with a general application over a range of subject matters. For example, administrative inquiries under the *Defence (Inquiry) Regulations 1985* can be used for a wide range of subject matters. Alternatively, some types of inquiry, investigation and review are subject matter specific. For example, work health and safety investigations or security investigations. Given the significant overlap and interaction there is between subject matters and processes, an endeavour has been made to categorise the system of inquiry, investigation and review to ensure that information is presented in a coherent manner. For this reason, Annex B has been divided into six categories and 27 sub-categories, including:

Inquiry mechanisms

- Administrative inquiry under the Defence (Inquiry) Regulations 1985
- Routine inquiries
- Non-statutory inquiries
- Quick assessments

Investigation mechanisms

- APS Code of Conduct investigations
- Investigation under the DFDA

Internal review mechanisms

- APS review of actions
- ADF Redress of Grievance

²¹ Free text comment from a survey respondent

- Security clearance reviews
- Medical Employment Classification Review Board reviews
- ADF health care complaints
- Compensation for Detriment Caused by Defence Administration
- Inspector General ADF reviews
- Joint Housing and Accommodation Review Committee
- Review of convictions of service tribunals under the *Defence Force Discipline Act 1982*

External review mechanisms

- Defence Force Ombudsman
- Honours and Award Tribunal
- Australian Human Rights Commission
- Privacy
- Freedom of information
- Administrative Appeals Tribunal

Other processes

- Defence Whistleblower Scheme
- Alternative Dispute Resolution

Particular subject matters

- Unacceptable behaviour
- Fraud management
- Security investigations
- Procurement process inquiries
- Debt write offs
- Work health and safety investigations
- Performance management
- Complaints against service police
- Australian Cadet Force

It is only when the analysis of each category and sub-category is read together that the full complexity of the system can be appreciated. These complexities become evident due to the degree of overlap between the different categories outlined. For example, an incident of unacceptable behaviour involving both ADF and APS personnel may commence with a Quick Assessment. It may then proceed to an inquiry under the *Defence (Inquiry) Regulations 1985* followed by a DFDA investigation in relation to the ADF member, concurrently with an APS Code of Conduct investigation in relation to the APS employee. Depending on the nature of the unacceptable behaviour, the legal and policy framework relating to particular subject matters such as procurement complaints and performance management

might also be relevant. The framework relating to seven different processes and subject matters are relevant to this single incident.

It is when multiple mechanisms and subject matters apply that the system becomes complicated and incidents become difficult to manage. In Defence's integrated environment, a single incident rarely triggers the application of only one policy.

There is also overlap of the functions of internal areas in Defence and external agencies responsible for conducting inquiry, investigation or review, or are responsible for relevant policy. In the seven different processes and subject matters referred to above, there may be nearly a dozen internal and external areas involved, from Values, Behaviours and Resolution, to ADFIS, to the Merit Protection Commissioner. This has the potential to give rise to duplication, inconsistent approaches and significant delay in resolving the incident. There may be ambiguity in who is accountable for the ultimate resolution, and it may be difficult to achieve finality. Information obtained through one process may also not be readily available to another, frustrating Defence's ability to provide consistent decision-making.

To provide a visual representation of the overlap, two tables have been developed. Table 1 of Annex B identifies the Defence Instructions and other Defence documents that may become relevant to particular processes or particular subject matters. Table 2 of Annex B describes the internal areas within Defence and external agencies that may become involved when dealing with particular processes or subject matters.

Whole-of-government vs Defence-specific legislation and policy. The legal and policy framework for each type of inquiry, investigation and review in each category has been analysed in Annex B with a view to identifying opportunities for change. The framework includes legislation and policy which is administered by other Commonwealth agencies, and is therefore applicable on a whole-of-government basis, as well as legislation and policy which is administered by Defence. This allowed the identification of legislation and policy which Defence has limited capacity to change, as well as legislation and policy over which Defence has a greater level of control and therefore has a greater capacity to change.

In relation to whole-of-government legislation and policy which is generally applicable across the Commonwealth, Defence has a lesser ability to influence change. To the extent that Defence is not itself capable of varying these legal and policy constraints, they constitute the greatest impediments to reform of the Defence investigation, inquiry and review system.

Preliminary observations. Despite the above, one common theme throughout the analysis is that the whole-of-government requirements relating to some mechanisms and subject matters are not particularly prescriptive and so there is significant scope for reform of Defence-specific policies.

For example, the primary legislation dealing with APS Code of Conduct investigations is the *Public Service Act 1999*, the *Public Service Regulations 1999*, and the *Public Service Commissioner's Directions 1999*. Section 15(3) of the Public Service Act requires agency heads to develop procedures for determining whether an employee in their agency has breached the APS Code of Conduct, and the Regulations and Directions provide further detail as to the nature of these procedures. However, the whole-of-government legislative requirements in relation

to APS Code of Conduct investigations leave ample scope for an agency to tailor its own processes.

On this basis, Defence has considerable flexibility to develop and apply processes for investigating and making decisions in relation to alleged APS Code of Conduct breaches. The flexibility available to Defence in developing processes provides significant capacity to align these processes with other inquiry, investigation and review processes, including those that apply to ADF members. Even if Defence does not have the capacity to change the whole-of-government requirements, there is still significant scope for reform.

One of the most significant aspects of the legal framework is the extraordinary number of Defence Instructions which are used to disseminate policy in relation to these matters. Defence Instructions are statutory instruments, and have the force of law. Individuals within Defence are legally required to comply with their content, and the confusion and inconsistency inherent in these documents is a significant problem on that basis alone. There is also significant risk where Instructions become outdated and inconsistent, so that they contain incorrect but apparently mandatory requirements.

The problems associated with the multiplicity of Defence Instructions are compounded when considered in light of other policy documents. Defence Instructions and other policy documents are often very prescriptive in terms of the processes that must be followed when undertaking a particular inquiry, investigation or review or when managing an incident relating to a particular subject matter. The prescriptive and inflexible nature of these documents has led to difficulties in compliance and reduces the discretion of line managers and commanders to adapt solutions to the circumstances. It also represents a significant legal risk for Defence where it does not follow its own mandated processes when handling particular matters.

One key observation in Annex B is the opportunity that lies in reviewing such documents with a view to consolidating policy and ensuring that more flexible processes are provided for. Additionally, it is recognised that an opportunity lies in improving guidance on the availability and powers associated with non-statutory inquiries, and how this could potentially lead to a much more flexible and adaptive inquiry system for both line managers and commanders in the integrated environment.

Outcomes of previous relevant inquiries

There are far too many reviews, appeals and other investigations. In most cases, they take far too long, are resource intensive and do not provide value for money ie. the cost of doing them far outweighs the value of the subject being investigated. There should be an appeal system but once a decision is made on appeal, that should be the finish. The endless appeals makes a mockery of the whole system and wastes valuable resources that could be better employed elsewhere.²²

Thirteen inquiries were identified on the basis of their relevance to this project. The recommendations from each of these inquiries were identified and analysed. The implementation status of relevant recommendations has also been assessed, in order to understand how the current system has evolved.

The inquiries considered were:

- Senate Committee report 1994 (Report to the Senate on the Elimination of Sexual Harassment in the ADF)
- Burton report 1996 (Women in the ADF)
- Quinn report 1996 (Sexual harassment in the ADF)
- Abadee report 1997 (A study into the judicial system and under the DFDA)
- Grey report 1998 (Report of the review into policies and practices to deal with sexual harassment and sexual offences at ADFA)
- Defence Force Ombudsman's report 1998 (DFO's own motion investigation into how the ADF responds to allegations of serious incidents and offences – review of practices and procedures)
- Joint Standing Committee report 1999 (Military Justice procedures in the ADF, Joint Standing Committee on Foreign Affairs, Defence and Trade)
- ANAO Report 1999 (Audit Report No 46, Redress of Grievances in the Australian Defence Force)
- Review of ROG system 2000 (Defence Personnel Executive review of the Australian Defence Force Redress of Grievance System)
- Joint Standing Committee report 2001 (Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice? An investigation into allegations of Brutality in the Army's Parachute Battalion*)
- Burchett report 2001 (Report of an inquiry into military justice in the ADF)
- Acumen Alliance audit 2003 (The Defence Legal Service Board of Inquiry Management Audit)
- Commonwealth Ombudsman's report 2005 (Review of the ADF Redress of Grievance System, a Joint Report by the Department of Defence and the Defence Force Ombudsman)

²² Free text comment from a survey respondent

- Senate Committee report 2005 (the effectiveness of Australia's military justice system)
- Investigative Capability audit 2006 (Report of the Audit of the ADF Investigative Capability)
- Defence Force Ombudsman's report 2007 (Defence Force Ombudsman's own motion investigation – management of unacceptable behaviour complaints in the ADF)
- Street / Fisher report 2008 (Report of the Independent Review on the Health of the reformed military justice system)

In summary, these inquiries illustrate a long history of issues that have continuously plagued Defence in terms of its culture, the military justice system, and complaint handling and inquiry processes. Many of the observations made resonate with the more recent cultural reviews and the observations made in this project. However, some inquiries focus on particular aspects of the problem, at the expense of a holistic review of the system. This has led to piecemeal reform addressing issues in isolation, without regard to the unintended consequences. Much of the complexity of the current system can be attributed to this type of reform. Structures and processes have been devised to respond to these inquiries, and have been tacked on to existing processes without any consideration by Defence of broader systemic rationalisation.

The inquiries' tendency has been to recommend the addition of more rules and processes, in order to address specific issues. This is reflective of a view that it is somehow possible to achieve a perfect outcome in every case through the imposition of processes and rules that are designed to make provision for every possible circumstance. The tendency has been to see command discretion as a source of injustice, rather than a valuable source of power to suppress bad behaviour, and to restrict it accordingly. The approach taken has been to address concerns with the substance of decisions and outcomes by developing more rules. These include processes that are disproportionate to the risks and desired outcomes in many cases.

The process becomes an end in itself, rather than a tool for making sound decisions. The accumulation of ever more complex rules over time arguably means that line managers and commanders are unable to adopt flexible approaches to problems based on sound risk-management principles. Instead, they are bound to a particular course of action even if it is not appropriate to the circumstances. This approach also reduces the accountability of line managers and commanders for their decisions – it is difficult to hold someone to account for a decision if they have followed the rules in making the decision. The risk-aversion associated with the rules-driven reform arising out of previous inquiries is reflective of the adverse and subtle implications of command disempowerment referred to by Mr Gyles in the Part Three Report of the HMAS *Success* CDF Commission of Inquiry.

A summary of these inquiries, together with the analysis of recommendations, is at Annex C.

Commonwealth best practice

Commanders need the autonomy to make common sense decisions based on the facts in front of them without the black and white perspectives of legal officers. The world is not black and white, but grey, and our system seems to not take this into consideration in my experience.²³

Within the Commonwealth, Defence is unique: *Defence's mission is to defend Australia and its national interests. In fulfilling this mission, Defence serves the Government of the day and is accountable to the Commonwealth Parliament, which represents the Australian people to efficiently and effectively carry out the Government's defence policy.*²⁴ The integrated military and civilian workforce that exists to execute this mission is unlike any other Commonwealth agency.

In light of this, the best practice guides and other resources of this nature developed for Commonwealth agencies cannot apply in their entirety to the whole of Defence. Further, unlike many other Commonwealth Government departments, Defence is not involved in the delivery of services and has no 'customers' apart from Government.²⁵ However, these guides are a valuable resource and have informed a number of aspects of the development of the essential components for an optimal system.

The following Commonwealth guides and reports have been considered:

- *Handling Misconduct: a human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct* (Australian Public Service Commission, 2008)
- *Better Practice Guide to Complaint Handling* (Commonwealth Ombudsman, 2009)
- *Administrative Review Council Report No 44, Internal Review of Agency Decision Making* (2000)
- *Not just about process: the review of actions scheme – a human resources practitioner's guide to responding to and managing employee complaints and disputes* (Office of the Merit Protection Commissioner, 2012)
- *Making inquiries report – a new statutory framework* (Australian Law Reform Commission, Report 111, 2009)

Handling Misconduct: a human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct (Australian Public Service Commission, 2008)

The Handling Misconduct Guide is described as a good practice guide that has been developed to assist human resource practitioners in agencies to review and improve their guidance material and procedures for reporting and dealing with suspected breaches of the Code. The Guide identifies the different stages of the process for

²³ Free text comment from survey respondent

²⁴ Defence Annual Report 2010-11, Vol 1, p 52

²⁵ Defence does receive complaints from the public, which are generally dealt with on an ad hoc basis. Complaint handling guides are a useful resource in considering how to develop a more permanent arrangement for handling public complaints. Such an arrangement may be considered in Stage B.

handling misconduct, and discusses the relevant issues and good practice principles that should be applied. While the Guide specifically refers to misconduct by APS employees and breaches of the APS Code of Conduct, its general principles can be applied to the management of misconduct by ADF members, and so is relevant to Defence's integrated environment.

The Guide explains that taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the APS and thereby maintaining public confidence in public administration, rather than aiming to 'punish' the employee per se. It advises that the procedures for determining whether there has been a breach of the APS Code of Conduct should be kept relatively brief and limited essentially to the requirements of the PS Act and the Directions. Agencies need to emphasise to managers the importance of complying with the agency procedures, given that they are legal instruments and failure to comply will leave the agency exposed to legal risk. The Guide suggests that in order to minimise the risk that managers may be found to have breached the agencies procedures, agencies should make their procedures as flexible as possible while still meeting the legislative requirements. It states that agencies should ensure that the wording of the guidance material avoids words that appear to be imposing mandatory requirements in addition to those required by the statutory framework when that is not intended (e.g. using 'must').

This point is particularly relevant in the Defence context, given the volume of prescriptive internal procedures that exist and the frequent inability of line managers and commanders to comply with all policies where multiple issues are raised. In particular, Defence Instructions are deliberately written in mandatory language, and as these have the force of law, Defence is exposed to significant risk where line managers and commanders do not ensure compliance (even where inconsistent requirements mean that compliance with all procedures is not possible). The Guide suggests that flexible procedures be adopted, perhaps supplemented by more detailed guidance material as necessary. A significant advantage of such an approach is that if a case is challenged, it is clear which are the mandatory procedures that are legally binding, as distinct from other material that has the status of guidance. In the legal framework analysis in Annex B, opportunities have been identified for the content of certain Defence Instructions to be reviewed and recast as guidance in manuals.

The Guide also provides that not all cases of suspected misconduct need to be dealt with by a formal investigation to determine whether a breach of the APS Code of Conduct has occurred. It states that misconduct action is part of a range of people management practices that agencies should have in place to encourage high quality performance. One issue that has been identified as part of this project is how often incidents are escalated to a formal inquiry or investigation process, when it may have been possible to resolve the issue at a lower, more informal level. Line managers and commanders need to ensure that their actions in responding to an incident, as well as any sanctions imposed, are proportionate. While it may be appropriate to use formal processes for more serious instances of misconduct, other less serious incidents (such as one-off incidents of harassment or rudeness) may be more appropriately dealt with through the performance management processes.

The Guide provides that the process for handling misconduct can be divided into a number of stages, and provides suggested material for incorporation into agency guidance. It notes that it is not intended to be prescriptive but rather be of practical

assistance to agencies. The stages and guidance that is relevant in the Defence context includes:

Receiving a report of suspected misconduct. Agencies should encourage employees to report suspected misconduct as part of their duties, ensure that there are different options available to employees to report misconduct, ensure that there are protections available to employees who report misconduct, and advise employees how to treat or collect any evidence prior to reporting.

Initial consideration of the report to decide how best to handle the suspected misconduct. Agencies should develop processes for identifying who is responsible for deciding whether suspected misconduct will be managed through the misconduct procedures or alternate procedures, ensure that alternative methods of handling suspect misconduct are available, ensure that it is clear at what stage misconduct action should be commenced, and ensure that guidance is provided as to how to manage employees during such processes.

Commencing a misconduct action under the misconduct procedures and undertaking an investigation. Agencies should outline procedures which ensure that the decision-maker (and investigator if roles are separated) is free from bias, direct the decision-maker to comply with the agencies' procedures, describe the agencies' procedures for conducting an investigation, provide advice on the different approaches to determining the scope of an investigation stress the importance of complying with the requirements of procedural fairness and other administrative law principles, note the legislative requirement that the investigation should be carried out with as little formality and as much expedition as a proper consideration of the matter allows, and provide contact points for support and advice.

Deciding whether the misconduct has occurred. Agencies should provide advice on the role of the decision maker, provide advice for the decision-maker on the breach about preparing a decision record (including whether to consider developing a template) and ensure that sources of advice such as data bases and HR personnel are clearly referenced.

Imposing the appropriate sanction where necessary. Agencies should explain the sanctions that can be used and the factors to be considered in determining an appropriate sanction, including the importance of consistency.

Better Practice Guide to Complaint Handling (Commonwealth Ombudsman, 2009)

The Better Practice Guide to Complaint Handling is aimed at Commonwealth agencies, providing guidance on the best way to set up a complaint handling system. The Guide is broadly consistent with Australian Standard AS ISO 10002-2006 '*Customer Satisfaction—guidelines for complaints handling in organizations*'. The Guide describes five elements of effective complaint handling:

Culture. Agencies must value complaints as a means of strengthening their administration and improving their relationships with the public.

Principles. An effective complaint handling system must be modelled on the principles of fairness, accessibility, responsiveness, efficiency and integration.

People. Complaint handling staff must be skilled and professional.

Process. The seven stages of complaint handling – acknowledgment, assessment, planning, investigation, response, review and consideration of systemic issues – should be clearly outlined.

Analysis. Information about complaints should be examined as part of a continuous process of organisational review and improvement.

Complaint handling involves decision-making, and necessarily incorporates elements of inquiry, investigation and review. The Guide is clearly directed at handling complaints from ‘customers’ external to the organisation, rather than internal complaints. For that reason, it has limited application in the Defence context, where the decisions being made and complained about are almost exclusively in relation to Defence personnel.²⁶

Review mechanisms in Defence, including the APS review of action process and the ADF redress of grievance process, are aimed at dealing with grievances from individuals who are part of the organisation, rather than complaints from individuals who are separate from the organisation. In the Defence context, the ‘complaints’ made are about decisions, actions or omissions made in respect of an individual’s employment or service, as opposed to complaints about customer service. Since complaints are about decisions, the ‘review’ mechanisms align much more readily with principles associated with internal merits review, rather than complaint handling in the sense considered in the Guide. Given this, those principles relevant to review mechanisms should be considered in the Defence context.

In terms of the specific principles that are relevant, the Guide provides that review mechanisms should provide an **impartial review** of the original decision or action. Review mechanisms should be **transparent**. Review mechanisms should be **efficient** – they should handle matters in a way that is proportionate and appropriate to the matter being reviewed. The Guide also emphasises the importance of properly trained and skilled personnel.

Administrative Review Council Report No 44, *Internal Review of Agency Decision Making* (2000)

The Administrative Review Council (ARC) undertook this project to examine issues in relation to internal review of decisions by Commonwealth agencies with a view to offering practical assistance to agencies. It is a useful framework for Government agencies planning new review regimes or reviewing existing practices. The ARC Report distinguishes between internal review and general complaint handling procedures (such as those in Customer Service Charters), noting that complaint handling can encompass issues of service delivery and process, while internal review involves reviewing a particular decision on the merits, with the possibility of a changed outcome. The Report is focused on merits review relating to particular decisions affecting particular applicants. For this reason, it is likely to be more

²⁶ It is noted that potential contractors, who may make complaints in relation to procurement processes, are not Defence personnel. These complaints, however, remain conceptually different from those of concern in the Ombudsman’s report.

relevant in the Defence context of 'review' than the Commonwealth Ombudsman's Best Practice Guide to Complaint Handling. That said, the ARC Report is aimed at merits review of decisions affecting individuals external to the agency, as opposed to merits review of decisions affecting staff.

ARC's view of internal review is as a precursor to external review by a merits review tribunal. While, at present, most decisions in Defence are not reviewable by an external merits review tribunal, external review is available through the Defence Force Ombudsman (in the case of ADF members) or the Merit Protection Commissioner (in the case of APS personnel).

ARC outlined some of the major advantages of internal review: internal review can be a quick and easily accessible form of review that can efficiently satisfy large numbers of client who might otherwise not take up external review rights, or might unnecessarily pursue the more resource and time consuming external process. Internal review can also provide a useful quality control mechanism for an agency, feeding back and influencing primary decision-making.

ARC also identified some disadvantages with internal review. Most relevantly, ARC concluded that internal review can sometimes act as a barrier to external review, introducing lengthy delays and deterring clients from reaching a genuinely independent review body.

The complexity of internal review in Defence, in particular in relation to ADF members, is likely providing a barrier to ADF members seeking review by the Defence Force Ombudsman (who will ordinarily, but not always, refuse to consider complaints unless all internal avenues have been exhausted). It is also questionable whether the advantages of internal review are being achieved through these multiple and complex processes – the redress of grievance process is frequently extensive and drawn out, losing the advantage of speed that is a hallmark of a good internal review system. In order to be effective, internal review must be quicker and more cost-effective for Defence and affected individuals than external review. Given the multiple layers of review currently available, it is not clear that the current system of review mechanisms meets this basic requirement.

ARC made other pertinent observations, including in relation to the independence of internal review decision-makers from primary decision-makers. ARC concluded that it is preferable to have a simplified structure consisting of a single layer of review by a senior officer uninvolved in the primary decision (as opposed to, for example, returning matters to the original decision-maker for reconsideration).

ARC also considered the tension between the aims of fairness and correct decision making, and the aim of efficiency in relation to the amount of time taken in processing the review and the resource cost of such a process. It noted that the more thorough the review, and the longer the time period involved, the more likely it is that fresh evidence will emerge. However, investing too much time in the internal review stage can compromise the efficiency aspects of internal review.

Not just about process: the review of actions scheme – a human resources practitioner’s guide to responding to and managing employee complaints and disputes (Office of the Merit Protection Commissioner, 2012)

This is a good practice guide produced by the Merit Protection Commissioner in relation to APS review of action processes in Commonwealth agencies. The APS review of action process is a statutory review mechanism for APS personnel, and applies to APS personnel in Defence. The guide notes that the statutory review of actions scheme gives agencies considerable flexibility to conduct reviews in a way that suits their culture and operating environment, and notes that the APS Values are the principles upon which all people management decisions should be based. The guide is aimed at helping Agency Heads and managers implement best practice in handling applications for review of employment decisions. The facets of best practice identified are:

- values-based procedures that commit to a fair and independent review process
- arrangements for routinely advising employees of their right to review
- clear and accessible processes for lodging a review application
- arrangements that support the effective management of the relationship with the review applicant
- arrangements that result in fair, evidence-based and clear reasons for the outcome of the review

The guide notes that clumsy or ineffective handling of a problem when it first emerges magnifies a dispute and colours perceptions of the people involved. These perceptions can last for a long time, and have a negative impact on engagement and productivity. The internal review process cannot substitute for effective people management in the first place.

The guide notes that if the facts underlying the dispute are contested, it is usual for there to be some sort of inquiry conducted to establish the facts. However, a review may simply involve listening to and considering the employee’s concerns, or reviewing a decision on the basis of the available documents and relevant argument. The overwhelming majority of employee complaints and disputes are resolved informally through discussion.

The guide notes that the way a complaint is resolved will vary depending on the circumstances. The best response balances the interests of the agency with the views and interests of the parties. It is in the interest of both the agency and employees to resolve a complaint in a way that addresses the underlying motivation and interests of the employee. It is also in the interests of both the agency and employee that the process for resolving the complaint is quick, fair and transparent.

This best practice guide is highly relevant to this project – clearly, the observations about the APS review of actions scheme, and in particular the degree of flexibility agencies have in developing review of action processes, are relevant when assessing this aspect of Defence’s review mechanisms. However, the operation of the APS review of actions scheme may also be relevant when considering other review mechanisms in Defence, including the ADF redress of grievance process. The guide is an important source of information when considering methods to align APS and ADF processes to operate more effectively together.

Making inquiries report – a new statutory framework (Australian Law Reform Commission, Report 111, 2009)

This report by the Australian Law Reform Commission (ALRC) was the culmination of a nine month inquiry into the operation of the provisions of the *Royal Commissions Act 1902* (Cth), and the question of whether an alternative form or forms of Commonwealth executive inquiry should be established by statute.

The ALRC's central recommendation was the establishment of a two-tiered inquiry system, consisting of Royal Commissions appointed by the Governor-General and Official Inquiries appointed by Ministers. The ALRC then made recommendations in relation to the conduct of both types of inquiry, including proposals in relation to the cost of public inquiries, inquiry powers, and handling of security information.

The Government has not yet provided a response to this report. Its relevance to this project is also limited, as it deals with whole-of-government inquiries that are not necessarily adapted to the Defence context. However, the observations in relation to inquiry powers, in particular, are relevant to this project when considering the operation of higher level statutory inquiries in Defence (such as Courts of Inquiry, Boards of Inquiry and CDF Commissions of Inquiry), which have not been updated in some time .

Costing/resources

The current system is overly complex and not user friendly. There is a mountain of policy which frequently overlaps, constantly changes and is often too complex.²⁷

The difficulty in costing the current process is a major weakness of the current system. The responses to the questionnaire identified that the value of an inquiry, investigation or review's outcome was often surpassed by the resources required. These statements are difficult to validate as appropriate arrangements are not in place to capture and track these costs.

It is doubtful that it will be possible to fully cost all aspects of the current system of inquiry, investigation and review. The concern that the resource requirements are disproportionate to the system's value cannot be ignored, however, and identification of indirect or hidden costs will be attempted as part of this project. Indirect costs include the diversion of personnel and budget resources from other priorities and salaries for specialist staff. Even more difficult to cost are hidden costs such as lost productivity from complainants, respondents and witnesses, and lowered staff morale. These will be aligned with the various processes used, along with any direct costs that can be identified to develop a basis for determining costs of the current system.

A methodology for costing the system, including indirect or hidden costs, would enable an assessment of the comparative efficiency of new models. It is suspected that a system that complied with all of the essential components identified below would be less resource-intensive than the current system, but without a robust costing methodology, this remains a supposition only. In an environment of cost-consciousness and increasing scrutiny of Defence spending, a definitive conclusion about the comparative use of resources associated with a new system would be valuable when a decision is made to act on the Stage B recommendations.

Areas within Defence have been identified whose main purpose is to conduct, manage, or facilitate inquiries, investigations or reviews and whose direct costs can be included in the costing methodology being developed. These areas are:

- IGADF – portion only
- Values, Behaviours and Resolution Branch
- Conduct Performance Probation
- ADFIS – portion only
- CDF COI cell
- Inspector General - Defence
- Defence Security Authority
- Air Safety (DDAAFS)

²⁷ Free text comment from a survey respondent

Where statistics are available from these organisations they will be combined with the actual costs to determine an average figure for the cost of these types of inquiries, investigations and reviews. Also, where statistics on duration of a process are available this information will also be combined with the cost data to better inform our analysis. This information will form the basis of our cost assumptions.

A matrix is being developed to map the costs identified with the type and quantity of inquiries, investigations and reviews undertaken. This will allow the identification of costs at various points along the process and identify gaps in the end-to-end process. This matrix will support any assumptions used in developing cost models for the current system and may be used for comparison with the cost models for the options to be developed in Stage B.

Further research is being conducted at the unit level to determine the number of man-hours, on average, units contribute to the various species of inquiries, investigations and reviews. This will assist in developing the costing methodology and ensure that indirect costs are considered in the development of models for a new system.

Early analysis indicates that the processes that can be costed relatively simply are: CDF Commissions of Inquiry, ADF redress of grievance once it is referred to a Service Chief, and APS Code of Conduct Reviews. The project team are progressing further liaison with the Service specific inquiry cells to identify contacts at the unit level to provide more granular level detail to inform the costing methodology.

Consultation with CFO Group is ongoing and they will provide assurance of any costing models developed as well as validating any assumptions. Once the initial data is identified contact will be made with the COO cost modelling areas for further assistance.

Key strengths and weaknesses of the current system

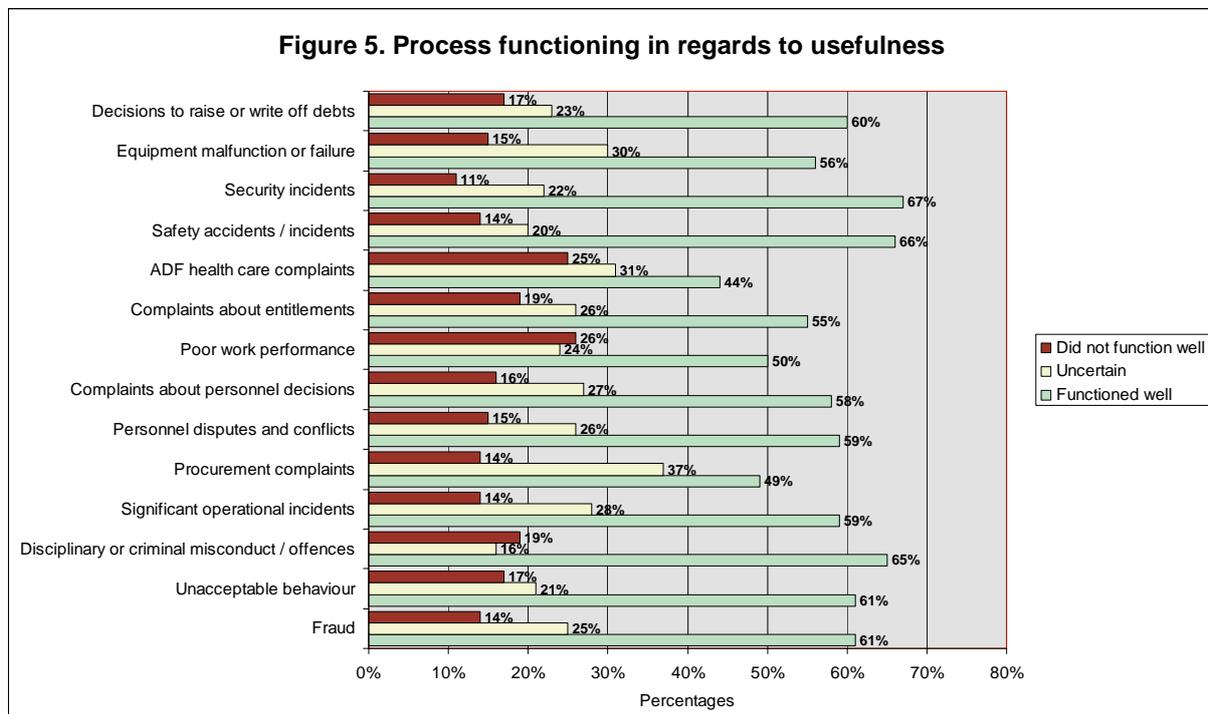
*Inquiry processes are used as an excuse to AVOID decisions rather than support decision making. It is bureaucratic churn that fools no one.*²⁸

Having analysed the current structures associated with inquiry, investigation and review, their characteristics, and the views of key internal stakeholders and survey respondents, the key strengths and weaknesses of the current system have been identified.

Major strength

Usefulness. Overall, survey respondents identified that inquiry, investigation and review processes were more likely than not useful in relation to all of the subject matters identified. A number of elements of the system appear to be functioning well in relation to particular subject matters. For example, there has been strong praise for the aviation accident and incident investigation process.²⁹

Figure 5 displays how each subject matter scored in relation to the usefulness of inquiry, investigation and review processes.³⁰ The survey analysis at Annex A provides further information about variations in responses from ADF and APS survey respondents, and from respondents working in integrated and non-integrated environments.



²⁸ Free text comment from a survey respondent

²⁹ Chief of Air Force feedback on draft Stage A report

³⁰ Based on data at Annex A, page 13

The cautious optimism displayed by survey respondents in relation to usefulness is reflective of comments made by senior internal stakeholders in the questionnaire responses. For example, comments in the questionnaire responses included:

'processes may ultimately achieve their aims'

'generally satisfied with outcomes'

'allow informed assessment of incident'

'administrative inquiries generally inform good decision-making'

'overall, inquiries etc do achieve outcomes'³¹

There appears to be a general acceptance that most inquiries, investigations and reviews will ultimately achieve their purpose.

Major weaknesses

While, overall, there was a general consensus among both survey respondents and senior internal stakeholders about the usefulness of inquiry, investigation and review, it is clear that there were also significant concerns about particular aspects of the system.

Complexity. Complexity is a significant concern in the current system of inquiry, investigation and review. The complexity of the system makes it difficult to use, and is likely to contribute to delayed outcomes and increased costs. Complexity could potentially lead to reluctance to take action, use of wrong or flawed processes, and ultimately, poor decision-making.

Survey respondents were asked whether, overall, they found inquiry, investigation and review processes in Defence easy to apply. The prevalence of respondents who viewed inquiry, investigation and review processes as easy to apply was the same as those who viewed them as not easy to apply. However, one-fifth of respondents were uncertain about the ease of applying inquiry, investigation and review processes in Defence.³² These figures are indicative of the difficulty of operating within the current system.

The complexity of the system is also illustrated by the survey outcomes in relation to the particular processes used in relation to the various subject matters. In relation to each subject matter selected by a survey respondent, the respondent was asked to identify which processes had been used to resolve the matter(s). The listed processes were:

Internal Defence inquiry / investigation processes:

- Quick Assessment
- APS Code of Conduct investigation
- DFDA investigation (conducted by ADFIS)

³¹ See Enclosure 1, Annex A for the full analysis of questionnaire responses

³² Annex A, page 9

- DFDA investigation (conducted at unit level)
- Routine inquiry
- Inquiry Officer inquiry under the Defence (Inquiry) Regulations 1985
- CDF Commission of Inquiry under the Defence (Inquiry) Regulations 1985
- Board of Inquiry under the Defence (Inquiry) Regulations 1985
- Aircraft Accident Investigation Team
- Informal fact finding
- Whistleblower scheme

Internal Defence review processes:

- APS review of action
- CDDA scheme (compensation for detriment due to defective administration)
- Redress of grievance (Commanding Officer level)
- Redress of grievance (Service Chief and CDF levels)
- IGADF inquiry under the Defence (Inquiry) Regulations 1985
- Informal review of a decision

External inquiry, investigation and review processes:

- Comcare investigation
- Civilian police investigation
- Coronial inquests / investigations
- Review of discrimination complaint by Australian Human Rights Commission (and State-based equivalents)
- Review by Privacy Commissioner
- Review by Commonwealth Ombudsman
- Review by Defence Force Ombudsman
- Review by APS Commissioner
- Review by Merits Protection Commissioner
- Review by a professional body (eg medical board / law society)
- Review by Administrative Appeals Tribunal
- Review by a Court

Other:

- Alternative dispute resolution
- Informal workplace problem solving

It is acknowledged that this is by no means a complete list of inquiry, investigation and review processes. The results for this question appear in the survey analysis at Annex A.³³ Generally, there were a significant number of possible processes selected for most subject matters, suggesting a high level of complexity in the system.

The large number of processes available to inquire into, investigate or review a single matter could be considered as indicative of inbuilt flexibility in the system. However, flexibility is better achieved through fewer simple processes, rather than multiple detailed processes. The array of options available makes the system as a whole incoherent.

Complexity was also identified as an issue by the senior internal stakeholders in the questionnaire responses. Comments included:

'there is concern that many processes have become unduly cumbersome, overly complicated and slow'

'HR investigations were cumbersome, complicated, confusing, onerous, resource-intensive and legalistic'

'double handling where DFDA matters are investigated concurrently with an administrative inquiry'

The complexity of the system is heightened in the integrated environment. Processes applicable to APS and ADF members are rarely the same even though, as identified in the analysis of legal framework at Annex B, there is scope for the same processes to be applied in some instances. The system is further complicated where contractors are involved, as their behaviours are not governed by the same requirements as apply to APS and ADF members, and may depend on the terms of a particular contract. Defence's own obligations in relation to contractors may also vary depending on the terms of a contract. The complexity associated with the integrated environment is a particularly significant problem – 82.7% of survey respondents identified themselves as working in an integrated environment.³⁴

Complexity could potentially be mitigated through co-ordinating structures to provide advice, to minimise double-handling of matters, to co-ordinate the flow of information between areas, and, in some cases, to undertake centralised inquiry, investigation and review. In the current system, however, the number of co-ordinating structures, together with their overlapping jurisdictions and variable sources of power, may be acting to increase rather than decrease complexity. Table 2 in Annex B provides information about the co-ordinating structures in Defence in relation to various types of inquiry, investigation and review.

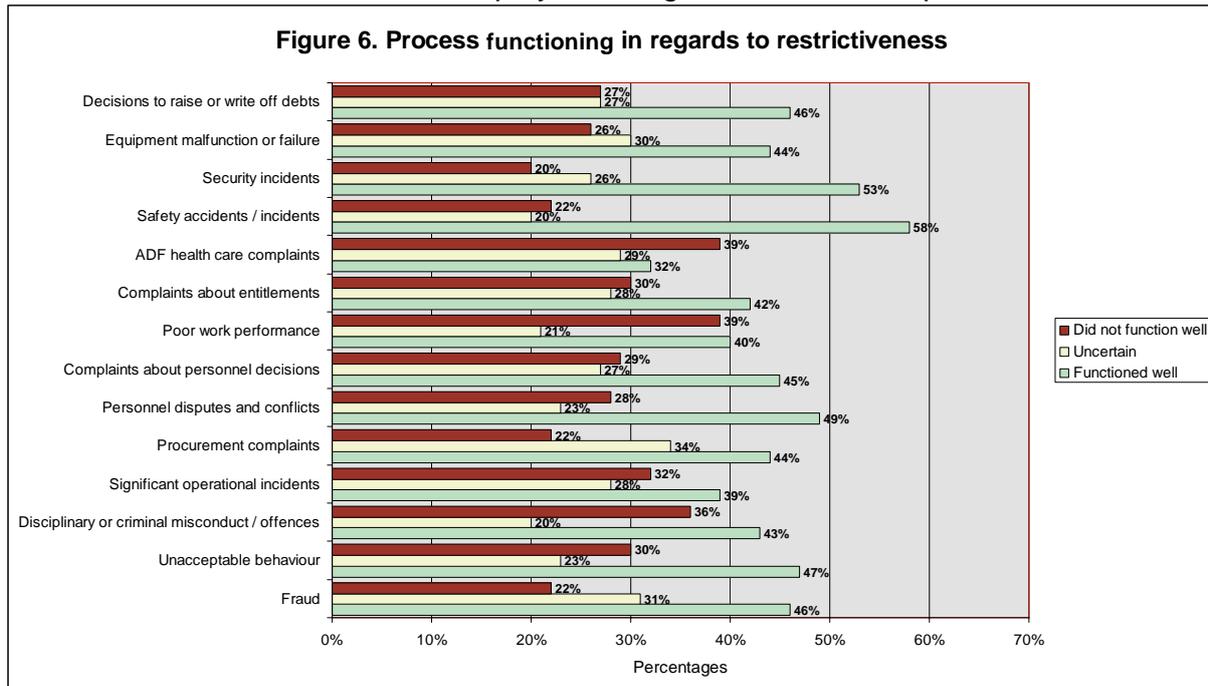
The view that complexity is a significant problem in Defence's inquiry, investigation and review system is supported in some of the inquiries previously conducted into aspects of that system (see Annex C).

³³ Annex A, pages 47-51

³⁴ Annex A, page 46

Restrictiveness. The inquiry, investigation and review system does not allow line managers and commanders sufficient scope to tailor responses to trigger events to best meet the needs of the particular circumstances.

Survey respondents were asked whether Defence's policies and procedures for inquiry, investigation and review were too restrictive. The responses were, overall, quite negative. In all categories apart from safety and security incidents, more than half of survey respondents either agreed or were uncertain that Defence policies and procedures were too restrictive. Figure 6 displays how each subject matter scored in relation to the restrictiveness of inquiry, investigation and review processes.³⁵



In questionnaire responses, a number of senior internal stakeholders also indicated that inquiry, investigation and review processes in Defence are not sufficiently flexible. For example, there was a view that formal procedural requirements were not suitable for all circumstances.

The legal framework analysis (at Annex B) has identified many of the Defence policies and procedures associated with various subject matters. In many cases, these policies mandate that particular inquiry, investigation or review processes must be followed, regardless of the circumstances of the incident in question. This leaves line managers and commanders with little discretion when it comes to managing their own work environments. In some cases, these rule-based policies have been developed to address perceived problems of under-reporting or systemic failure to take matters seriously. However, an unintended consequence has been to hamper decision-makers as they attempt to address issues in a flexible, proportionate way.

This problem was highlighted by Mr Gyles in the HMAS *Success* CDF Commission of Inquiry Part Three Report. Mr Gyles was of the view that many of the disciplinary problems in HMAS *Success* were a direct result of command being unable, or

³⁵ Based on data at Annex A, page 11

perceiving themselves as unable, to act due to the prescriptive and complex nature of Defence processes and procedures.

The restrictive, rules-based policies and procedures under which Defence is currently operating its inquiry, investigation and review processes has the potential to be unduly burdensome, and frequently is not capable of meeting the needs of a particular circumstance. This can result in flawed decision-making processes which can, in turn, lead to dissatisfaction of complainants, respondents or other persons involved in an incident.

Resources. The questionnaire responses from senior internal stakeholders repeatedly identified inadequate resourcing as a problem. The problems identified in questionnaire responses included:

- the unavailability of trained personnel to conduct inquiries and investigations,
- the imposition on staff when existing workloads needed to be balanced with additional inquiry-related workloads,
- the lack of or inadequate databases (particularly in the DFDA investigation and policing context),³⁶
- delays in access to information and lack of access to information for privacy reasons (such as files, documents, internet logs), and
- the volume of ROG complaints exceeding personnel resources.

Some questionnaire responses indicated that the resources used were not always proportionate to the problem that the inquiry, investigation or review was dealing with. For example:

'Unacceptable behaviour investigations etc... do not provide value in comparison to the resources required'

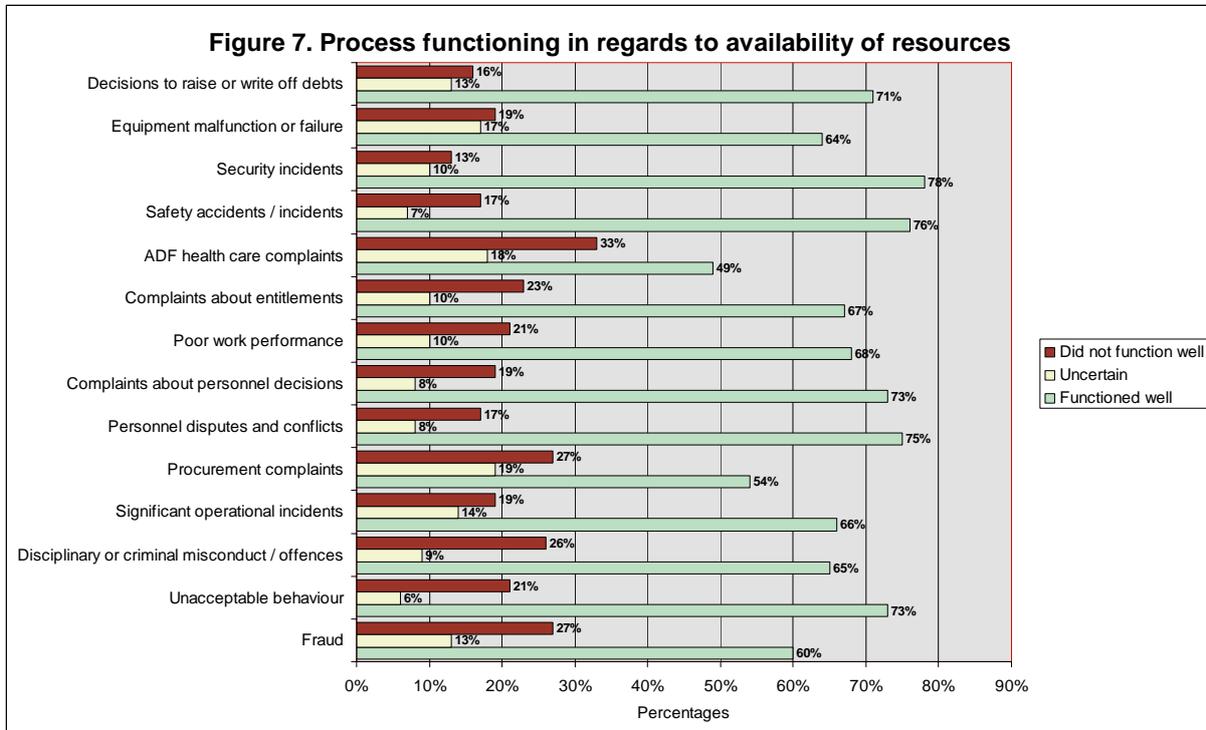
'Some admin inquiries provide little value'

In Defence, resourcing of inquiry, investigation and review arrangements is a difficult task. Generally there is no specific funding allocation made for these matters in operating budgets. Attempts in this project to determine how much is being spent on, and how many personnel resources are being invested in inquiry, investigation and review processes, have reinforced the difficulty of that task. It is difficult to assess whether there are adequate resources without a clear understanding of what resources are actually required and what is actually occurring at present. It seems fairly clear, however, that one reason for significant delays experienced in the inquiry, investigation and review system is insufficient resources at key points.

In contrast to the views expressed in the questionnaire responses, survey respondents had a relatively positive attitude to resources for inquiry, investigation and review. The proportion of survey respondents who had a positive view of the resources available for inquiry, investigation and review processes was even greater

³⁶ In his comments on the draft of this report, Inspector General – Defence has identified that *'the vast majority of complaints about the capabilities of DPSMS [a database used by all Defence Investigative Authorities] can be traced to problems with poor quality data being entered by users and/or users not utilising the full functionality of the system'*.

than had a positive view about the overall usefulness of the system. The proportion of respondents who were uncertain about resources was also significantly lower. Figure 7 displays how each subject matter scored in relation to the resources available for inquiry, investigation and review processes.³⁷



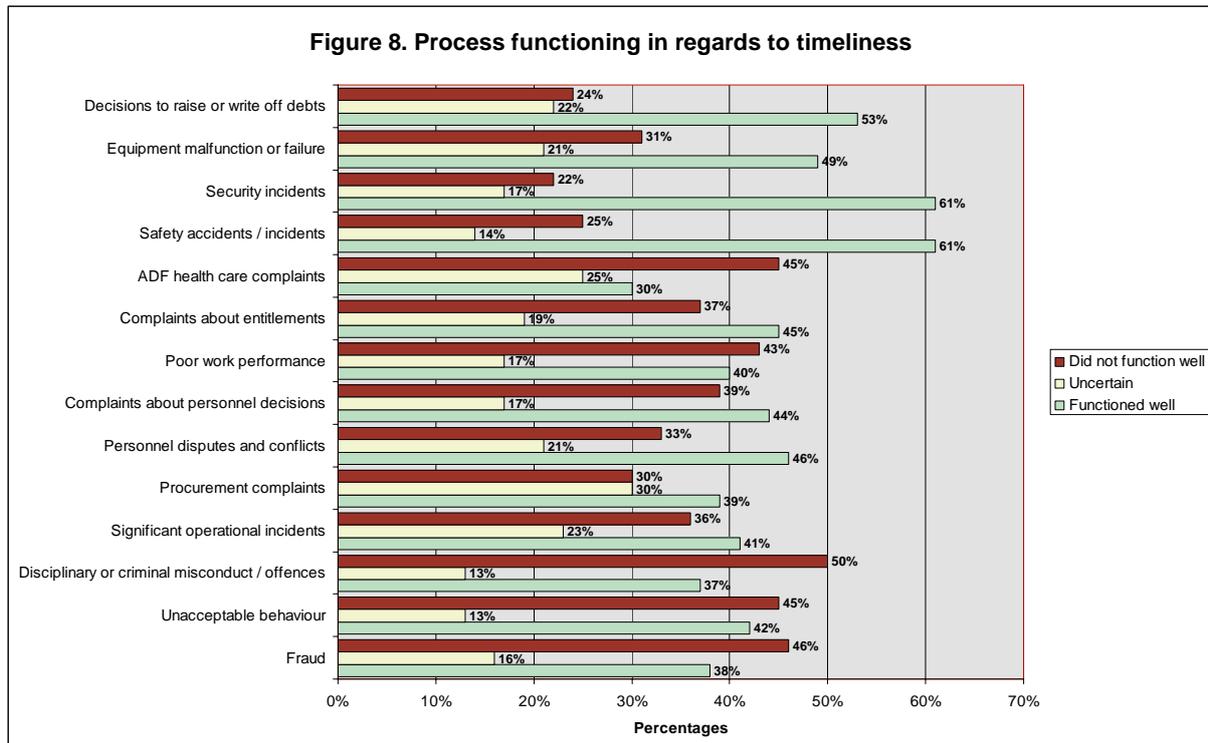
While the survey outcomes were surprisingly positive in relation to resources, the concerns expressed by senior internal stakeholders and in various reviews into aspects of the system cannot be discounted. For that reason, resource availability has been identified as a weakness of the current system, but is probably not as widespread a problem as might have been thought in the absence of the survey results.

Delay. The problem most frequently cited by senior internal stakeholders in the questionnaire responses was delay. Delay in inquiry, investigation and review processes necessarily leads to delay in decision-making. Delay can be a source of unfairness, can cause significant hardship to affected individuals, and, in some cases, can make the result of an inquiry, investigation or review meaningless. Delay is of particular concern when the inquiry, investigation or review is related to a safety incident.

Survey respondents were asked, in relation to each subject matter they had selected, whether inquiry, investigation and review processes allowed decisions to be made in a timely manner. Apart from safety and security incidents and decisions to raise or write off a debt, less than half of survey respondents considered that these processes were timely. With regard to categories such as fraud, unacceptable behaviour and poor work performance, the prevalence of respondents indicating that the system was not functioning well was higher than those indicating that it does function well.

³⁷ Based on data at Annex A, page 10

Figure 8 displays how each subject matter scored in relation to the timeliness of inquiry, investigation and review processes.³⁸



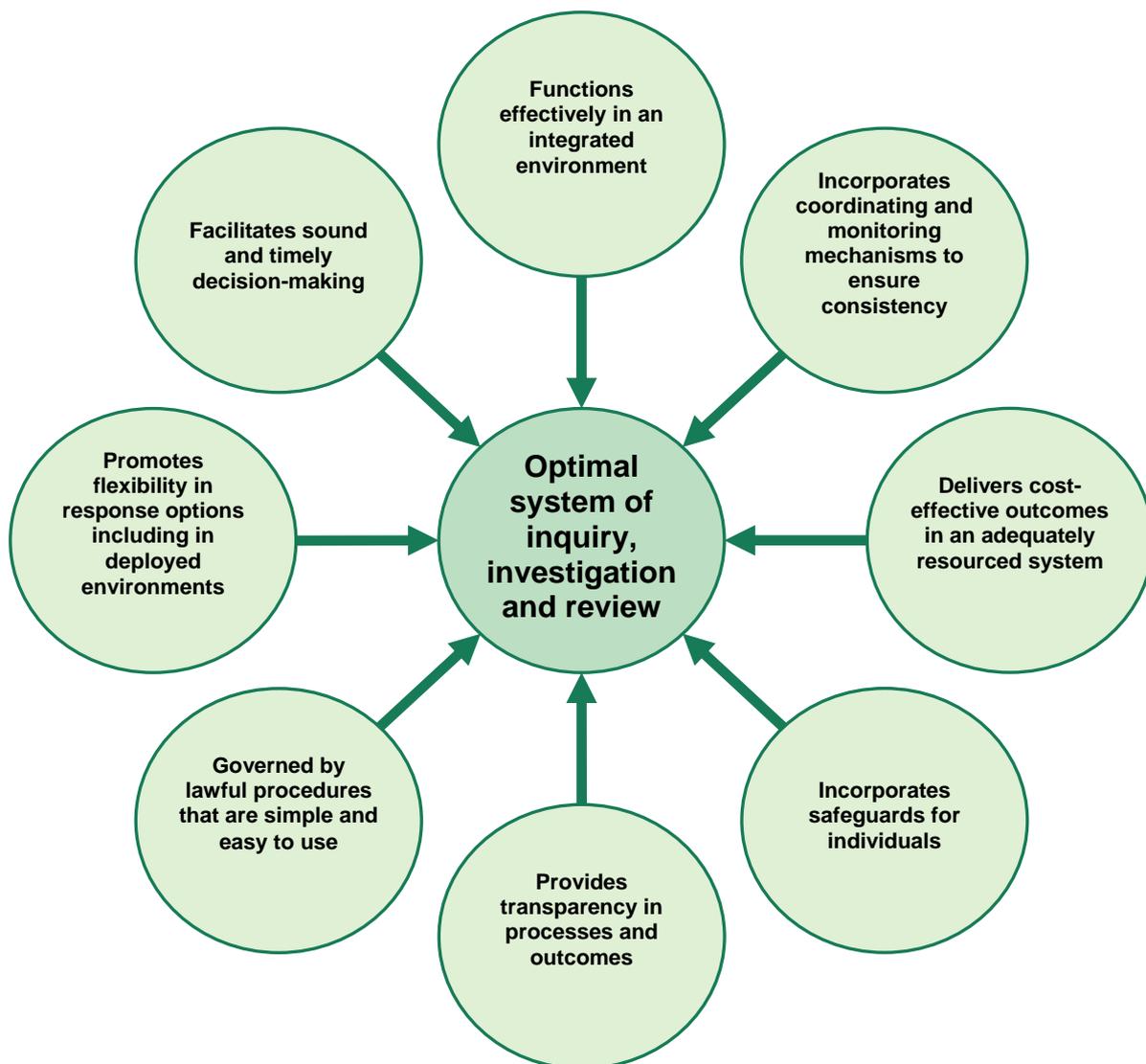
Delays in inquiry, investigation and review processes are a significant problem. Delay is, however, likely to be a function of the other major weaknesses identified here. The significant degree of complexity, restrictiveness of process, and insufficient resources in key areas all contribute to delay. While the interdependent relationship between complexity, restrictiveness of process and insufficient resources, leading to delay, was not statistically examined, it is anticipated that the prevalence of delay is dependant upon those factors and can be reduced by addressing them.

³⁸ Based on data at Annex A, page 12

Essential components of an optimal system

A system of inquiry, investigation and review needs emphasis on results and outcomes as its primary driver. Current systems are too easy to use as an excuse to do nothing or to defer a decision. Too much authority is centralised, too little is delegated.³⁹

Based on analysis undertaken during each of the Stage A activities, in particular, the survey outcomes, eight essential components for an optimal system of inquiry, investigation and review in Defence have been identified.



³⁹ Free-text comment from a survey respondent

Functions effectively in the integrated environment

Arrangements for inquiries, investigations and reviews have been developed almost exclusively for either the ADF or APS components of Defence. Increasingly though, Defence workplaces are becoming more integrated—with ADF members and APS employees working alongside (and for) each other. It is also common for other categories or people (such as contractors, volunteers and cadets) to have a presence in Defence workplaces.

Indeed, of the 1678 survey respondents from around Australia, 1387 (83%) identified themselves as working in an integrated environment.⁴⁰ The integrated nature of the Defence workplace now clearly extends to units and workplaces (including in deployed environments) which were once staffed exclusively by military or APS personnel. To deal effectively with problems or events affecting integrated workplaces, inquiry, investigation and review arrangements need to be applicable, to the maximum extent possible, to both ADF and APS personnel. If not, they hamper the ability of line managers and commanders to fulfil their responsibilities and are of limited utility in Defence.

There are considerable disparities between the inquiry, investigation and review arrangements that apply to ADF members and APS personnel. Two examples are:

- Inquiries conducted pursuant to the *Defence (Inquiry) Regulations 1985* are limited to matters affecting the ADF, not Defence more broadly. This limits the utility of these inquiry mechanisms in the integrated environment, where APS personnel may supervise ADF members and vice versa, and where APS personnel are just as likely to require the facts gathered during an inquiry process to inform decision-making.
- The APS review of actions scheme allows for a single layer of internal review of APS actions that relate to an individual's APS employment, and then, in the event the individual is not satisfied with the outcome, external review by the Merit Protection Commissioner. The ADF redress of grievance system allows a member to make a complaint where the member considers that 'a decision, act or omission in relation to the member's service is adverse or detrimental to him or her', and then allows for, in some cases, two further layers of internal review of the decision complained about.

When considering disparities such as these, it must be remembered that there are some fundamental differences between service in the ADF and employment in the APS, which may justify different treatment in Defence's inquiry, investigation and review system in some respects. The major legal differences are:

- ADF members are subject to command – they must follow all lawful orders (including those that may result in their death), while APS personnel must only follow lawful and reasonable directions;
- Most ADF members are liable to be targeted as combatants during an armed conflict, and are sent into combat on this basis;
- Unlike APS personnel, ADF members are not party to a contract of employment with the Commonwealth, and as such do not have rights in employment law.

⁴⁰ Annex A, page 46

Decisions in relation to their service are made pursuant to the command power and statutory provisions, which are governed by administrative law principles;

- There is no union for ADF members;
- ADF members are subject to a disciplinary code under which they can be imprisoned, including for failure to follow a lawful order; and
- ADF members can be directed to serve at any time and in any place.

In addition to these legal differences, there are more fundamental cultural differences between service in the ADF and civilian service in the APS.

Contractors have a very different legal relationship with the Commonwealth compared to APS personnel or ADF members. Involvement of contractors in inquiry, investigation and review processes could be incorporated into contractual terms outlining when and how they should be involved. An alternative would be to specify the role of contractors in the inquiry, investigation and review system through legislation.

The Australian Cadet Force, again, has a different legal relationship with the Commonwealth. It is a voluntary organisation established under legislation. The administration of the Cadet Force lies with Defence, so this area needs to be considered as part of this project.

To function effectively in the integrated environment, common inquiry, investigation and review arrangements should be developed to cover ADF and APS personnel, to the maximum extent possible. Where not possible, every effort should be made to ensure arrangements align so that processes can be coordinated. Coverage of contractors, cadets and others potentially involved in inquiry, investigation and review processes needs to be explicitly accommodated.

Facilitates sound and timely decision-making.

As outlined above, inquiry and investigation activities are integrity functions, that primarily exist to support decision-making in Defence—they are not ends in themselves. Associated procedures should promote the ability of line managers and commanders to gather information required to make sound and timely decisions.

The survey results indicate that the current system is not effectively supporting decision-making. Survey respondents were asked whether overall, inquiry, investigation and review processes in Defence support effective decision-making. Fifty percent of respondents indicated that inquiry, investigation and review processes support effective decision-making, while 28% of respondents indicated that they do not (with the remaining 22% of respondents uncertain). A larger proportion of respondents provided a positive response on whether inquiry, investigation and review supports effective decision-making, when compared to those who do not consider inquiry, investigation and review processes to support effective decision-making. However, it would be considered that a well functioning

system would have produced a higher than 50% prevalence of those who view the current system as supporting effective decision-making.⁴¹

Timeliness was identified by 29.6% of survey respondents as one of the three most important qualities of an optimal system of inquiry, investigation and review, making it the second most identified quality in the survey.⁴² Delay was also cited by key internal stakeholders as a significant problem in the questionnaire responses.

In addition, internal review processes serve an important integrity function, supporting accountability and quality control. To achieve these goals, internal review processes need to be structured and resourced to deliver timely and sound outcomes. If internal review processes are too complex or protracted, they undermine their intended purpose and act as a barrier to external review mechanisms that are also an essential part of any decision-making framework. Additionally, investing too much time on internal review processes can compromise efficiency, and will not necessarily improve the quality of the outcome. Accordingly, the two-tier review process advocated in Commonwealth best practice – a single layer of internal review followed by a single layer of external review – should be the goal.

To facilitate sound and timely decision-making, inquiry, investigation and review arrangements must be recognised as part of a broader decision-making framework, and must support integrity-driven decision-making in Defence. The system should include processes for fact finding to inform decision-making, a single layer of formal internal review, and external oversight mechanisms.

Promotes flexibility in response options including in deployed environments

Inquiry, investigation and review processes in Defence need to be flexible and capable of broad application across a range of situations that may be subject to inquiry, investigation or review. It is also important that the inquiry, investigation and review system is flexible enough to function effectively in different environments—from Russell Offices in Canberra to patrol bases in Afghanistan. To achieve flexibility, line managers and commanders need a significant degree of discretion so they can apply judgement ‘on the ground’ and flexibly tailor inquiry and investigation processes.

Flexibility is particularly important in the operational context, where there is significant pressure to move through the initial assessment, the fact finding stage and into the decision-making as quickly as possible. A scalable response mechanism is necessary, taking into account the resources available to operational commanders, which are likely to be limited. This applies both in relation to operational incidents as well as in relation to the more ‘domestic’ unacceptable behaviour / workplace management issues that occur during a deployment. The system must allow operational commanders to move quickly and fairly through personnel management incidents / issues, including for the purpose of determining whether personnel should remain deployed.

⁴¹ Annex A, page 9

⁴² Annex A, page 9

The tendency in the past within Defence has often been to respond to particular events in a piecemeal manner—by introducing rules or processes intended to address the issues or concerns that were apparent in that event. Over time this has led to a proliferation of detailed and restrictive rules that prescribe procedures to be applied in given circumstances. This tendency has reduced flexibility and increased complexity for line managers and commanders. Moreover, it has reduced the ability of line managers and commanders to apply good judgement to circumstances that confront them.

An inflexible rules-based system can have serious unintended consequences, primarily because detailed rules cannot be developed to deal optimally with all circumstances. For example, where an ADF member makes a health care complaint, difficulties have been experienced in implementing complicated requirements when a simple clinical review would be the most appropriate response.⁴³ An optimal system would instead be principles-based, ensuring flexibility and providing line managers and commanders with better support and resources to tailor practical solutions (formal or informal) to a variety of disparate circumstances.

Within certain legal and policy limits, Defence should empower line managers and commanders to apply good judgement when choosing the best approach for dealing with a variety of trigger events. Flexible inquiry, investigation and review processes would re-invigorate the responsibility of line managers and commanders in Defence, emphasising that, subject to legislative requirements and in the context of the broader decision-making framework, they are accountable for the quality and results of decisions made in response to trigger events. They would be accountable to their own supervisors for the quality of the decisions they have made, and would also be accountable for their decisions through internal and external review mechanisms.

An optimal system would allow decision-makers in Defence the flexibility to use informal processes, alternative dispute resolution, disciplinary action, formal inquiry, or any other process as the circumstances dictate, creating a proportionate and appropriate response in light of the seriousness and possible repercussions of any trigger event.

To promote flexibility in response options, inquiry, investigation and review processes should be flexible, providing leaders in Defence with the opportunity to tailor solutions to the circumstances that confront them. A flexible system is of particular importance in deployed environments.

Governed by lawful procedures that are simple and easy to use

Almost one-third of survey respondents identified simplicity as one of the three most important qualities of an optimal system of inquiry, investigation and review—making it the most frequently identified quality in the survey.⁴⁴ It was also frequently identified as an essential component of an optimal system by senior stakeholders in their responses to the initial questionnaire. Previous reviews have identified complexity of processes as a significant problem. For example, Burchett identified the complexity of disciplinary processes as a significant factor behind the use of

⁴³ Feedback from RADM Robyn Walker on draft Stage A report

⁴⁴ Annex A, page 9

unlawful punishments.⁴⁵ As identified throughout Annex B, there is considerable scope to develop a system that is simple and easy to use within whole-of-government legal and policy requirements.

An inquiry, investigation and review system that is simple and easy to use would:

- avoid, so far as possible, the use of multiple inquiry and investigation processes in relation to the same matter or issue;
- avoid duplication of review mechanisms, and multiple layers of internal review;
- be supported by clear and simple-to-follow policies and guidelines;
- recognise that there will always be a degree of complexity when dealing with multiple subject matters, or where there is a need to incorporate, for example, both a criminal standard investigation and administrative inquiry into systemic issues, and incorporate mechanisms to make more complex matters user-friendly; and
- provide users with expert support and training in relation to how the system operates.

Particular emphasis must be given to avoiding duplication, which leads to waste and inefficiency. Duplication promotes what has been described as ‘gaming’ of the system, whereby individuals exploit overlapping or uncoordinated systems to their advantage, often at the expense of the interests of other individuals and Defence as a whole.

Inquiry, investigation and review processes should be simple and easy to use, including through reduction of duplication of mechanisms, easy-to-use processes, the development of easy-to-understand policy guidance, and the provision of training and support for users.

Provides transparency in processes and outcomes

One quarter (25.9%) of survey respondents identified transparency as one of the three most important qualities of an optimal system of inquiry, investigation and review, making it the third most frequently identified quality in the survey.⁴⁶ The provision of transparency in processes and outcomes is considered to be an essential component of an optimal system.

Transparency can help individuals who may be affected by an inquiry, investigation or review to understand what is occurring, how long it might take, and the possible outcomes. Transparency of outcomes can also help individuals understand the decisions that affect them. Where individuals understand what is going on, they are more likely to accept outcomes associated with inquiry, investigation and review processes. It creates an environment in which individuals can be confident that their concerns are being genuinely considered. A transparent system also promotes public confidence in the integrity of Defence’s inquiry, investigation and review processes.

⁴⁵ Burchett report 2002

⁴⁶ Annex A, page 9

The Commonwealth Ombudsman and the Merit Protection Commissioner have both identified transparency as a fundamental of good practice in relation to complaint handling and APS review of actions respectively.

Transparency in relation to the inquiry, investigation and review system can be achieved by:

- adopting a general position that information related to inquiry, investigation and review should be accessible to affected individuals and the public, subject to the protection of personal, security and other protected classes of information;
- providing clear guidance for affected individuals as to the process that is to be followed, and the reasons that a particular process is being followed;
- informing complainants, respondents, and other legitimately affected individuals in relation to outcomes, including reasons for decisions;
- incorporating simple and easy to use independent review mechanisms;
- conveying lessons learned from inquiries, investigations and reviews throughout Defence as a matter of course; and
- undertaking robust costing and tracking of inquiries, investigations and reviews throughout Defence, so that assessments can be made on the proportionality of responses to trigger events

The inquiry, investigation and review system should provide transparency in processes and outcomes. Affected individuals and the public should be kept informed, as far as practicable, about the processes to be followed and outcomes of those processes.

Incorporates safeguards for individuals

An optimal system of inquiry, investigation and review is fair, by incorporating safeguards for the protection of individuals. One quarter (25.6%) of survey respondents identified fairness as one of the three most important qualities of an optimal system of inquiry, investigation and review—making it the fourth most frequently identified quality in the survey.⁴⁷ Incorporating safeguards reduces the risk that line managers and commanders abuse the power that they have over individuals, including through being ‘ad hoc and individualistic in their approaches’.⁴⁸ Safeguards can also be incorporated to first discourage malicious or vexatious complaints, and secondly, to ensure that respondents are appropriately supported where such complaints are made.

In identifying the need for safeguards as an essential component of an optimal system, it is of note that attempts over previous years to increase the fairness of inquiry, investigation and review processes has arguably resulted in increased complexity in those processes and slower outcomes. A complex system of safeguards that promotes significant delays does not provide fair outcomes—delay is itself a source of unfairness. Previous inquiries have also recognised this. For

⁴⁷ Annex A, page 9

⁴⁸ IGADF/OUT/2012/260 - Comment on draft Stage A report

example, the ANAO audit of the ROG system noted that in some cases where an individual's ROG was upheld, the outcome came too late to provide any genuine satisfaction to the member. Delay may also be a cause of significant stress to individuals involved in a matter, leading in some cases to absence from work and long-term wellbeing issues.

Two aspects of fairness that have been the subject of considerable concern in the past are independence and procedural fairness.

While line managers and commanders within Defence strive to be impartial and unbiased, they are not completely independent. Internal decision-makers will never be perceived as being as independent as external or statutorily independent agencies who are outside of the Defence portfolio. Accordingly, internal decision-making and review processes should be focused on achieving impartiality and objectivity, rather than independence. Independence is an important aspect of fairness, but it is best achieved through external review processes, and ensuring that personnel affected by Defence decisions have reasonable and prompt access to external mechanisms.

At its simplest, procedural fairness requires that individuals who may be adversely affected by a decision are given a fair opportunity to present their case before the decision is made. Procedural fairness obligations will vary depending on the circumstances, such as the stage of the resolution process. The legal obligations associated with procedural fairness are generally less onerous than procedures specified in current Defence documents. With the exception of statutory inquiries, procedural fairness obligations usually attach to decisions, rather than any fact finding process used to inform decisions. Procedural safeguards that give an individual multiple opportunities to present their case in relation to the same decision simply cause delay, without improving substantive fairness to that individual (and may in fact result in unfairness to others involved in the matter).

A fair system of inquiry, investigation and review is one that:

- supports timely and principles-based decision-making;
- balances the need for independence with the need for timely and informed decision-making. This includes timely access to external, independent review mechanisms to mitigate any perceived lack of independence in internal Defence decisions;
- is fair to all individuals involved in the process; and
- provides procedural fairness to adversely affected individuals as part of the whole decision-making framework, rather than in relation to isolated elements of the decision-making framework.

The inquiry, investigation and review system should incorporate safeguards for individuals. A fair process balances the competing considerations of independence and procedural fairness with timeliness, all of which affect how fairly a matter is handled.

Delivers cost-effective outcomes in an adequately resourced system

The requirement for officials to efficiently and effectively use Commonwealth resources means there are legal and practical limits to what can or should be allocated to inquiry, investigation and review processes. It is important that the design of any inquiry, investigation or review system should have sufficient regard to the need for it to be affordable, efficient and financially sustainable.

Resources for inquiry, investigation and review, including access to training, skilled personnel, or diversion of resources from primary roles, was frequently cited as a problem in the key internal stakeholder questionnaire responses. As noted above, however, the survey respondents displayed relatively little concern about resources.

Of survey respondents, 8.2% identified 'well-resourced' as one of the three most important qualities of an optimal system of inquiry, investigation and review, while 8.1% identified 'availability of skilled personnel'. These were the tenth and eleventh most frequently selected qualities by survey respondents.⁴⁹ Even if these responses are added together (bearing in mind that some respondents may have selected both of these qualities), 'well-resourced' and 'availability of skilled personnel' would be only the seventh most frequently selected quality.

Given that most survey respondents did not identify resourcing as a problem, it is not surprising that it scored relatively low on the important qualities question. It is also worth noting that while a majority of the survey respondents did not appear to consider resourcing a significant problem, a number of isolated comments from survey respondents did raise this issue. For example:

Often the policy requires skill sets and resources (particularly time) not resident at unit level. If commanders are required to meet mandatory requirements then some central resourcing of the process is necessary

had to raise an IOI in 2011. It was extremely difficult to find anyone willing to do it and I spent at least 10 working days before I could coerce anyone into doing it. Everyone is so busy in their primary role that undetaking (sic) such as RIs and IOIs are not attractive options.

Whilst it is a necessary function and responsibility, unit level enquiries and assessments are extremely taxing on human resources (ie the diversion of resources from normal operational functions and/or the burden of additional workload due to concurrent activity). Enquiries such as routine inquiries can also be taxing of financial resources in having to investigate matters.

Although overall the processes and resources are adequate, there are specific elements of the support system that are under-resourced and adversely influence timely outcomes.

Adequate resourcing is essential to an optimal system of inquiry, investigation and review. The capacity of these integrity functions needs to be supported by sufficiently resourced legal, financial, human resources, education and leadership elements.⁵⁰ A well-resourced and cost-effective system includes:

- systems and procedures that are affordable, efficient and financially sustainable;
- allowance in unit and team staffing and budgets to undertake low level inquiries, investigations and reviews;

⁴⁹ Annex A, page 9

⁵⁰ NISA report page 62

- allowance in unit and team staffing and budgets to co-ordinate with and co-operate with centralised inquiries, investigations and reviews;
- awareness training for all personnel about the inquiry, investigation and review system;
- comprehensive training for all line managers and commanders who are likely to be involved in inquiry, investigation and review for the purposes of managing trigger events;
- centre/s of excellence to provide expert advice to line managers and commanders who are likely to be involved in inquiry, investigation and review for the purposes of managing trigger events;
- sufficient levels of skilled personnel available to conduct centralised inquiry, investigation and review processes;
- sufficient levels of legal authority to conduct inquiry, investigation and review processes, allocated to appropriate office holders; and
- support mechanisms for personnel undertaking an inquiry, investigation or review.

The inquiry, investigation and review system should deliver cost-effective outcomes and be adequately resourced, including appropriate levels of training and skilled personnel. Resources in relation to inquiry, investigation and review should be considered at the unit and team level, not just in centralised structures.

Incorporates co-ordinating and monitoring mechanisms to ensure consistency

Given the size and complexity of Defence, inquiry, investigation and review processes cannot realistically exist without some co-ordinating structures to ensure that they operate reasonably consistently across Defence. One quarter (25.4%) of survey respondents identified consistency as one of the three most important qualities of an optimal system of inquiry, investigation and review, making it the fifth most selected quality.⁵¹ A system that works consistently across Defence has much more credible outcomes.

There is a plethora of co-ordinating structures already in existence throughout Defence relating to particular subject matters or processes (see for example the organisations identified at Table 2 of Annex B). Their functions can overlap and, in some cases, they appear to add to the complexity of the inquiry, investigation and review system rather than ensuring a co-ordinated approach across Defence. Co-ordinating structures in Defence need to work co-operatively, be appropriately located, and have minimal duplication of function between them. This does not necessarily mean that all co-ordinating structures would be based on a shared services model – many functions of such structures may be better realised through dispersal within Groups and Services. The way these structures interact with each other and other areas in Defence must be carefully considered.

Ideally, co-ordinating structures should:

⁵¹ Annex A, page 9

- provide advice and support to line managers and commanders who are engaged in and responsible for inquiry, investigation and review processes;
- co-ordinate centralised inquiry, investigation and review processes, including by providing adequate levels of skilled personnel to other areas or undertaking the processes themselves as appropriate;
- co-ordinate development of Defence policy and other documents related to integrity functions;
- receive and manage reports on inquiry, investigation and review processes, and track their progress. Collected data would be used for trend analysis and costing purposes. Co-ordinating structures would be tasked with managing IT or other tools to allow the tracking and reporting of inquiry, investigation and review in Defence;
- co-ordinate complex matters where there are multiple interested areas within Defence;
- co-ordinate complex matters where there are multiple processes involved (particularly where criminal standard investigations are being conducted concurrently with administrative inquiries);
- co-ordinate the flow of information between different areas, or between different types of inquiry and investigation, to ensure that there is minimal duplication of effort and that decisions are made on the best possible information, and to ensure compliance with privacy legislation;
- manage and promulgate throughout Defence lessons learnt from inquiry, investigation, review;
- manage media interest in sensitive matters subject to inquiry, investigation or review; and
- manage support mechanisms for complainants, respondents and other affected parties.

Some aspects of inquiry, investigation and review may be centralised in order to meet legal requirements for enhanced impartiality (for example in relation to the APS review of action process). In other cases, inquiry, investigation and review may be centralised in order to achieve efficiencies or to improve consistency of outcomes. These goals need to be carefully balanced with the need for line managers and commanders to have flexibility in the way they deal with trigger events. An overly centralised system is likely to act as a barrier to line managers and commanders making day to day management decisions in a timely manner.

The inquiry, investigation and review system should include co-ordinating structures to ensure the consistent application of the system across Defence. These structures could fulfil a number of important goals, such as providing support to line managers and commanders, engaging in centralised processes, managing the flow of information in relation to inquiry, investigation and review, and tracking the costs and subject matters of inquiry, investigation and review.

Next steps – Stage B: develop options for a new system

In a resource constrained environment where managers are expected to do more with less, it is absolutely critical that appropriate and timely support is provided. Without this support inquiries, investigations and reviews may fall victim to conflicting priorities.⁵²

Once the identified essential components have been endorsed, models for a system of inquiry, investigation and review that include these components will be developed. The work to identify costs will continue in parallel, noting that COO and CFO are being consulted to provide assistance with cost modelling.

Timeline for Stage B

In order to ensure significant engagement occurs with key stakeholders and the Corrective Processes lever of the Defence 100, the following timeline will need to be followed if recommendations are to be made by the end of November 2012:

- From 30 July 2012 – Key internal stakeholder engagement and focused external stakeholder engagement commences
- 7-9 August 2012 – Brief HDL, HPC, CAE on broad models
- 9 August 2012 - 19 October 2012 – Develop detailed models (timeframe structured to accommodate leave periods of principals and Senate Estimates)
- 22-26 October 2012 – Brief HDL, HPC, CAE on detailed models
- 29 October 2012 - 2 November 2012 – Prepare briefing packs for war-games
- 5 November 2012 – Briefing packs for war-games dispatched
- 9-23 November 2012 – War-gaming activities involving internal stakeholders to contribute to model development and line managers and commanders to confirm feasibility of proposed models
- 30 July 2012 - 30 November 2012 – Work with COO and CFO to prepare cost modelling
- 26-30 November 2012 – Finalise draft Stage B Report and brief to HDL, HPC, CAE
- 1 December 2012 – Forward draft Stage B Report to stakeholders for consultation
- 30 January 2013 – Consultation period closes
- February 2013 – Stage B Report provided to Secretary and CDF

Engagement with internal and external stakeholders is essential to the development of feasible models in Stage B. A draft communication strategy (Enclosure 2) has been developed for this engagement. It is proposed that the first phase of this strategy will commence roll-out at the next Defence 100 meeting on 6 August 2012.

⁵² Free text comment from a survey respondent

Related reform activity

This project is only one aspect of the significant reform activity that is occurring in Defence at present. An important goal of the project, particularly heading into Stage B and the development of options for a new system of inquiry, investigation and review, is to ensure that related reform activity is taken into account and that this project aligns with that activity.

The following have been identified as major reforms or inquiries underway that may overlap or otherwise require co-ordination with this project:

Pathway to Change. The Pathway to Change strategy is a cultural change program based on the outcomes of a suite of reviews initiated in April 2011 following the ‘Skype’ incident at ADFA. At its centre is a statement of cultural intent: Defence is trusted to defend, proven to deliver, respectful always, which describes how the Secretary and CDF expect all in Defence to think about their work and behaviour towards others. The Pathway to Change strategy is concerned with giving effect to this statement of cultural intent. There are six key levers described in the Pathway to Change document to achieve this change. The Corrective Processes lever is most relevant for the purposes of this project, but other levers, in particular ‘Leadership and accountability’, ‘Values and behaviours’ and ‘Structure and support’ are also important in the context of this project.

Recommendation Leads have been assigned to implement the recommendations in the Pathway to Change reviews. They have authority to work across all parts of Defence to achieve the outcomes envisioned, and the intention is that they will link this activity with other actions being taken across Defence. The Organisational Development Unit will track overall progress of planning and implementation. The project team leader of this project is involved with the Organisational Development Unit. In addition, Recommendation Leads in relation to relevant Pathway recommendations have been consulted in the preparation of this report. Consultation at both these levels will continue throughout Stage B.

Co-ordinating with the Pathway to Change implementation processes provides two important benefits. First, to ensure that the outcomes of this project are consistent with the cultural intent underlying the Pathway to Change, with particular regard to the specific recommendations from the reviews underlying the strategy. The outcomes and recommendations in the IGADF’s *Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction* and MAJGEN Orme’s *Beyond Compliance: Professionalism, trust and capability in the Australian profession of arms* are of particular importance. Secondly, the outcomes of this project will themselves be a part of implementing the Pathway to Change strategy.

DLA Piper review. The DLA Piper review was instigated following the ‘Skype’ incident at ADFA in April 2011. Individuals who alleged abuse perpetrated by Defence personnel were invited to make submissions to the review being conducted by DLA Piper – 847 people raised matters within the scope of the review, covering a period of over 50 years. Volume One was publicly released on 10 July 2012. Volume Two, and the future course of action in relation to the particular allegations, remains under consideration by Government.

A preliminary review of Volume One indicates that DLA Piper has identified high levels of dissatisfaction and disillusionment with the ADF's application of military justice processes and approach to complaint handling. The DLA Piper review has further identified low levels of prosecutions and inaction by the ADF in failing to call perpetrators to account for unacceptable behaviour, including conduct that would amount to a criminal offence. The DLA Piper review identifies the value of recording and tracking incidents and accusations against individuals even if no adverse finding is made.

Volume One raises issues about the suitability of current inquiry, investigation and review systems in Defence, which tend to place significant weight on protecting the rights of accused individuals. It is possible that such systems may actually hinder the ability of line managers and commanders to hold abusers accountable for their actions. For example, when adverse administrative action has not been considered after an unsuccessful criminal prosecution in relation to sexual offences.

While the DLA Piper review is aimed at dealing with allegations of past abuse and legacy issues, the way these allegations will be dealt with may affect the way this project develops through Stage B. The observations made in Volume One must be taken into account in the development of new models – it is clear that any new system must ensure that line managers and commanders are able to hold perpetrators of abuse to account for their actions.

Implementation of Part Three Report outcomes of HMAS *Success* CDF Commission of Inquiry. The HMAS *Success* CDF Commission of Inquiry was conducted by the Honourable Roger Gyles, AO, QC, following incidents of sexual misconduct and unacceptable behaviour in HMAS *Success* during 2009. Mr Gyles considered the incidents themselves, the way they were handled by Defence, and some more general systemic issues in relation to the way matters of this nature are handled. The Part Three report, which was completed in December 2011 and publicly released on 9 February 2012, made recommendations in relation to a number of aspects of Defence's system of inquiry, investigation and review.

The underlying theme of the Part Three report was Mr Gyles' view that commanders in Defence had been disempowered by the complex system, such that they were unable, or perceived themselves to be unable, to appropriately discipline members or otherwise manage incidents of unacceptable behaviour. This had, in turn, contributed to the culture in HMAS *Success* where individuals felt able to get away with bad behaviour as the command response was lacking. Mr Gyles' particular recommendations were intended to make changes to the current system in order to alleviate this problem.

Many of the Part Three report recommendations relate to the Defence system of inquiry, investigation and review. Consideration, and any subsequent implementation of these recommendations, is being undertaken as part of this project, rather than through the separate HMAS *Success* CDF Commission of Inquiry implementation process. This will ensure that the Part Three report recommendations relating to inquiry, investigation and review are considered as part of the holistic reform being considered in this project, rather than the piecemeal approach that has typified implementation of inquiry recommendations in the past.

Human Resources Shared Services Program – WHS Pilot Project. The WHS Pilot Project is part of the Shared Services Program within the Strategic Reform Program. Seven Work Health and Safety functions have been identified by the WHS Pilot Project as candidates for delivery as shared services, including safety audit and investigation functions. Processes underpinning the Work Health and Safety audit and investigation functions have been mapped.

Revision of the safety incident investigation function, with a view to deliver this function through shared services, is of obvious interest in this project. To that end, project team members have liaised with the WHS pilot project, and will continue to do so through Stage B of this project, as a new model for inquiry, investigation and review in Defence is developed. As well as sharing information, such as process maps developed by the WHS pilot project, the intention from both projects is to ensure that the shared services model developed in the safety sphere is consistent with recommendations this project makes about the broader inquiry and investigation system.

APS Complaints Management Review. This review is being coordinated by People Group and is considering the areas for improvement in the way in which Defence handles complaints of alleged misconduct and unacceptable behaviour by, and about, APS employees. The review is confined to providing recommendations on ways to improve the management of complaints about Defence APS employees who may be behaving in a way that could be inconsistent with the APS Values and the Code of Conduct. It is looking at the management of complaints up until the point when the matter is referred for an APS Code of Conduct investigation. The review is focused on more than the inquiry process, and includes consideration of matters such as training of managers and support for complainants. There is, however, some overlap between the work being done by the review and work being done in relation to inquiries and investigations by this project. While the review is complete, an implementation plan has not yet been released.

The review's recommendations, some of which deal with the conduct of QAs and the confusion and complexity of Defence policy outlined in Defence Instructions, will be considered as part of Stage B of this project when developing new models. Relevantly, the review suggests a Proposed Future Complaints Management Model which aims for early intervention and resolution, and a Virtual Advisory Service which will act as a central filter point for queries on a case-by-case basis. Additionally, while the review is confined to the management of complaints regarding APS employees, it has endeavoured to identify areas where key synergies exist between the APS and ADF, and therefore where there is scope for wide reform. The review proposes consultation during the implementation process to ensure that there is consistency between the two projects' outcomes.

Reform of Part VI of the DFDA. Defence Legal, in consultation with the Services and ADFIS, is working on reform of the investigative powers in Part VI of the DFDA, with a view to modernising the ADF's investigative capability. DFDA investigative powers will not be considered in this project in the same level of detail that is contemplated in the reform of Part VI of the DFDA. However, the responsible teams will need to co-ordinate to ensure that the reforms proposed to Part VI of the DFDA are consistent with the broader reform to investigative processes and structures that may be proposed in Stage B of this project.

Report of the five year audit of the Australian Defence Force Investigative Service (2011). This audit was conducted to assess the progress of reforms to the ADF investigation capability undertaken as a consequence of the 2005 Joint Standing Committee on Foreign Affairs, Defence and Trade 'Report on the Effectiveness of Australia's Military Justice System', and associated audits and reviews. The audit was to examine and evaluate the effectiveness of ADFIS in terms of its capability and capacity to deliver investigative services to the ADF.

The audit identified that legislative change is necessary to provide Service Police with enhanced powers for effective and professional policing. One of the primary recommendations was that the single Service policing elements and ADFIS should be consolidated under the command and control of the Provost-Marshal ADF. The Secretary and CDF have confirmed that this recommendation should be considered in this project. The structures associated with DFDA investigation will be considered in Stage B of the project, and this audit will be one of the matters considered.

Reform of *Cadet Force Regulations 1977*. It is understood that the *Cadet Force Regulations 1977* are currently being reviewed, including the content of the Code of Conduct and review and recruitment processes. Inquiry, investigation and review processes associated with these decisions may also be considered as part of this process. Accordingly, consultation will occur with the responsible areas during Stage B to ensure that such issues are considered.

Comparison with coalition partner systems

Recognising that our coalition partners may be able to provide some valuable insights into the system of inquiry, investigation, and review, a request for information about their systems has been distributed to the United States, Canada, the United Kingdom, and New Zealand. This request has been sent through the American, British, Canadian, Australian and New Zealand Armies' Program (ABCA). The request includes a query about the degree to which their respective systems operate in an integrated civilian / military environment. It is likely that Defence in Australia has a much higher level of integration than exists elsewhere. Any relevant input obtained will be incorporated into Stage B.

Risks to project

There are a number of risks that could undermine the resolve to conduct holistic reform of the inquiry, investigation and review system. It is expected that there will be pressure to act quickly on recommendations of other inquiries, for example, the DLA Piper review and the forthcoming Broderick phase two report, in order to demonstrate that action is being taken to address the very serious shortcomings identified. While in isolation these recommendations may address particular problems or concerns, they may also be incompatible with the holistic approach to reform that this project has been tasked to undertake. As identified in this report, piecemeal reform activities have themselves contributed to the problem we now face.

A related risk concerns the activities of areas within Defence that have a vested interest in retaining the status quo. In particular, there is concern that the project results may be undermined if such groups successfully lobby principals for support to commence isolated reform to their current structures as purported solutions to the problems identified in this and other reports. While such reforms may be attractive as quick fixes, they again run the risk of perpetuating the iterative reform cycle that has led to the current state of affairs.

A more immediate risk to the project concerns a loss of internal stakeholder engagement, resulting in a loss of momentum and disengagement with the project team. If the timeline for the Stage B report is to be met, there needs to be continued support for the project from key internal stakeholders.

On the basis of our inquiries to date, we expect that there is insufficient data to identify the costs of the current system, which means there is a significant risk that a comparison between the costs of the current system and models proposed in Stage B will not be possible. In an environment of increasing scrutiny of Defence spending, this would be a significant omission in the justification for any change. We propose to seek CFO engagement and assistance to ensure the best available data is included in Stage B.

Recommendation

It is recommended that you **endorse** the following essential components and **approve** the project to proceed to develop options for a new system of inquiry, investigation and review based on these components:

- functions effectively in the integrated environment
- facilitates sound and timely decision-making
- promotes flexibility in response options including in deployed environments
- governed by lawful procedures that are simple and easy to use
- provides transparency in processes and outcomes
- incorporates safeguards for individuals
- delivers cost-effective outcomes in an adequately resourced system
- incorporates co-ordinating and monitoring mechanisms to ensure consistency

Annexes

- A. Re-thinking inquiries survey report
- B. Legal framework analysis
- C. Analysis of previous relevant inquiries

Enclosures

1. Progress Report – Re-thinking systems of inquiry, investigation, review and audit in Defence, dated 11 May 2012, including Annexes and Enclosures
2. Defence Communication Strategy – Re-thinking systems of inquiry, investigation, review and audit in Defence, dated Jun 2012