

Re-Thinking Systems of Inquiry, Investigation, Review and Audit in Defence

Annex B

Model development

Contents

1. Introduction.....	1
1.1. Introduction.....	1
1.2. Defence’s integrity framework.....	1
1.3. Decision making framework.....	5
1.4. Changes to relevant legislation.....	7
2. Defence’s integrated workforce.....	10
2.1. Levels of integration of the Defence workforce.....	10
2.2. Workforce numbers.....	10
3. Phase 1: Recording, Reporting and Initial Assessment.....	15
3.1. Introduction.....	15
3.2. Brainstorming and consultation outcomes.....	16
3.3. Commonwealth best practice.....	18
3.4. Previous inquiries and related reform activities.....	18
3.5. Coalition practice.....	22
3.6. Observations on current arrangements.....	24
4. Phase 2: Fact finding.....	27
4.1. Introduction.....	27
4.2. Brainstorming and consultation outcomes.....	28
4.3. Previous inquiries and related reform activities.....	34
4.4. Coalition practice.....	35
4.5. Observations on current arrangements.....	40
5. Phase 3: Internal review.....	43
5.1. Introduction.....	43
5.2. Brainstorming and consultation outcomes.....	44
5.3. Commonwealth best practice.....	45
5.4. Previous inquiries and related reform activities.....	46
5.5. Coalition practice.....	46
5.6. Observations on current arrangements.....	50
6. Phase 4: External review.....	52
6.1. Introduction.....	52
6.2. Brainstorming and consultation outcomes.....	56
6.3. Previous inquiries and related reform activities.....	56
6.4. Coalition practice.....	56
6.5. Observations on current arrangements.....	57
7. Interoperability with coalition partners.....	59

1. Introduction

1.1. Introduction

1.1.1. The *Re-Thinking Systems Review* was tasked to review the current arrangements for inquiry, investigation and review in Defence.¹ Inquiry, investigation and review functions exist to support decision making. They are not an end in themselves. Therefore the focus of the *Re-Thinking Systems Review* is how these functions support Defence decision makers in making timely and professional decisions and how those decision makers can be held accountable.

1.1.2. The Stage A Report described inquiry, investigation and review as 'integrity functions'. The discussion emphasised that 'integrity' refers not only to individual integrity, 'the quality of being honest, uncorrupted and having strong moral principles', but also systemic or institutional integrity – 'something that is whole and healthy, that is functioning well, as intended'.² 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 in the context of Defence as a whole. Integrity of Defence decision making is crucial to the proper exercise of Defence's unique role on behalf of the Australian government, accountability for the use of extensive powers and resources, and maintenance of public confidence.

1.2. Defence's integrity framework

1.2.1. As noted in the Stage A Report:

*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.*³

1.2.2. Integrity of Defence decision making is created through individual integrity, institutional integrity functions and external integrity arrangements. **Individual integrity** is underpinned by individual attitudes, cultural reform such as that championed by *Pathway to Change* and leadership, while **institutional integrity functions** are geared to identifying and addressing flaws in decision making and providing an avenue for review of decisions. **External integrity functions** range from Parliamentary oversight, through to dedicated agencies such as the

¹ The Stage A Report provided the following definitions in relation to inquiry, investigation and review:

- 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.

² Robin Creyke, 'An 'Integrity' Branch' (2012) 70 *AIAL Forum* 33, page 33

³ National Integrity Systems Assessment, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, 2005 (NISA report), page 1

Commonwealth Ombudsman, and ad hoc inquiries such as Royal Commissions. The strength of an integrity system is not simply built on the institutions, laws and other elements that make up the system, but also the way in which they relate to each other.

1.2.3. The integrity system which underpins Defence decision making requires particular features because of the unique nature of power and authority entrusted to Defence and its people. While Defence, like other Commonwealth Departments, is held accountable for the use of resources through external integrity functions such as Parliamentary oversight and ANAO scrutiny, its people are also entrusted with unique powers which require oversight. For example, the power of command over subordinates and powers associated with use of force and war-fighting have significant potential for abuse and therefore require oversight through additional integrity functions. Even outside the more extreme cases of bastardisation and sexual abuse, the scope for commanders to interfere with an ADF member's individual liberty warrants a careful watch on the way in which command is exercised. Defence must allow commanders to command as a key enabler to the exercise of military force, but commanders must be accountable for their decisions. Similarly, to the extent that Defence has a role in the national security arena to identify, report and in some cases respond to, terrorism and other security threats, Defence must adhere to legal obligations including those that create safeguards for the rights of individuals. Additionally, the large, complex and high-risk procurement activities that Defence must undertake in order to function include severe public consequences for flawed decision making in terms of, for example, capability, value for money and safety.

1.2.4. **Defence's internal integrity system.** Internal inquiry, investigation and review processes are all part of the internal integrity system. Defence's internal integrity system is made up of internal institutions, law, procedures, practices and attitudes. The internal integrity system has a significant effect on day-to-day decision making and the exercise of powers in Defence.

1.2.5. The 'attitudes' inherent in the internal integrity system, including the role of Defence culture, are arguably more important than any other aspect. 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'*.⁴ Inquiry, investigation, review and audit processes can support integrity in Defence decision making, but it is a culture of openness and accountability that will ultimately ensure that decisions throughout the whole of Defence are made with integrity.⁵

4 National Integrity Systems Assessment, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, 2005 (NISA report), page 9

5 Defence Committee (Department of Defence), *Pathway to Change: Evolving Defence Culture (A Strategy for Cultural Change and Reinforcement)*, 7 March 2012 (*Pathway to Change* strategy). The *Pathway to Change* strategy is dealing with integrity holistically in Defence by looking at the underlying cultural aspects of integrity, in addition to some of the structural and procedural aspects that are the subject of this review.

1.2.6. The internal integrity system comprises:⁶

- Agencies within, or attached to, Defence who are specifically tasked with integrity functions, including: Audit and Fraud Control Division; Values, Behaviour and Resolutions Branch; Work Health and Safety Branch; Inspector General ADF; Inspector General – Defence; CDF Commission of Inquiry Directorate; Army Administrative Inquiries Cell; Service incident managers; Australian Defence Force Investigative Service; the three Service Police organisations; Defence Security Authority; Freedom of Information and Information Management Branch; Australian Government Security Vetting Agency; and the Honours and Awards Tribunal.
- Arrangements for the command and administration of the ADF established under sections 9 and 9A of the *Defence Act 1903*.
- In the ADF, Service chains of command and, in particular, the accountability of Service decision makers to the chain of command and ultimately to their respective Service Chief.
- Military discipline processes established under the *Defence Force Discipline Act 1982* (DFDA) to enforce Service discipline.
- Administrative inquiry mechanisms (including statutory inquiries under the *Defence (Inquiry) Regulations 1985* and non-statutory inquiries) and associated supporting policy documents such as ADFP 06.1.4 *Administrative Inquiries Manual*.
- The Defence Whistleblower scheme.
- The redress of grievance complaint and review framework for ADF members under Part 15 of the *Defence Force Regulations 1952*.
- Defence Instructions including DI(G) ADMIN 45-2 – *The Reporting and Management of Notifiable Incidents*, DI(G) PERS 35-3 – *Management and Reporting of Unacceptable Behaviour*, DI(G) FIN 12-1 – *The Control of Fraud In Defence and the Recovery of Public Monies*, and DI(G) ADMIN 45-4 – *Defence Investigations Standards*.
- Policy documents implementing whole-of-government requirements, including the Defence Security Manual, the Defence Fraud Control Plan No 9, the Defence Procurement Policy Manual, Defence Safety Manual and the Defence Workplace Relations Manual.

1.2.7. During Stage A, a survey of commanders and line managers about Defence's system of inquiry, investigation and review structures revealed that while these aspects of the internal integrity system have a useful purpose, they are generally too complex and convoluted, and work against achieving a timely

⁶ This list is not exhaustive, and focuses primarily on inquiry, investigation and review functions in Defence (as these are the main focus of this project). The elements of the internal integrity system listed here may have functions both in relation to systemic integrity and individual integrity. A description of many of the identified aspects of the internal integrity system is available in: Head Defence Legal, Head People Capability, Chief Audit Executive, *Re-thinking systems of inquiry, investigation, review and audit in Defence: Report on Stage A (Research and analysis stage)*, 1 August 2012 (Stage A report), Annex B Legal Framework Analysis.

resolution.⁷ These arrangements can make it difficult to identify who is responsible for decisions. A number of reviews have also noted the complexity of policy and other documentation in Defence.⁸ However, the standards set in policy documents are frequently the standards against which integrity of decision making is measured. The complexity of processes contained in the documentation, as well as the complexity of the documentation itself, must lead us to question not only the efficacy of the internal integrity system as a whole, but also the way in which we measure individual integrity.

1.2.8. External integrity framework. Defence, like other Commonwealth departments of State, is subject to an external integrity system that operates on a whole-of-government level. In 2013, it is no longer palatable for any part of Defence to suggest that it should not be subject to scrutiny through the Commonwealth's external integrity system. External inquiry, investigation and review processes form part of that integrity system. The external integrity system includes elements such as:

- Government 'integrity agencies' whose roles are to monitor particular aspects of the exercise of public power, including the Commonwealth Ombudsman, the Defence Force Ombudsman, the Auditor-General, the Australian Public Service Commissioner, the Australian Commission for Law Enforcement Integrity, the Merit Protection Commissioner, the Information Commissioner, the Inspector General Intelligence and Security, the Independent National Security Legislation Monitor and the Australian Human Rights Commission.
- Judicial oversight by the courts, including through judicial review to determine the legality of government decisions.
- Merits review tribunals, such as the Administrative Appeals Tribunal, which have the power to re-make government decisions and so provide a check on unfair decision making.
- Civilian police forces and other agencies whose roles include the investigation of individuals for criminal offences, including corrupt conduct and its indicators.
- Parliamentary Committees.

⁷ Stage A Report. Annex A provides a complete analysis of survey results.

⁸ See, for example: Ass Prof Rufus Black, *Review of the Defence Accountability Framework*, January 2011 (Black review), recommendation 6 (to simplify documentation); Rumble, G. et al, *Report of the Review of Allegations of Sexual and Other Abuse in Defence*, Volume 1, October 2011 (DLA Piper report), recommendation 2 (identifies inconsistency in policies regarding the management of allegations of criminal /disciplinary offending), issue 14 (to review the language used in certain policy); Elizabeth Broderick, *Review into the Treatment of Women in the Australian Defence Force (Phase 2 report)*, 8 August 2012 (Broderick Phase 2 report), recommendation 18 (establish SeMPRO to coordinate policies); Geoff Earley, *Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction: a report by the Inspector General Australian Defence Force*, 6 September 2011 (IGADF complaint review 2011), recommendation 4 (to simplify complex policy instructions), recommendation 5 (production of a user friendly Complaints and Alternate Resolution Manual), recommendation 21 (combine unacceptable behaviour and sexual offences policies), recommendation 29 (identifies inconsistencies in incident management policies), recommendations 32 & 33 (consolidation of jurisdiction policies); Geoff Earley, *Report of a review of the notifiable incidents system in Defence*, 9 November 2012 (IGADF notifiable incident review 2012), recommendation 1 (revise policy making it more simple and user-friendly)

- Ad hoc inquiries appointed by government, such as Royal Commissions.
- Whole-of-government legislative and policy requirements setting out standards in particular contexts, such as the APS Code of Conduct,⁹ the Public Service Whistleblower requirements,¹⁰ requirements in the *Work Health and Safety Act 2011*, the *Financial Management and Accountability Act 1997*, the Commonwealth Fraud Control Guidelines 2011, the Legal Services Directions 2005, the *Privacy Act 1988*, the Australian Government Protective Security Policy Framework, the Commonwealth Procurement Rules, and the Australian Government Investigations Standards 2011.
- Freedom of information laws, which ensure transparency in government action.

1.2.9. **Interaction of internal and external integrity functions in Defence.** Consultation with internal stakeholders throughout Stage B suggests that the relationships between different elements of Defence's internal integrity system are not always functional. The tendency is for internal integrity functions to exist in subject-based or Service-based stove-pipes, rather than to view problems holistically from a whole-of-Defence perspective. This is a weakness in the way the internal integrity system is currently structured. The recommended model aims to address this weakness by proposing a much more co-ordinated approach to incident reporting and investigation.

1.3. Decision making framework

1.3.1. The Stage A Report emphasised that inquiry, investigation and review functions must be understood as part of a broader decision making framework. The Report included an illustration for a generic model of the way decisions are made and reviewed.¹¹ In light of the further work undertaken throughout Stage B, a more sophisticated illustration has been developed (see Figure 1). It emphasises the centrality of decision making and the contribution of initial assessment, recording, reporting and fact finding to those decisions. Internal and external review of decisions and actions, together with internal and external audit and oversight, operate as further safeguards to support the integrity of decisions and actions.

1.3.2. The elements of the decision making framework are:

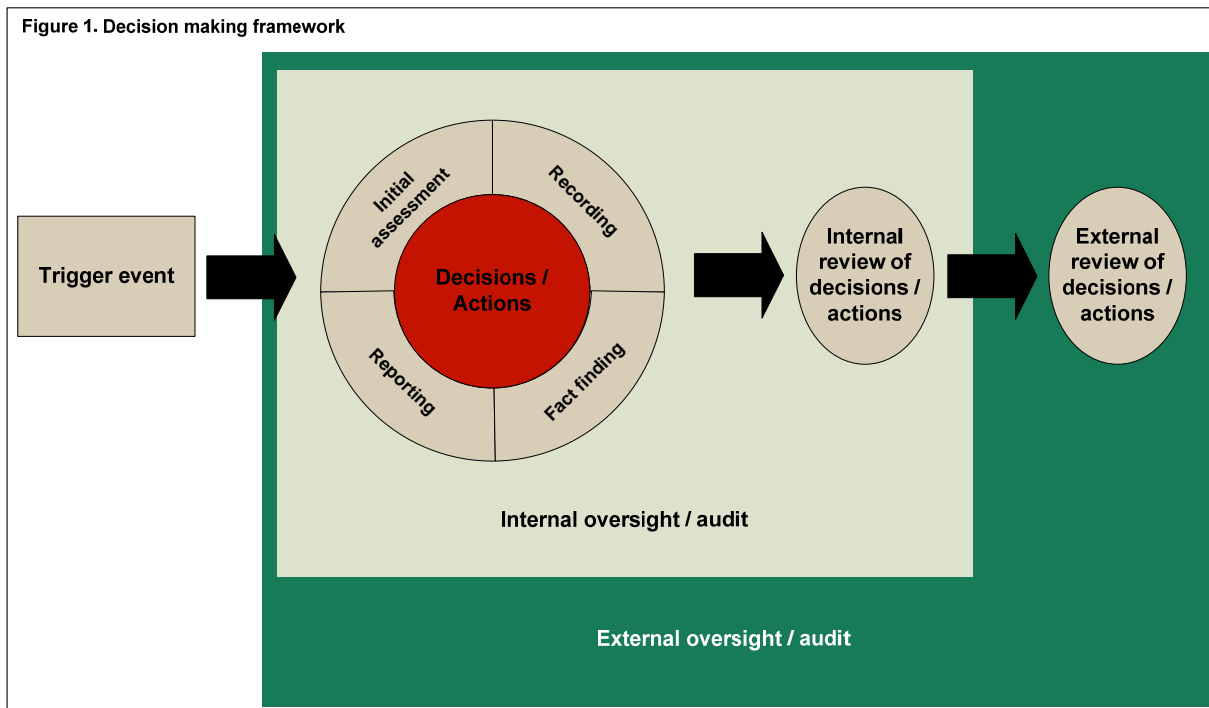
- **Trigger event:** an event or circumstance that requires an individual within Defence to make a decision or action. Common trigger events include a complaint, an incident (such as a safety incident), or a direction from higher in the chain of command.
- **Initial assessment:** determining what is known about a trigger event, what needs to be discovered, and any immediate actions that must be taken.
- **Recording:** making a record of relevant information in relation to a trigger event.

9 *Public Service Act 1999*, section 13

10 *Public Service Act 1999*, section 16; *Public Service Regulations 1999*, regulation 2.4

11 Stage A Report, Figure 1, page 11

- **Reporting:** submitting a record of the trigger event to the chain of command and elsewhere, both within and outside Defence.



- **Fact finding:** the process by which a decision maker informs him or herself of relevant information necessary to make a decision. Fact finding may be conducted through a formal inquiry or investigation, although it is frequently conducted through less formal processes.
- **Decision making:** the point at which Defence decision maker(s) determine what action, if any, will be taken in relation to issues associated with the trigger event. In practice, decision making occurs throughout all phases, and there may be multiple decision makers dealing with different aspects of a trigger event.¹² Analysis of available information, and reasons that explain and justify the decision are inherent features of decision making, as is the requirement to communicate the decision and how it is to be implemented.
- **Internal review:** re-consideration within Defence of a Defence decision or action. Re-consideration may include an element of further fact finding or the making of a new decision.
- **External review:** re-consideration by an agency outside of Defence of a Defence decision or action. Re-consideration may include an element of further fact finding or the making of a new decision.

1.3.3. Based on this decision making framework, the recommended model developed in Stage B and presented in this report operates across four phases:

¹² For example, where a trigger event reveals broad systemic issues covering multiple Groups / Services, decision makers from each affected Group / Service may be required to make decisions to address systemic issues.

- **Recording, Reporting and Initial Assessment:** Making a record of relevant information, determining what is known, what needs to be discovered and what immediate actions are required, and advising the military chain of command and relevant areas within and outside of Defence.
- **Fact Finding:** obtaining information to inform and support decisions.
- **Internal Review:** re-consideration within Defence of a Defence decision or action.
- **External Review:** re-consideration by an agency outside of Defence of a Defence decision or action.

1.3.4. These phases are not discrete and will often not follow a linear process. In practice, each phase may contain elements of another. For example, the recording, reporting and initial assessment, internal review and external review phases may all involve elements of fact finding.

1.3.5. This Annex discusses the *Re-Thinking Systems Review's* development of the recommended model contained in the Stage B Report. It commences with a discussion of the integration of Defence's workforce, and therefore the justification for uniform processes and policies where such is appropriate (noting the fundamental differences between ADF and APS service). It then discusses the findings of brainstorming and consultation outcomes; the research undertaken in relation to Commonwealth best practice, previous relevant reviews and the systems adopted by coalition partners; and observations on current arrangements. Finally, it contains the *Re-Thinking Systems Review's* conclusions in relation to the investigation of Service-related deaths and the need for models to support collaboration with coalition partners.

1.4. Changes to relevant legislation

1.4.1. Annex B to the Stage A Report included an analysis of the legal framework in which the arrangements for inquiry, investigation and review in Defence operates. Since the Stage A Report was finalised, there have been a number of important legislative developments. These changes have been considered in developing the recommended model in State B. The changes include the following:

1.4.2. **Privacy legislation.** The *Privacy Amendment (Enhancing Privacy Protections) Act 2012* amended the Privacy Act to replace the current Information Privacy Principles and National Privacy Principles with the Australian Privacy Principles, which apply to both government entities and the private sector. The Australian Information Commissioner will have enhanced powers including the ability to accept enforceable undertakings, seek civil penalties and conduct assessments of privacy performance. These changes are scheduled to take effect in March 2014. While these are significant changes, they will not drastically change the way that Defence must handle personal information.

1.4.3. **Anti-bullying provisions.** The *Fair Work Amendment Act 2013* introduced a new Commonwealth anti-bullying mechanism, whereby workers who have been bullied at work can apply to the Fair Work Commission for an order to stop the bullying. This legislation is scheduled to commence on 1 January 2014.

While ADF members will not be entitled to apply to the Fair Work Commission through this mechanism, it provides an additional avenue of external review of Defence activities for APS employees.

1.4.4. **Public Service legislation.** The *Public Service Amendment Act 2013* revised the APS Values, revised the role of the Public Service Commissioner (including enhanced functions in relation to APS Code of Conduct matters) and made minor amendments to the APS Code of Conduct. The amendments commenced on 1 July 2013. While these changes are significant, they will not drastically change the way that Defence must handle APS Code of Conduct matters.

1.4.5. **Information disclosure in the public interest.** The new *Public Interest Disclosure Act 2013*, which is to commence on a day to be fixed, establishes a scheme to investigate allegations of wrongdoing in the Commonwealth public sector and provide protections for current or former public officials who make qualifying public interest disclosures under the scheme. The scheme imposes obligations on Commonwealth agencies to investigate and respond to public interest disclosures. The Commonwealth Ombudsman (in consultation with the Inspector General Intelligence and Security) will be responsible for determining standards for dealing with public interest disclosures, the conduct of investigations and the preparation of investigation reports. These standards, once developed, will be relevant when investigating reports which fall within the scheme.

1.4.6. **Royal Commissions.** The *Royal Commissions Amendment Act 2013* made two key amendments to the *Royal Commissions Act 1902*, in anticipation of the Royal Commission into Institutional Responses to Child Sexual Abuse. The amendments allow members of multi-member Royal Commissions to hold hearings separately, and allow evidence to be given in private. These changes to a formal statutory inquiry process should be considered when developing Defence's statutory inquiry system.

1.4.7. **Cadets.** The *Cadet Forces Regulations 2013* replaced the previous regulations relating to the ADF Cadets, with effect from 18 June 2013. The Regulations ensure best practice child safety measures and the highest standards of safety for minors participating in the ADF cadets program. They emphasise that cadets are a voluntary community organisation in partnership with the Department of Defence and aimed at personal development programs for young people which are provided administratively in policy and local manuals. The Regulations do not have a great deal of detail surrounding inquiry, investigation and review processes, leaving these matters to be dealt with at a policy level.

1.4.8. **Public sector governance and accountability.** The new *Public Governance, Performance and Accountability Act 2013*, most of which will commence on 1 July 2014, will replace both the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997* and introduce a new framework for the use and management of public resources by Commonwealth entities. The legislation is principles-based, with detail to be included in rules issued by the Finance Minister where appropriate. A number of Commonwealth and Defence documents relating to investigation of fraud, procurement complaints and other financial matters are currently issued to comply with obligations under the *Financial Management and Accountability Act 1997*, and

may need to be re-issued or amended in light of the new legislation or any rules issued under it by the Finance Minister.

2. Defence's integrated workforce

2.1. Levels of integration of the Defence workforce

2.1.1. In a survey conducted during Stage A (and contained in the Stage A Report), 1387 of 1678 respondents (83%) indicated that they worked in an integrated environment. The *Re-Thinking Systems Review* has since obtained figures from the Workforce Planning Branch to provide a fuller picture of the level of integration between APS and ADF personnel. The figures have been analysed on the basis of 'Service Groups' and 'non-Service Groups'.

- 'Service Groups' are headed by ADF officers, and consist of the three Services, Headquarters Joint Operations Command (HQJOC), Vice Chief of the Defence Force Group (VCDF) and Capability Development Group (CDG).
- All other groups are 'Non-Service Groups', and include Defence People Group (DPG), Defence Support and Reform Group (DSRG), Chief Information Officer Group (CIOG) and the Defence Materiel Organisation (DMO).

2.1.2. The differences, in each of these categories, between the Canberra-based workforce and the workforce in other regions have also been analysed. The figures are limited to permanent ADF members and APS employees and do not include ADF Reserve members or civilian contractors who work in Defence workforce.

2.2. Workforce numbers¹³

2.2.1. 26% of the total Defence workforce are in non-Service Groups and 74% are in Service Groups. Figure 2 illustrates the total number of personnel in each Service and Group.

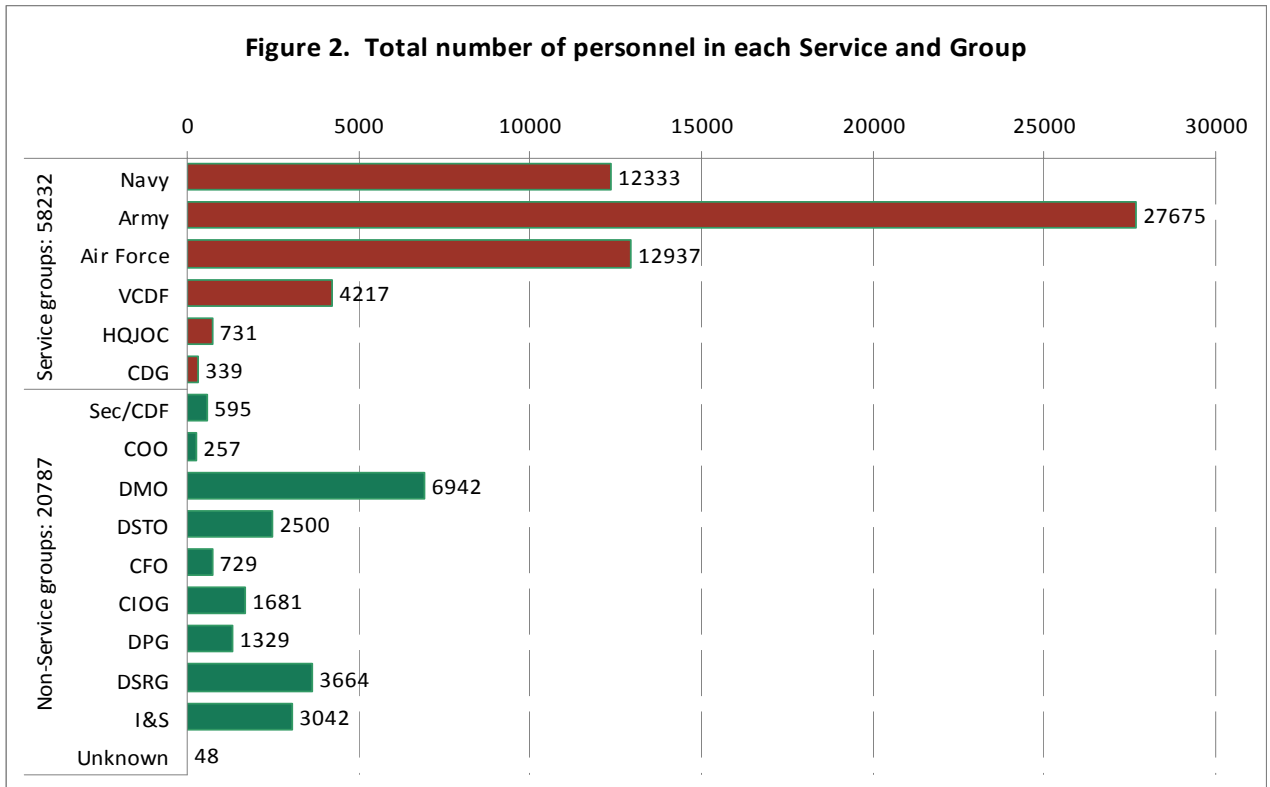
2.2.2. The three Services obviously have the most number of personnel, with Army having more than twice the number of personnel as Navy and Air Force. Other significant groups, in terms of size, are DMO, VCDF Group,¹⁴ DSRG¹⁵ and Intelligence and Security (I&S).¹⁶

13 This analysis is based on figures provided on 10 July 2013, and does not take account of any changes since that date.

14 VCDF Group includes a number of tri-Service functions, including Joint Health Command, Joint Logistics Command, and the Cadet, Reserve and Employer Support Division.

15 DSRG provides support functions to the ADF, including management of the Defence estate, garrison support services, ADF recruitment services and travel services.

16 I&S includes three intelligence organisations (the Australian Geospatial Intelligence Organisation, the Defence Intelligence Organisation and the Australian Signals Directorate) and the Defence Security Authority (responsible for protective security in Defence).

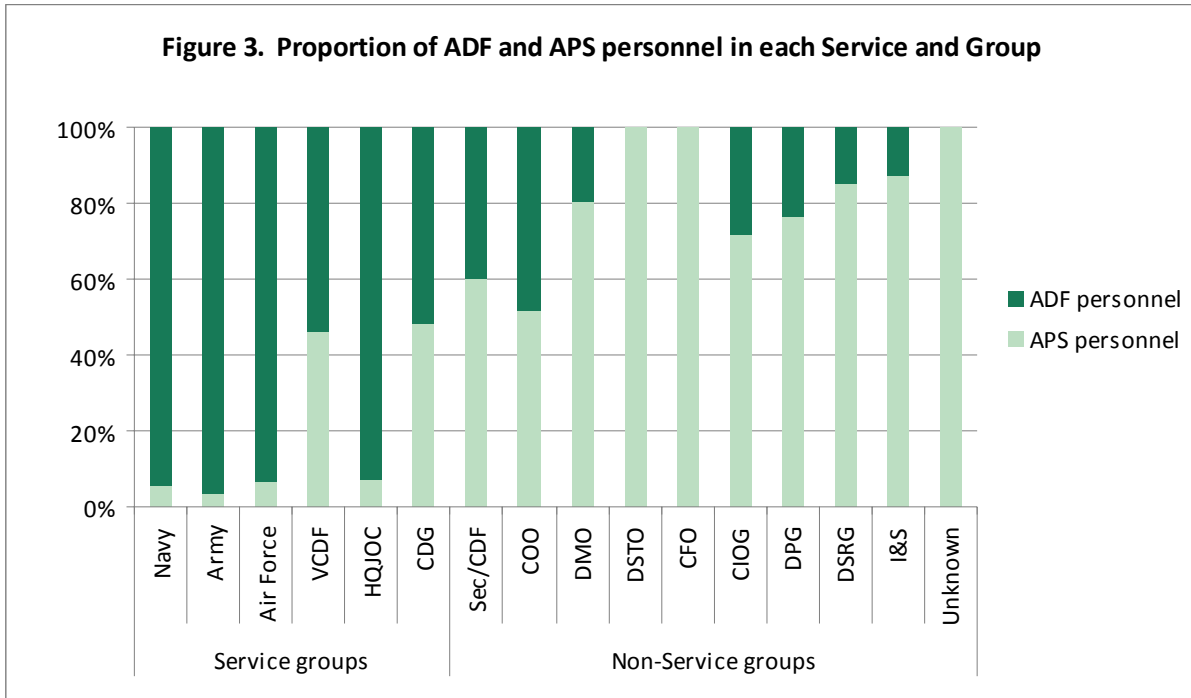


2.2.3. A similar ratio applies in relation to the distribution of APS employees and ADF members: 28% of the total Defence workforce are APS employees (22,017), and 72% are ADF members (56,948). However, 22% of APS employees (4,740) work in Service Groups, and 6% of ADF members (3,456) work in non-Service Groups.

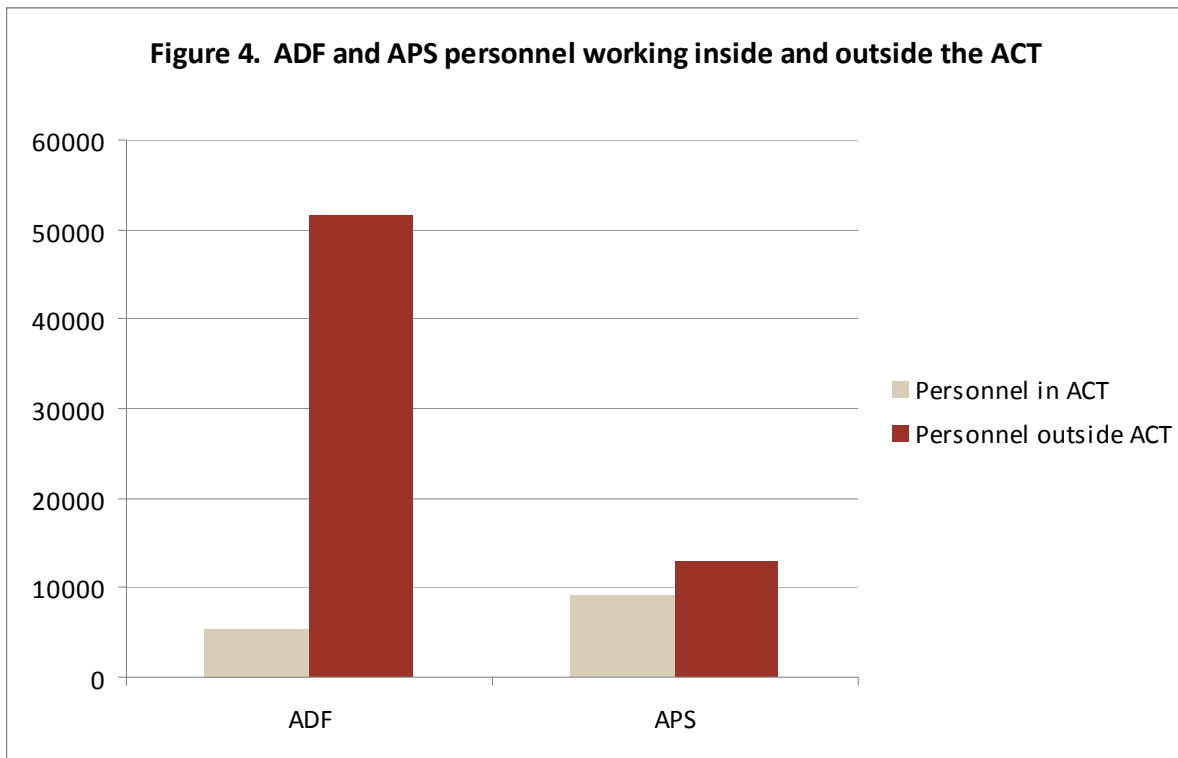
2.2.4. 8% of the workforce in Service Groups are APS employees, and 17% of the workforce in non-Service Groups are ADF members.

2.2.5. Figure 3 illustrates the proportion of ADF and APS personnel in each Group and Service. As would be expected, the three Services have low proportions of APS personnel (5-6% of all personnel), although these do reflect significant numbers of APS employees (2,578). The mix of ADF and APS staff in other groups varies. Of the Service Groups, VCDf Group and CDG have close to equal numbers of ADF and APS staff. In the non-Service Groups, several groups have 20% or more ADF personnel (DMO, CIOG and DPG).

2.2.6. Where an APS employee works in a Service Group, there will be at least one ADF member in their management chain. Similarly, ADF members who work in non-Service Groups will have APS employees involved in their day to day work. In addition, 14.25% of all APS employees (3,149) are directly supervised by an ADF member. 2.16% of all ADF members (1,231) are directly supervised by an APS employee.

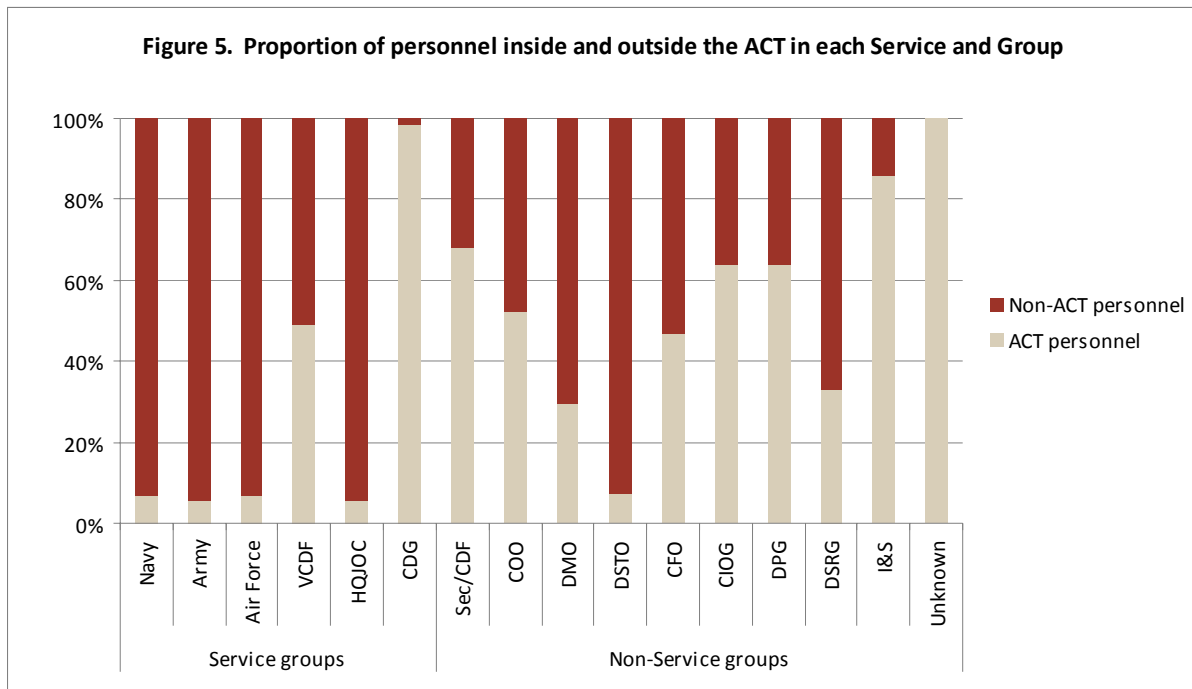


2.2.7. Based on these figures, it is clear that the level of integration between the ADF and APS elements of the Defence workforce is considerable. Thousands of APS employees work directly for ADF supervisors, or in Groups that would traditionally be considered the domain of the ADF. Similarly, thousands of ADF members work for APS supervisors or in groups that are headed by APS executives.



2.2.8. To address some stakeholder comments that this phenomenon is limited to the Canberra region, the figures were also analysed in terms of the geographic distribution of the workforce between the ACT and other locations. Figure 4 illustrates the number of APS and ADF personnel working within and outside the ACT. A majority of both ADF and APS staff work outside the ACT.

2.2.9. Figure 5 illustrates the distribution of personnel between the ACT and other locations in each Service and Group. It is clear that very few of the larger Groups, including non-Service Groups, could be considered 'Canberra-centric'. A significant number of APS employees working outside the ACT would, in fact, be working at military bases. The phenomenon of an integrated workforce is not limited to the Canberra region.



2.2.10. For this reason, one of the essential components for an optimal system of inquiry, investigation and review, identified in the Stage A Report, was that the system function effectively in integrated environments. All types of trigger events have the potential to involve ADF members and APS employees. Many legal obligations relate to the Department as a whole, and not to the ADF or APS in isolation, including safety, security and financial obligations. Misconduct by an ADF member can adversely affect an APS employee, and vice versa, and there are many known examples of workplace conflict that have involved both ADF and APS staff.

2.2.11. There are some fundamental differences between the ADF and APS workforces in Defence which were outlined in the Stage A Report. Further, the nature of service in the ADF means that a different standard of behaviour applies to the ADF and APS. For example, Defence is concerned about a much greater range of activities engaged in by ADF members outside the traditional 'work' environment than is the case for APS employees. The immediate discipline requirements of the ADF also mean that there is greater devolution of responsibility for managing misconduct in the ADF than in the APS, where APS Code of Conduct decision making delegations are held within a single area in Defence. All of these differences

also reflect the relative distribution of decision making authority within the ADF and APS more generally.

2.2.12. These differences do not mean, however, that similar processes cannot be used to inform the decisions made in relation to both ADF and APS personnel. For example, where a single trigger event involves misconduct by an APS employee and an ADF member, a single investigation could be used to inform decisions by APS Code of Conduct delegates and ADF commanders. As well as reducing duplication and inefficiencies inherent in the current system, this approach would make management of these types of matters far easier for commanders and line managers working in integrated workplaces.

3. Phase 1: Recording, Reporting and Initial Assessment

3.1. Introduction

3.1.1. Currently in Defence, there is an obligation to decide whether a 'Quick Assessment' is required following 'any significant incident, allegation or problem... using common sense and sound judgement'.¹⁷ The purpose of a Quick Assessment is to 'quickly assess the known facts, and to identify what is not known about an occurrence, so that a decision can be made about the most appropriate course of action to be taken in response to it'.¹⁸ This obligation applies to both ADF commanders and APS line managers.¹⁹ DI(G) ADMIN 67-2 *Quick Assessment* is referred to in a range of subject matter-specific Defence policies which require a Quick Assessment to be conducted in relation to particular types of trigger events. Notwithstanding the reference to a *significant* incident in DI(G) ADMIN 67-2, some of these other Defence policies specify a lower threshold for the conduct of a Quick Assessment.

3.1.2. The obligation to conduct a Quick Assessment exists alongside numerous other reporting obligations.²⁰ The obligation to report may arise before, during or after the conduct of a Quick Assessment. Under current policies, a single trigger event may generate multiple reporting obligations to multiple areas within Defence and externally to other agencies, each requiring a different format and mechanism. The administrative burden for commanders and line managers during the recording, reporting and initial assessment phase following a trigger event is significant under current arrangements, if all of these reporting 'obligations' were followed.

3.1.3. *Annex H: Current Defence reporting requirements* sets out some of the reporting obligations for trigger events in Defence. The table is not intended to be a comprehensive list of all policies that contain reporting requirements, nor is it intended to comprehensively set out the reporting processes. Instead, it is intended to demonstrate the extent of current reporting obligations. It reveals multiple processes and layers (especially where there are multiple reporting lines) that are complex, inconsistent and at times difficult to understand. This can result in inconsistent outcomes that do not facilitate sound and timely decision making. The extensive reporting requirements, together with ambiguous guidance about what a

17 DI(G) ADMIN 67-2 *Quick Assessment*, issued 7 August 2007, paragraph 8. CDF Directive 4/2010 *Interim Arrangements – Quick Assessments and Administrative Inquiries*, issued 23 April 2010 (CDF Directive 4/2010), reiterates a number of aspects of DI(G) ADMIN 67-2, and also includes additional requirements for reporting a Quick Assessment to the chain of command.

18 DI(G) ADMIN 67-2 *Quick Assessments*, paragraph 2

19 Annex K includes a process map of the current requirement in DI(G) ADMIN 67-2 to conduct a Quick Assessment, including the process of determining whether a Quick Assessment is required.

20 Some key reporting obligations are contained in: DI(G) ADMIN 45-2 *Reporting and Management of Notifiable Incidents*, issued 26 March 2010; Defence Security Manual; Defence Safety Manual (SAFETYMAN); DI(G) PERS 35-3 *Management and Reporting of Unacceptable Behaviour*, issued 28 June 2009; DI(G) PERS 35-4 *Management and Reporting of Sexual Offences*, issued 22 November 2011; CDF Directive 4/2010; DI(G) PERS 20-6 *Death of Australian Defence Force Personnel*, issued 20 May 2008. Annex H contains an indicative (not exhaustive) list compiled during Stage B of numerous reporting requirements in Defence documents. A similar list was compiled by Inspector General ADF in Annex C to the IGADF notifiable incident review 2012.

Quick Assessment is and when it should be conducted, contribute to the complexity Defence personnel currently face in assessing, reporting and managing incidents.

3.1.4. Complexity was identified in the Stage A Report as a significant weakness of current arrangements. It is imperative that the recommended model for Phase 1: Recording, Reporting and Initial Assessment is easier and simpler to use.

3.2. Brainstorming and consultation outcomes

3.2.1. The brainstorming and consultation conducted throughout Stage B generated significant comment on current assessment and reporting requirements. Generally, participants found it difficult to consider recording, reporting and initial assessment from a first principles perspective, focusing instead on identifying problems with current arrangements.

3.2.2. The conduct of Quick Assessments was the subject of significant, mostly negative, comment. A common concern was the tendency of the Quick Assessment process to be used as an investigative mechanism, taking several weeks to complete instead of the mandated 24 hours. This was a particularly significant issue in the context of the Cadet organisations, where Cadet staff are often 'weekend participants' and are not able to meet such short timeframes. Another common complaint was that a formal Quick Assessment is not necessary if the decisions to be made in relation to a trigger event are obvious, but nevertheless a culture has developed requiring a 'process' to be completed.

3.2.3. A related concern was duplication of effort. Many reporting obligations require completion of a form or report. The content of that form or report is often the same type of information that is obtained through a Quick Assessment – the 'who, what, where, when' of an incident. The requirement to complete a Quick Assessment where there is a reporting obligation of this nature can be repetitive and an unnecessary administrative burden. This burden is exacerbated where a single event requires reporting to multiple areas within Defence and externally to other agencies, as well as chain of command reporting through, for example, hot issues briefs (see Annex H).

3.2.4. Another common theme was the question of threshold. When does a trigger event require a written assessment? When does a trigger event need to be recorded? When does a trigger event need to be reported to the chain of command? When does a trigger event need to be reported outside the chain of command? Some observations made by consultation and brainstorming participants included:

- Matters that previously required a commander's diary note now require completion of a Quick Assessment, either by policy or practice.
- The Services have issued their own guidance on the requirement to complete Quick Assessments over and above the Defence-wide guidance in DI(G) ADMIN 67-2.
- Where there is a specialised process to deal with a matter, a Quick Assessment should not be required (for example, in the case of health care complaints).
- Requirements should depend on whether an incident is a minor incident (which can be resolved locally through alternative dispute resolution or command

decision making immediately after the trigger event) or a major incident (requiring support/assistance or intervention from another area in Defence).

- The focus should be on the requirement for the commander or line manager to make an initial decision about what is required.
- Information must be filtered so that command and line management is only provided with the level of information necessary and essential to allow decisions to be made in a timely fashion.
- Routine matters should not be reported outside the unit or chain of command.
- A trigger event should be reported if it requires third party intervention.
- In the Cadet context, there should be a consistent policy for recording, reporting and initial assessment across all three Cadet organisations, both to address concerns about under-reporting to Defence and Cadet staff's lack of training in conducting Quick Assessments.²¹

3.2.5. There was a general view expressed during consultation that the current threshold for conducting a Quick Assessment is too low. This view was likely influenced by perceptions of what is required in a Quick Assessment, or a procedural culture. The comment about matters that previously required a commander's diary note now requiring a Quick Assessment, for example, was telling. No one disputed the need for record-keeping and ensuring an audit trail to support decision making. Rather, the problem with a Quick Assessment is the way in which it has developed into a quasi-investigative process, usually involving appointment of a Quick Assessment Officer and, on occasion, even fixing terms of reference before commencement.

3.2.6. A number of suggestions were made about how to resolve some of these issues. For example, one suggestion was that there would be value in merging aspects of the Quick Assessment and routine inquiry under the *Administrative Inquiries Manual*, so that the trigger event could be a catalyst for an informal inquiry without need for a separate Quick Assessment. Another suggestion was to use the Hot Issues Brief format for a Quick Assessment, partly to constrain the scope of a Quick Assessment and partly to allow one report to be used for both purposes to avoid duplication and potential distortion / misinterpretation. This concept was expanded in a suggestion that a single initial written assessment should be used for any reporting requirements.

3.2.7. Most participants focused on current requirements to write a Quick Assessment report, and referred to other reporting obligations only to the extent that they duplicated aspects of that process. However, one observation about reporting was that requirements must be proportionate to the nature of the incident, and that if reporting requirements are too onerous, it may lead to under-reporting.

²¹ In relation to the Australian Army Cadets, CA Directive 16/10 states that the Cadet organisation must comply with DI(A) ADMIN 23-2 *Management of Reportable Incidents*. However, elements of this DI(A) are not easily applied to incidents involving Cadets and Cadet staff.

3.3. Commonwealth best practice

3.3.1. The Stage A Report contains a summary of some of the key guidance contained in the APSC's 2008 *Handling Misconduct: A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct*. The Guide suggests a number of mechanisms agencies can employ to ensure that the processes of handling misconduct are appropriate. Among other things, the Guide suggests the establishment of a centralised function within the agency to collect data and monitor the progress of misconduct cases to ensure consistency, check on timeliness of decisions and actions, and provide data to senior management for strategic monitoring purposes.

3.3.2. In relation to APS misconduct, 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. Instead, misconduct action is part of a range of people management practices that agencies should have in place to encourage high quality performance. Central reporting and data collection can ensure that appropriate support is available to commanders and line managers in determining the appropriate way forward in managing an issue. Commanders and line managers are able to discuss with the central area(s) the most appropriate way to manage an issue, such as whether an incident requires investigation or whether it should be dealt with as a performance management issue.

3.4. Previous inquiries and related reform activities

3.4.1. Quick Assessments have been the subject of significant scrutiny in a number of recent inquiries, including some that form part of the *Pathway to Change* strategy. Analysis of previous inquiries and related reform activities, and the way they relate to the proposed models, are provided in full at Annexes E and F. The following describes some of the observations and recommendations that were most influential in developing the models.

3.4.2. **CDF Working Group Review of the System of ADF Administrative Inquiries 2010.** The working group's report included some observations and recommendations about the Quick Assessment process. The report noted that, in addition to the purpose described in DI(G) ADMIN 67-2, a further purpose of a Quick Assessment is to provide commanders and line managers with an audit record of occurrences. The report outlined a number of problems with the Quick Assessment process, including:

- The purpose of Quick Assessments is misunderstood (or understood in a different way).
- Many Quick Assessments are conducted like an inquiry. As well as wasting resources, there is therefore potential to contaminate subsequent inquiry or investigation processes.
- Many Quick Assessments are initiated when other reporting is prescribed, such as vehicle accident investigations, civilian offences with no Service nexus, and obvious DFDA offences. Mandatory completion of a Quick Assessment is not warranted in these types of matters.

- There is conflicting guidance on whether a Quick Assessment is always mandatory or whether it is discretionary in some circumstances.

3.4.3. The report recommended clarification of guidance on when a Quick Assessment is required, as well as clarification of the purpose of reporting a Quick Assessment to higher headquarters (for serious and complex matters); emphasising that there was no need to wait for a review of the Quick Assessment by the higher headquarters before action is taken.²² Another recommendation was that a standard template or form for Quick Assessments should be introduced, in order to define requirements of form and detail. The introduction of legal protections for Quick Assessment Officers and other participants, as are available for Inquiry Officers appointed under the *Defence (Inquiry) Regulations 1985*, was also recommended.

3.4.4. The working group recommended the introduction of a new species of assessment mechanism, the Operational Incident Review (OIR), for initial review of combat-related incidents. The OIR would be a hybrid of a Quick Assessment and routine inquiry with a slightly extended timeframe (96 hours) for completion. An OIR could make recommendations (for example, about tactics or whether further investigation is required), but could not make adverse findings about individuals.

3.4.5. **Inspector General ADF Review of the Management of Incidents and Complaints in Defence 2011.** The Inspector General ADF review repeated many of the observations on Quick Assessments that were made in the 2010 CDF working group report. The report noted that the Director General ADF Legal Services, as sponsor of DI(G) ADMIN 67-2, proposed to amend the DI(G) to: clarify the circumstances in which a Quick Assessment is required; clarify that a Quick Assessment is not required where there are other specific Instructions mandating other immediate actions that replace the requirement; and provide more detailed guidance as to the substance and form of Quick Assessments. The Inspector General ADF recommended that, subject to the receipt of the HMAS *Success* Commission of Inquiry Part Three Report, the proposed amendments be expedited.²³

3.4.6. **HMAS *Success* Commission of Inquiry Part Three Report 2011.** Mr Gyles made a number of observations about the Quick Assessment process.²⁴ He noted that there was significant variation in the manner in which Quick Assessments were conducted in relation to the HMAS *Success* deployment, ranging from a perfunctory desktop exercise through to a thorough investigation. Mr Gyles concurred with many of the observations in the CDF working group report, particularly those relating to ‘mission creep’ and the tendency of Quick Assessments to become de facto inquiries. He agreed, however, that Quick Assessments serve a useful purpose, but only in situations where the decision maker does not already

22 The obligation to report Quick Assessments in relation to serious and complex matters to higher headquarters was introduced in the CDF Directive 4/2010.

23 This review has looked at recording, reporting and assessment processes from a first principles perspective, taking into account these recommendations. In light of the work anticipated for this review, the proposals referred to in the Inspector General ADF report have not been implemented at this time and, if the models proposed in this report are adopted, the specific changes would become redundant.

24 The Hon Roger Gyles AO QC, *HMAS Success Commission of Inquiry: Allegations of Unacceptable Behaviour and Management Thereof, Part Three Report: Further recommendations*, December 2011 (HMAS Success Part Three report), [2.177] to [2.184]

have enough knowledge of the facts and circumstances to make a sound decision about what should be done. He suggested that a Quick Assessment not be mandatory before a routine inquiry is initiated. Mr Gyles concluded that there was no reason why decision makers should not conduct Quick Assessments themselves in appropriate cases, commenting that the process of appointing a Quick Assessment Officer can amount to a de facto delegation of decision making and a side stepping of responsibility.²⁵

3.4.7. Mr Gyles agreed with the CDF working group's recommendations that the circumstances in which a Quick Assessment requires clarification and that a standard template or form be adopted (provided it is not too bureaucratic), but questioned whether legal protections are necessary for properly conducted Quick Assessments.

3.4.8. **APS Working Group Review of APS Complaints Management 2012.** The APS working group noted that all external agencies consulted in the course of the review conducted some sort of initial assessment process in relation to complaints, although the name 'Quick Assessment' was unique to Defence. It was noted that DI(G) ADMIN 67-2 is open to misinterpretation, and in practice is often not followed. In particular, it has often been used as a formal fact finding process, becoming a quasi-investigation (or in some cases a full investigation) of a complaint. At times, this has led to the mismanagement of a complaint. The APS working group recommended that DI(G) ADMIN 67-2 be reviewed and simplified, and that a template for Quick Assessments to deal with unacceptable behaviour be developed.

3.4.9. **Other recommendations about reporting requirements.** Other previous inquiries have also dealt with aspects of incident reporting, usually in the context of whole-of-Defence data collection. For example:

- In 1994, the Swan Inquiry recommended that Defence collect unacceptable behaviour records on a database which could be taken into account by the relevant Service for career management and posting decisions. The information was also to be used for compiling ministerial briefings and in aggregate form for analysing statistical trends.²⁶
- In 1998, the Grey report recommended that a database be established of all DFDA convictions and all administrative action undertaken based on unacceptable behaviour and other harassment, as it was difficult to identify and track repeat offenders.²⁷
- In 1998, the Defence Force Ombudsman recommended the collection of data for all complaints of discrimination and harassment, as well as unacceptable sexual behaviour, and when reported, require units to indicate whether

25 HMAS *Success* Part Three report, [2.181]

26 Senate Standing Committee on Foreign Affairs, Defence and Trade, *Report on Sexual Harassment in the Australian Defence Force*, 1994 (HMAS *Swan* inquiry 1994)

27 Grey, *Report of the Review into Policies and Practices to Deal with Sexual Harassment and Sexual Offences at ADFA 1998* (Grey report 1998), recommendation 4.5

resolution of the complaint by alternative dispute resolution mechanisms was considered and, if not, why not.²⁸

- In 2005, the Ombudsman recommended that a common complaint management system be developed to manage cases across all avenues of Defence complaints, with the ability to provide information in a form that would support Defence-wide reporting. The Ombudsman also recommended consolidation of a number of different complaint avenues.²⁹
- The 2008 Street / Fisher review of the military justice system included recommendations to: 'rebalance investigative authority between units and Defence Investigative Authorities in DI(G) ADMIN 45-2; simplify military justice data collection systems for several purposes, including to minimise the growing number of reporting systems and occasions for reporting; and to review policy about the retention of and access to disciplinary investigations and records that do not result in prosecution.³⁰

3.4.10. Some of these issues were addressed in the DLA Piper Report of the Review of Allegations of Sexual and Other Abuse in Defence and in the Broderick Phase 2 Report into the Treatment of Women in the Australian Defence Force. Volume 1 of the DLA Piper Report suggested that systems to track serial perpetrators in Defence should be examined to determine if they are being used to their optimum capacity and whether further systems should be put in place. It suggested that the content of information contained on the unacceptable behaviour database be expanded and its availability to managers increased.³¹ It also recommended reviewing the adequacy of Defence systems for tracking, internally reporting on and responding to media allegations of abuse.³²

3.4.11. The Broderick Phase 1 report into the *Treatment of Women at the Australian Defence Force Academy* recommended that ADFA develop and maintain a comprehensive, accurate and up to date incident system or database that identifies all relevant information relating to individual complaints and incidents of unacceptable conduct, including sexual harassment, abuse and assault, and sex discrimination.³³ Recommendations regarding incident reporting systems and case management have

28 Defence Force Ombudsman, *Own Motion Investigation into How the ADF Responds to Allegations of Serious Incidents and Offences – Review of Practices and Procedures 1998* (Defence Force Ombudsman report 1998), recommendations 6 and 7

29 Joint report by the Department of Defence and the Defence Force Ombudsman, *Review of the ADF Redress of Grievance System, 2005* (Ombudsman report 2005), recommendations 8, 9, 10, 11, 12, 14 and 15

30 Street and Fisher, *Report of the Independent Review on the Health of the Reformed Military Justice System, 2009* (Street / Fisher report 2008), recommendations 6, 7, 35, 36 and 37

31 DLA Piper report, issues 7 and 8

32 DLA Piper report, issue S8, page 67

33 Elizabeth Broderick, *Report on the Review into the Treatment of Women at the Australian Defence Force Academy (Phase 1 of the Review of the Treatment of Women in the Australian Defence Force)*, 21 October 2011 (Broderick Phase 1 report), recommendation 27. Note that it is understood that after briefing Ms Broderick on the current systems used within Defence as a whole, agreement was reached on a number of recommendations, including recommendation 27, that do not require separate implementation action as Ms Broderick was satisfied that existing Defence arrangements were adequate or addressed the intent of her recommendation.

been made by Hamilton in relation to alcohol-related incidents³⁴ and in key actions identified in the *Pathway to Change* strategy to establish data collection.³⁵ Significantly, recommendations about establishing a 'restricted' reporting regime in relation to sexual misconduct³⁶ have been implemented in a way that permits incident data to be aggregated for trend monitoring purposes.

3.4.12. The Inspector General ADF recently conducted a review of the notifiable incidents system in Defence, examining the operation of DI(G) ADMIN 45-2 *The Reporting and Management of Notifiable Incidents*. He recommended that there be a higher threshold for **referring** matters to the ADF Investigative Service, but that other matters currently **reportable** to the ADF Investigative Service continue to be reported for information purposes. He made a recommendation about communication between Defence Investigative Agencies and Service / Group headquarters and an enterprise-wide information communication technology solution for incident reporting and case management.

3.5. Coalition practice

3.5.1. The analysis of coalition practice in this and in subsequent sections in this Annex highlights two key themes of this review: the complexity of existing structures in Australia is reflected internationally in forces of a similar size and military culture, and (particularly in review phases) incremental reform based on ongoing reviews has not resolved complexity and delay. The coalition forces underpinning the study are Canada, the United Kingdom and New Zealand which share Commonwealth legal and military culture, and with them the US Air Force. The latter, which at approximately 330,000 active duty personnel is larger than the Australian Defence Department, shows similarities in workplace integration and policy development which offer scope for comparison.

3.5.2. For Phase 1: Recording, Reporting and Initial Assessment, coalition practice avoids some of the difficulties of the current Quick Assessment process by generally preferring an informal (albeit informed) command decision on what further action is required.

3.5.3. **Canada.** The Canadian investigative model does not include a formalised Quick Assessment process as a prelude to Phase 2: Fact Finding. Rather, the Quick Assessment merges with a process similar in some respects to a low-level routine inquiry and can be used either to finalise a response to an incident or to recommend further formal investigation. There do not appear to be mandated forms or templates: examples of the process include 'a chief clerk directing a subordinate clerk to find out why a member's pay allotment did not start on the expected date ... [or] a memo from a CO directing the unit quartermaster to look into unexpectedly high expenditures of training ammunition and requiring the quartermaster to report back to the CO.'³⁷

34 Prof Margaret Hamilton AO, *The Use of Alcohol in the Australian Defence Force: Report of the Independent Advisory Panel on Alcohol*, 19 August 2011 (Hamilton review 2011), recommendations 4 and 6

35 *Pathway to Change* strategy, key action 15

36 Broderick Phase 2 report, recommendation 19; DLA Piper report, issue 11; but see IGADF complaint review 2011, recommendation 25

37 Office of the Judge Advocate General (Canada), *Military Administrative Law Manual* (2008) A-LG-007-000/AF-010, Chapter 3 - Administrative Investigations, Section 2 – Informal Investigations, para 6

When a complaint alleges harassment, the model adjusts slightly so that the 'Responsible Officer' in the chain of command conducts a 'situational assessment' to assess whether the complaint could amount to harassment liberally interpreted. If so, a formal 'harassment investigation' is required.³⁸

3.5.4. The process for receiving and initially assessing complaints varies according to the nature of the complaint. If a complaint is made under the Military Grievance Process for officers and NCOs, it is submitted to the commanding officer as 'Initial Authority' for the first level of assessment. This person cannot be a civilian.³⁹ Civilian grievances are governed by DAOD 5026-0 *Civilian Grievances* and Part 2, *Public Service Labour Relations Act*, under which individual, group and policy grievances can be submitted to the individual's line manager (military or civilian). Other complaint mechanisms include health care matters (through the local provider) and claims against the Crown. In relation to military police, complaints can be made by any person to the Military Police Complaints Commission. Complaints can be received by any military police member, the chair of the Commission, the Judge Advocate General or the Provost-Marshal, but must be immediately notified to the Chair and the Provost-Marshal.⁴⁰ All complaints appear to be addressed by the same initial, informal process (which may be conducted by the person receiving the complaint), which may recommend further, formalised fact-finding.

3.5.5. **United Kingdom.** The UK's Phase 1: Recording, Reporting and Initial Assessment process also appears to lack the formality of a command-directed Quick Assessment. However, the required response following initial assessment varies according to the nature of the incident. For example, complaints about inefficient performance can be received and acted upon by a range of members, even junior members for minor administrative action,⁴¹ and that person must take 'stock of what he knows of the allegation' then determine what action is required.⁴² A commanding officer who receives complaints from, or has performance concerns about, a member is required to decide to whom it should be referred, if the commanding officer cannot resolve it themselves.

3.5.6. The absence of a formal Quick Assessment is particularly noticeable in the management of bullying and harassment allegations in the United Kingdom. If a complaint concerns harassment or bullying, 'within 24 hours of receiving a formal complaint, wherever reasonably practicable, the Deciding Officer [generally the Commanding officer] must acknowledge the complaint in writing and invite the Complainant to attend a meeting to discuss it as soon as possible. The purpose of the meeting is to understand fully the basis of the complaint; it does not form part of any subsequent formal bullying/harassment complaint investigation.'⁴³ Then, 'once it is evident that an investigation is required, for example if a respondent denies the

38 Ibid para 60. See also DAOD 5012-0 *Harassment Prevention and Resolution*

39 DAOD 2017-1 *Military Grievance Process*

40 Lamer, The Right Hon Antonio, *The First Independent Review of the Right Honourable Antonio Lamer PC, CC, CD, of the Provisions and Operation of Bill C-25 (2003)* (Lamer Review), p81

41 Army General Administrative Instruction (AGAI 67), Volume 2, Chapter 67 – Administrative Action, Annex D, para 67-009(a). Originating Officers in minor administrative action may be Lance Corporals

42 Ibid para 4

43 Joint Service Publication 763, *The MOD Bullying and Harassment Complaints Procedures* (15 December 2010), para 5.3

allegation(s), the Deciding Officer must appoint a suitable person or team to conduct an investigation.⁴⁴

3.5.7. **New Zealand.** Uniquely among Coalition partners, NZ legislation endows the Chief of Defence Force with employer's authority over civilian staff in the department, as well as command power over members. Thus initial complaints are made, in both instances, through the immediate superior (uniformed or military) for first assessment and response.⁴⁵ No formal Quick Assessment process has been identified as a requirement in this process. The CDF / Secretary diarchy makes this degree of integration inapplicable in Australia.

3.5.8. **United States.** For the US Air Force, the responsibility of the 'immediate commander' to conduct 'preliminary inquiries' extends to accusations that a member has committed a disciplinary or criminal offence and appears to be without mandated Quick Assessment-style forms. However there are extensive subject matter-based reporting requirements. For example, all reprisal and restricted access complaints, must be reported to centrally without any command-level initial investigation, regardless of the nature of the allegation.⁴⁶

3.5.9. **Conclusion.** The weight of Coalition practice is against an overly formalised initial assessment process, relying instead on informal inquiries, generally by the decision maker themselves. That said, there remain considerable initial reporting requirements across major Coalition partners which are generally governed by both the seriousness of the incident *and* the subject matter concerned.

3.6. Observations on current arrangements

As stated at 3.4.2, the purposes of Quick Assessments are to quickly assess what is known and not known about a trigger event to inform decision making, and to provide an audit trail in relation to how a trigger event was managed and the reason for decisions. In some cases, the first purpose has already been met, and the decisions or actions required are obvious without the need to appoint a Quick Assessment Officer to undertake a formal process. The second purpose will always be required but need not take this form.

3.6.1. The tendency to use a Quick Assessment to gather information and conduct quasi-investigations is frequently due to a need to collect information quickly following an event. It is understood that in the MEAO, for example, a Quick Assessment is frequently conducted over a one week period to collect information about an incident as quickly as possible, without resort to more formal forms of investigation. Based on this and other examples raised during consultation, there is clearly a need within Defence for a standardised framework for quickly collecting and collating information about a trigger event. Under current arrangements, the default is to use a Quick Assessment as a mechanism for fast or informal fact finding.

3.6.2. DI(G) ADMIN 67-2 lends itself to conducting a quasi-investigation. For example, it requires appointment of a Quick Assessment Officer and refers to the

44 Ibid para 6.2

45 Section 49, 71, *Defence Act 1990* (NZ)

46 US Air Force Judge Advocate General, *The Military Commander and the Law*, 11th Edn, 2012, <http://www.afjag.af.mil/shared/media/document/AFD-120828-043.pdf>, pp167, 384

conduct of interviews. Further, in general ADF members are exposed to Quick Assessment processes during promotion and training courses as part of their training on administrative inquiries. This creates the impression that a Quick Assessment is some sort of formal inquiry process. The recommendations in the 2010 CDF working group report to provide a form for completion of Quick Assessments was directed at addressing this problem. Other guidance on inquiries in Defence only relates to quite formal processes. Even a routine inquiry, as described in Chapter 4 of ADFP 06.1.4 *Administrative Inquiries Manual*, requires legalistic processes.⁴⁷ For APS employees, there is no guidance at all about fact finding processes. This vacuum means that both ADF members and APS employees frequently use the Quick Assessment process as a fact finding process, rather than simply as a record of an event and decision / actions. This vacuum is addressed in the recommended model for Phase 2: Fact Finding. On this basis, the models for Phase 1: Recording, Reporting and Initial Assessment focus on recording a trigger event and initial actions taken, rather than conducting a quasi-investigation into the event.

3.6.3. In relation to reporting, as is apparent from Annex H there is an enormous array of reporting requirements in Defence. The majority of events that occur within ADF units require some level of reporting to the chain of command for Service purposes. Other events have centralised reporting requirements that apply across all Groups and Services. The reasons for reporting a trigger event vary:

- Some trigger events will be managed entirely at a local level, but there is a whole-of-Defence interest in the event and it will be reported for information purposes only. The information reported will be used for data analysis or trend tracking.⁴⁸ Reporting the trigger event does not absolve the commander or line manager of responsibility for managing it.
- In some cases, a commander or line manager will require assistance in order to investigate or otherwise manage a trigger event. Reporting will occur both for information purposes and in order to request that assistance.
- In other cases, the nature of a trigger event will require it to be centrally managed, including through investigation for the purposes of informing decisions to be made outside the chain of command. These trigger events will be centrally reported in order to refer the event; the commander or line manager will no longer be responsible for outcomes.⁴⁹
- Some trigger events will be reported outside of Defence in order to comply with legislative requirements (for example, to the civilian police, to Comcare or, in an extremely limited range of security issues, to the Australian Security Intelligence Organisation.⁵⁰

47 Annex K includes a process map for the conduct of a routine inquiry, based on ADFP 06.1.4 *Administrative Inquiries Manual* (Second edition, June 2006), Chapter 4 and CDF Directive 04/2010.

48 For example: unacceptable behaviour reporting on Comtrack in accordance with DI(G) PERS 35-3 and reporting of minor safety incidents in accordance with SAFETYMAN.

49 For example: reporting of a 'notifiable incident' in accordance with DI(G) ADMIN 45-2.

50 *Defence Security Manual*, Part 2, Chapter 1, paragraph 2.1.3 defines 'reportable major security incidents' as those that fall, or are suspected of falling, within 'security' as defined in the *Australian Security Intelligence Organisation Act 1979*. A very narrow range of incidents require reporting by Defence to ASIO namely espionage, sabotage, acts of foreign interference, attacks on Australia's defence systems, politically motivated violence, and promotion of communal violence.

- Some matters will be reported because they are more appropriately treated as criminal offences under the civilian law rather than internal Defence matters.

4. Phase 2: Fact finding

4.1. Introduction

4.1.1. There are currently numerous fact finding processes available in Defence for different purposes, often carried out by teams of specialist investigators. For example:

- APS Code of Conduct investigations are conducted by the Directorate of Conduct, Performance and Probation.
- Criminal fraud investigations are conducted by Inspector General – Defence.
- DFDA investigations (including some ADF fraud matters) are conducted by the ADF Investigative Service, Service Police, or non-professional investigators within the Services.
- Security investigations are conducted by the Defence Security Authority.
- Inquiries into Service-related deaths are conducted by civilians with judicial experience, supported by the CDF Commission of Inquiry Directorate.
- Routine inquiries and Inquiry Officer inquiries are appointed by commanders in the ADF, using available personnel including Reserve officers (the Army Administrative Inquiries Cell has established a pool of trained inquiry officers that can be used for Inquiry Officer inquiries in Army).
- Procurement complaints are investigated by teams appointed following the report of a complaint, which may include external contractors.
- Safety incidents are frequently investigated within units or areas using available resources, often using a formal administrative inquiry process. Further, the Director General Work Health and Safety has recently established a centralised safety investigation capability to investigate systemic matters (as opposed to isolated safety incidents) as part of a hazard reduction program.
- Serious aviation safety incidents are investigated by the Directorate of Defence Aviation and Air Force Safety, while less serious matters are investigated by aviation safety officers throughout Defence.
- Complaints about the conduct of Service Police are investigated by the Inspector General ADF.

4.1.2. The purpose of these fact finding activities varies. The clearest distinction of purposes is between ‘human inquiries’ to determine individual culpability, for example in DFDA or Code of Conduct investigations, and ‘system inquiries’ to determine whether systemic factors contributed to an incident and how to prevent reoccurrence. These different fact finding foci reflect the distinction between individual integrity and systemic integrity outlined above. However, the distinction is not always clear cut. While some investigations are clearly ‘human inquiries’ (such as an APS Code of Conduct investigation) and some are clearly ‘system inquiries’ (such as air safety investigations or a security incident - albeit that they still relate to human decisions and actions), many fact finding processes have functions in relation

to both. For example, an inquiry may make adverse findings against individuals and also recommendations for organisational change. Identifying both people and systems issues is often not possible until fact finding is underway.

4.1.3. Secondly, the way information is collected is determined by the types of decisions that will need to be made following the fact finding process. For example, if the decision will be whether or not to prosecute an individual for an offence, certain standards relating to evidence in criminal or DFDA proceedings apply. If decisions are likely to be of an administrative character, investigation processes can be much more flexible. In some cases, such as some safety and security investigations, actions to mitigate the risks associated with the incident takes priority, so guarantees of confidentiality may be required in order to ensure individuals provide complete information during fact finding. In such cases, use of the information collected is limited to that risk mitigation, and cannot be used against the individual even in administrative decisions.

4.1.4. Thirdly, it is significant that some fact finding activities in Defence are carried out by professional investigators, while others are conducted in a more ad hoc fashion at a local unit or work area level. For the latter, coordination among multiple areas may be required, as in the case of the Cadet organisations where there may be a joint effort between the Cadet unit and the relevant single Service cadet headquarters.

4.1.5. Finally, there is the complexity of overlapping jurisdiction with external investigatory agencies, in which case Defence investigators may collect information to share with, or merely provide to, an agency which has specific responsibility or shared jurisdiction for the subject matter. For example, certain categories of security incidents must be referred to external agencies such as the civilian police or ASIO, which limits the fact finding responsibility of the Defence Security Authority primarily to coordination.

4.2. Brainstorming and consultation outcomes

4.2.1. The three major weaknesses of the inquiry, investigation and review system identified in the Stage A Report were complexity, restrictiveness and delay. It was clear during the Stage B brainstorming and consultation processes that these weaknesses are of particular concern in the fact finding phase. Again, participants frequently found it difficult to look beyond current arrangements and describe what they would develop from a first principles perspective. However, many observations and suggestions have been instrumental in the development of fact finding models.

4.2.2. **Investigations within a unit or work area.** There is a clear need for commanders and line managers to be able to undertake fact finding at the unit or work area level. However, as for the current arrangements for Quick Assessments, there is a gap in guidance about ways individuals can collect information quickly to inform their decision making. Current guidance for ADF members focuses on quite formal processes, and there is no guidance at all in relation to APS employees. One participant in the consultation process remarked that informal inquiries offer the best means to reform the current administrative inquiry system. Another participant suggested that statutory inquiries should only be used for the most serious incidents involving safety, serious injury or death.

4.2.3. Other observations about fact finding included:

- Individuals in units or work areas who are tasked with fact finding may have very little, or no, experience or training in such activities.
- Commanders and line managers should take greater control over fact finding processes, including by drafting tighter terms of reference or more closely directing the way their subordinates conduct fact finding (for example, to reduce the tendency of administrative inquiries to produce 30 or more recommendations going beyond what is actually required to resolve a matter).
- Staff work required for inquiry processes is immense and needs to be reduced.
- Under current practice, inquiries take too long which can result in delayed decisions and wasted resources. Commanders and line managers need to be able to direct someone to conduct fact finding for a specified period and report back, so that the decision maker rather than the fact finder can determine whether more information is needed before a decision is made.

4.2.4. **Investigations by professional investigators.** Under current arrangements, there is a requirement to refer possible DFDA offences that satisfy a certain threshold of seriousness to the ADF Investigative Service for investigation. There was concern that when matters are referred to the ADF Investigative Service or other Defence Investigative Authorities, the priorities for investigation may be inconsistent with the Service priorities. There was also concern that existing centralised investigative functions of this nature are not adequately resourced, causing significant delay in investigations. Specifically, the process for referring a matter back to the unit where a Defence Investigative Authority decides not to investigate takes too long, although it was conceded that some matters are so complex or serious that professional investigative skills are required. It was suggested that each Service and Group in Defence needs access to a pool of professional investigators for more complex investigations.

4.2.5. Some participants observed that professional investigative capability throughout Defence is held in 'silos'. They recommended that barriers between investigator pools be removed in order to avoid duplicate investigations into the same incident, albeit from different perspectives. They reported that duplication was especially prevalent where an incident affected more than one Group or Service and that, as a consequence, witnesses could be interviewed multiple times. It was suggested that different investigations should be able to co-ordinate and use a single interview to inform them all, perhaps by assembling a team of professional investigators with different expertise for any given trigger event.

4.2.6. There were many observations and comments on the particular skills and attributes required by professional investigators in Defence, especially in deployed environments. Most participants considered that there needs to be an element of uniformed professional investigative capability for such purposes.

4.2.7. On the required professional investigative skill set more generally, one participant suggested that investigative skills exist on a gradient, rather than being a binary state of skilled or unskilled, and that there is a baseline of investigative skills common to all investigators. Further specialist skills based on an investigation's

subject matter may be developed or directly recruited. Security investigations, for example, may require specialist knowledge about the security environment and air safety investigators clearly require technical aviation knowledge. Knowledge of this type is obtained, to some degree, through relationships between the professional investigator and specialist areas within Defence (such as security or technical air worthiness capability in Air Force). Specialist skills may be acquired through training and experience, for example, experience in interviewing or otherwise interacting with personnel in relation to sensitive issues.⁵¹

4.2.8. Most participants agreed that there was scope to combine some or all of the professional investigative capability that currently exists in Defence, including creating a combined civilian and ADF investigation workforce. It was noted that it would be important for such an organisation to maintain links with, for example, audit functions and security analysts, due to the necessary flow of information between investigators and audit, oversight and intelligence functions. Advantages of this combined approach would be the potential for a consistent and reasoned approach to setting investigative priorities and improved capacity to build/share specialist knowledge and skills to lift the departmental investigative baseline.

4.2.9. **Investigation in integrated environments.** Investigations in integrated environments in Defence have been particularly problematic due to the clear differences between investigation and inquiry processes for APS employees and ADF members. Environments where contractors and cadets are involved are even more complicated. Individuals that were consulted agreed that there should be synergies between ADF and APS investigation processes,⁵² as well as investigations involving cadets and contractors where appropriate, although the outcomes in relation to decisions about different categories of personnel would not necessarily be the same. Concerns were raised where, for example, adverse findings in an administrative inquiry could be used to sanction an ADF member, but could not be used for an APS Code of Conduct decision (resulting in the requirement to undertake a fresh APS Code of Conduct investigation in relation to the same trigger event and inability to rely on information collected using an ADF administrative inquiry).

4.2.10. **Purpose of investigations.** Many consultation participants were cognisant of the various purposes of investigations, particularly the distinction between human and system inquiries. They were concerned that the tendency for Defence Investigative Authorities to undertake fact finding in a silo works against the coordinated identification and exploration of all dimensions of a trigger event in a way which is also sensitive to organisational priorities.

4.2.11. **Inquiry officer powers.** A frequent concern raised during consultation was the need for powers to compel individuals to answer questions and/or produce documents. There was further concern that participants in administrative inquiries should be able to invoke the protections available in some formal inquiry processes under the *Defence (Inquiry) Regulations 1985*. While many participants were eager to see an end to the legalistic formalities associated with statutory inquiries, this

51 For example, special techniques for interviewing personnel with mental health issues or victims of sexual misconduct.

52 Which reflected recommendation 37 of the IGADF complaint review 2011.

eagerness was balanced against a contradictory concern about the loss of legislative powers and protections that might follow.

4.2.12. Most forms of statutory inquiry under the *Defence (Inquiry) Regulations 1985* permit the compulsion of individuals to answer questions, even to the extent that the answer may be self-incriminating.⁵³ Some are more limited, for example, Inquiry Officer inquiries and Inspector General ADF inquiries only have power to compel ADF members to answer questions (and incriminate themselves).⁵⁴ The power to compel individuals to answer questions, even where to do so might incriminate them, is a reasonably common power in Commonwealth legislation. Most integrity agencies have powers of this nature, including the Commonwealth Ombudsman.⁵⁵ Royal Commissions also have this power.⁵⁶ An example of a Commonwealth agency that can exercise this type of power internally is the Australian Federal Police in relation to some types of AFP misconduct (although it is a power that is only exercisable against AFP appointees).⁵⁷

4.2.13. Noting that Article 14(3)(g) of the *International Covenant on Civil and Political Rights* provides the right to be free from self-incrimination, in that a person may not be compelled to testify against him or herself or to confess guilt, the recommended model proposes reduced reliance on statutory inquiry processes. With fewer statutory inquiries held, there would be fewer occasions in which statutory power to compel an individual to self-incriminate was exercised. Importantly, the Attorney-General's Department has advised that while the privilege against self-incrimination may be subject to permissible limits, any limitations must be for a legitimate objective, and be reasonable, necessary and proportionate to that objective. In the context of statutory inquiries, consideration must therefore be given to whether compulsory methods of inquiry meet this standard.

4.2.14. Non-statutory inquiries conducted in Defence, such as Quick Assessments and routine inquiries, do not have legislative powers of this nature. APS Code of Conduct investigations and DFDA investigations are also conducted without these powers.⁵⁸ Safety investigations are regularly conducted without appointing a statutory administrative inquiry, and air safety investigations do not rely on statutory powers of this nature.⁵⁹ Generally speaking, decision makers in other Commonwealth agencies make decisions without relying on statutory powers of this nature to gather facts.

4.2.15. The frequency with which this issue was raised during consultation led to consideration of what powers outside the *Defence (Inquiry) Regulations 1985* might be used to compel individuals to answer questions. Legally, we assess:

53 *Defence (Inquiry) Regulations 1985*, regulation 14 (General Court of Inquiry), regulation 32 (Board of Inquiry), regulation 45 (Combined Board of Inquiry), regulation 120 (CDF Commission of Inquiry)

54 *Defence (Inquiry) Regulations 1985*, regulation 74 (Inquiry Officer inquiry), regulation 96 (IGADF inquiry)

55 See for example: *Ombudsman Act 1976*, sections 9 and 36; *Inspector-General of Intelligence and Security Act 1986*, section 18; *Law Enforcement Integrity Commissioner Act 2006*, section 80

56 *Royal Commissions Act 1902*, sections 6 and 6A

57 *Australian Federal Police Act 1979*, s 40VE

58 Section 101B of the *Defence Force Discipline Act 1982* provides that there is no requirement to answer any question asked by a DFDA investigating officer.

59 Civilian aviation investigators have powers under the *Transport Safety Investigation Act 2003*.

- ADF members can be lawfully ordered to answer questions and/or produce documents under the command power. Failure to answer a question as ordered would be an offence under the DFDA. A lawful order likely extends to ordering an ADF member to incriminate him or herself, or otherwise expose him or herself to a penalty, in the course of an administrative inquiry, although it may either not be admissible in subsequent criminal proceedings or there may be policy reasons why Defence would not pursue this.
- An APS employee's right to silence is qualified by their obligation of good faith and fidelity to the Commonwealth as their employer, which likely includes the obligation to provide information when requested by the employer. APS employees can also be given a lawful and reasonable direction to answer questions (both at common law and under the *Public Service Act 1999*). Failure to answer would be a breach of the APS Code of Conduct. We understand that, in practice, it is quite rare for APS employees to be directed to answer questions in an APS Code of Conduct investigation. However, where an APS employee declines to answer questions, it is a common practice for the delegate to point out to that individual that it would be to their disadvantage to refuse to provide information as decision making will proceed notwithstanding the absence of that individual's version of events.
- Contracts can include terms that require co-operation from the contractor with investigations or, in the case of a contract with a company, require the contractor to ensure, so far as possible, that its employees co-operate with investigations.

4.2.16. Even in the absence of a statutory inquiry, therefore, there is significant power to compel individuals in Defence to answer questions within the limits of what is reasonable, necessary and proportionate to a legitimate objective.

4.2.17. **Protections for inquiry officers.** Persons appointed to conduct a statutory inquiry under the *Defence (Inquiry) Regulations 1985* are subject to the same protections and immunities as a Justice of the High Court. Witnesses and lawyers appearing before a statutory inquiry have the same protections as witnesses and barristers who appear before the High Court. These are quite extraordinary protections, and we are not aware of any other government agency, including any integrity agency, that has the benefit of such protections. The only other executive function we are aware of that attracts protections of this nature is a Royal Commission.⁶⁰ A DFDA summary proceeding or court martial (a Service Tribunal)

⁶⁰ *Royal Commissions Act 1902*, section 7. In its recent review of the *Royal Commissions Act 1902*, the Australian Law Reform Commission (ALRC) recommended that royal commissions and other government-appointed inquiries be given less extensive protection: 'that no civil or criminal proceedings shall lie in respect of acts done... in good faith, in the exercise... of powers or functions under the Act' (Australian Law Reform Commission, Report No 111, *Making Inquiries: A New Statutory Framework*, 10 February 2010 (ALRC Report No 111, *Making Inquiries*), recommendation 12-1). The 'good faith' qualification on the immunity does not exist in relation to the immunity in High Court proceedings. The ALRC noted that an inquiry does not have the same ongoing need for independence as a court, so a qualified immunity was appropriate for inquiry members. This type of qualified immunity, applying only where powers are exercised in good faith, is typical of Commonwealth integrity agencies (see for example: *Ombudsman Act 1976*, section 33; *Inspector-General of Intelligence and Security Act 1986*, section 33).

also attracts these protections, presumably because of the quasi-criminal nature of these processes.

4.2.18. The protection and immunity afforded to a Justice of the High Court, and to judicial officers generally, is for the purpose of protecting the independence of the judicial branch of government and the integrity of the judicial process. Legally, our assessment is that the protection under the *Defence (Inquiry) Regulations 1985* gives Inquiry Officers the most extensive protection conferred on administrative decision makers under Commonwealth legislation. Our analysis is that, in applying the protection and immunity of a Justice of the High Court to an Inquiry Officer under the *Defence (Inquiry) Regulations 1985*, the Inquiry Officer:⁶¹

- Would not be liable to any civil suit, including actions in negligence or defamation. This applies even if the Inquiry Officer acts in bad faith.
- Would not be subject to DFDA proceedings in relation to conduct regarding the inquiry (because DFDA charges broadly equate to criminal charges).
- Would not be subject to complaints to the Ombudsman, Australian Human Rights Commission or Office of the Information Commissioner.
- May be subject to administrative sanctions in respect of their conduct as an Inquiry Officer, although this capacity would likely be limited.

4.2.19. Applying this level of protection to Inquiry Officers who, it must be remembered, conduct inquiries in private, effectively reduces the capacity of either the internal or external integrity system to scrutinise statutory inquiries properly and hold Inquiry Officers to account for actions they have taken in bad faith. Actions taken in good faith in the performance of duties would rarely, if ever, subject an individual to liability in this context, even without statutory immunity. Experience suggests that individuals dissatisfied with investigation processes are far more likely to resort to internal review processes or the administrative processes of external integrity agencies than the expensive process of bringing a suit in a court. Investigations conducted without these protections rarely end up in court. The risks of not having these protections is relatively low, and must be balanced against the inconvenience of the statutory inquiry process and the countervailing risk that Inquiry Officers themselves cannot be held to account for performing their duties.

4.2.20. There is a role for statutory inquiries in Defence. The capacity to appoint a public inquiry to inquire into a major incident of national interest should be retained. Conducting such inquiries in public may warrant the protections currently available under the *Defence (Inquiry) Regulations 1985*, although the more limited form of immunity recommended by the Australian Law Reform Commission with respect to Royal Commissions and other inquiries may be more appropriate. It is difficult to see, however, why more routine and, for the most part, private inquiries should share that same level of protection, given that actions taken in good faith would rarely if ever attract any form of individual liability.

⁶¹ We note that this discussion proceeds on the basis that the provisions in the *Defence (Inquiry) Regulations 1985* providing these protections are within the power to make regulations in section 124 of the *Defence Act 1903*, which is by no means certain.

4.3. Previous inquiries and related reform activities

4.3.1. Many previous inquiries have considered aspects of fact finding in Defence, predominantly in relation to processes affecting the ADF. Many recommendations have been implemented and our current inquiry and investigation system is, to some extent, a product of this incremental reform path. Moreover, the ADF focus of these inquiries has contributed to the significant difference between ADF and APS fact finding processes. Annex C to the Stage A Report and Annexes E and F to this Stage B Report contain analyses of previous relevant inquiries and their recommendations concerning fact finding in the ADF. Some of the more significant observations include the following:

- The Grey report 1998 recommended that an investigative mechanism be designed to enable command or management to deal with minor matters with an emphasis on informality, simplicity and the resolution of the incident at the lowest possible level.⁶²
- The Defence Force Ombudsman in 1998 and the Joint Standing Committee in 1999 criticised informal fact finding processes and shifted Defence towards a focus on formal inquiry processes.⁶³
- The Burchett report 2001 acknowledged the importance of simplicity in integrity processes through his observations about the discipline system at the time.⁶⁴ He pointed out that the complexity and other problems associated with summary proceedings had led to some charges not being brought when they should have been, and to some persons being punished unofficially.
- The HMAS *Success* Part Three Report was highly critical of the complexity associated with even supposedly minor administrative inquiries.⁶⁵
- The CDF working group review 2010 recommended the introduction of an 'Operational Incident Review' for initial assessment of combat-related incidents, in order to address the gap between the Quick Assessment and routine inquiry in current arrangements for the operational environment.⁶⁶
- The IGADF complaint review 2011 recommended providing simpler and better guidance in relation to fact finding to support decision making.

4.3.2. There has also been significant discussion of arrangements for professional investigative capability within Defence. The 2006 Audit of Defence Investigative Capability and the five year audit of the ADF Investigative Service are recent examples. A number of inquiries have talked about developing a permanent pool of inquiry officers available for the conduct of administrative inquiries. All of these inquiries have focused entirely on ADF investigative capability, with very little

62 Grey report 1998, recommendation 6.16

63 Defence Force Ombudsman report 1998; Joint Standing Committee on Foreign Affairs, Defence and Trade, *Report on Military Justice in the Australian Defence Force 1999* (Joint Standing Committee report 1999)

64 James Burchett QC, *Report of an inquiry into military justice in the Australian Defence Force 2001* (Burchett report 2001)

65 HMAS *Success* Part Three report, [2.176] to [2.192]

66 CDF working group review 2010, recommendation 5

recognition of APS-specific investigations (such as APS Code of Conduct investigations) or civilian investigations that apply to both ADF and APS (such as safety investigations). Generally, each inquiry has made recommendations about re-arranging or up-skilling investigative capability in Defence in order to improve efficiencies and outcomes, although none looked at Defence investigative capability across all subject matters and all categories of individuals within Defence.

4.4. Coalition practice

4.4.1. While fact finding across Coalition models are divided into formal statutory inquiries and command-initiated investigations, the favour in international practice for the latter supports a reduction of formality for, and a greater use of, non-statutory inquiries in the ADF. Importantly, many of the criticisms made in Stage A appear in similar form in reviews of Coalition military justice systems over the last ten years.

4.4.2. **Canada.** Canada's experience in the past ten years mirrors many aspects of Australian procedure criticised in this report. The fact finding phase of administrative decision making is channelled through different agencies according to subject matter and seriousness, with a complex web of governing regulations.

4.4.3. Under the *Queen's Regulations and Orders for the Canadian Forces*, summary investigations and Boards of Inquiry are authorised and described in considerable detail. Summary investigations can be initiated by the Chief of Defence Staff, a formation commander or a commanding officer for matters within their own command.⁶⁷ A Board of Inquiry may be convened by the same authorities, plus the Minister. Interestingly for Australia's issue of integrated workplaces, if the matter involves a civilian, then Defence civilian employees may also be appointed to the Board.⁶⁸ Additional requirements are mandated for certain subject matters including aircraft accidents, fires and explosions, and personal injuries and death.⁶⁹

4.4.4. Serious and sensitive matters involving the Department of National Defence and Canadian Forces are under the investigative jurisdiction of the independent Canadian Forces National Investigation Service (CFNIS).⁷⁰ CFNIS is under the separate command of a LTCOL reporting to the Canadian Forces Provost-Marshal and investigates all persons subject to the *Code of Service Discipline*. It can also lay charges against non-employee civilians, before civilian courts, for offences relating to military property. Lesser disciplinary matters can be investigated at unit level by a 'designated Canadian Forces member' or by a Service Police member.

4.4.5. Complaints about the Canadian Service Police are investigated by the Military Police Professional Standards Organisation and the Military Police Complaints Commission. The latter administers the *Military Police Professional Code of Conduct*,⁷¹ which is a 'quasi-judicial civilian oversight body and operating independently of the Department of National Defence and the Canadian Forces.'⁷²

67 Section 21.01, *Queen's Regulations and Orders (Canada)*

68 Ibid sections 21.06; 21.08

69 Ibid section 21.57; section 9 and section 6, respectively

70 Section 156, *National Defence Act*, section 2, *Criminal Code of Canada*

71 SOR/2000-14 (16 December 1999), pursuant to section 13.1, *National Defence Act (Canada)*

72 Lamer Review, p 77

Complaints must be limited to ‘policing functions.’ Any other function performed by military police is excluded, such as training and administration.

4.4.6. Where a personal complaint has been submitted for redress, the level of fact finding depends on the level at which the sought redress is possible. In general, this is conducted by the commanding officer but where a commanding officer is unable to grant a member the redress sought, it is to be forwarded to the next superior officer or to the headquarters Director General for investigation and resolution, who does have that authority.

4.4.7. Like in Australia, the efficacy of fact finding in the Canadian Forces has been criticised in recent reviews. As yet, significant reform has not been achieved:

- *The First Independent Review of the Right Honourable Antonio Lamer PC, CC, CD, of the Provisions and Operation of Bill C-25 (2003)* identified a backlog of 800 redress matters, making an exception in the ‘the military justice system [which] is generally working well.’⁷³ It also acknowledged that the expected workload of the Military Police Complaints Commission had not eventuated and recommended an internal audit to reconsider its needs.⁷⁴
- In April 2010, the Vice Chief of Defence Staff directed a review of the grievance system which recommended reducing the time for members to file their complaints from 180 to 90 days and to increase the time for the initial review and investigation from 60 to 120 days.
- The 2012 LeSage Review identified problems of delays caused by ‘over-investigating,’ arguing that ‘there needs to be a correlation between the offence alleged and the length and depth of the investigation required.’⁷⁵ As an example of the latter, ‘it is believed by some that the time and effort expended frequently outweighs the decision to be made’ by the Appeal Committee which approves legal aid for members lodging external disciplinary appeals.⁷⁶ The review also noted that the majority of Justice Lamer’s 2003 recommendations regarding the redress system had not yet been adopted, despite the introduction of three bills before Parliament.⁷⁷
- LeSage also concluded that ‘administrative action continues to be used in some units as a substitute for what some consider the more cumbersome summary trial process.’⁷⁸

4.4.8. Rather than a first principles reconsideration as in this review, the Canadian military justice system has applied a similar incremental program of reform, based on refining and adding detail to the regulatory and administrative structures.

73 Lamer Review, Foreword

74 Lamer review, pp 2, 78-9. Lamer noted that there had been four complaints of interference and 184 of misconduct over three years.

75 *Report of the Second Independent Review Authority to the Honourable Peter G. MacKay Minister of National Defence*, The Hon Patrick J. LeSage, QC, December 2011 (LeSage Review), p15. See also *External Review of the Canadian Military Prosecution Service*, Bronson Consulting Group, March 2008

76 Ibid, pp 47-8

77 Ibid, p 6

78 Ibid, p 27

Like Australia, this has not ultimately been successful in resolving the systemic issues.

4.4.9. **United Kingdom.** UK commanding officers have authority to ‘investigate any matter which occurs within their area of responsibility, in order to ensure that accidents and incidents are properly investigated, that appropriate lessons are learned, that all appropriate steps are taken to prevent recurrence and military activities are conducted on as safe a basis as is consistent with the accomplishment of the military purpose.’ Unless a (statutory) service inquiry is mandated by the nature of the incident,⁷⁹ ‘matters that are considered insufficiently serious to justify a service inquiry may be investigated by a non-statutory inquiry in accordance with single-service guidance.’⁸⁰

4.4.10. Recently, the UK has introduced ‘fee-earning Harassment Investigation Officers (HIOs) to replace the previous system of civilian and Service volunteers who undertook this role in addition to their normal duties which caused delays in dealing with complaints.’⁸¹ Although a general split between criminal and administrative fact finding is observed, ‘Exceptionally in complex and difficult cases [of misconduct or inefficiency]’ the Royal Military Police ‘may be requested to assist the CO by taking witness statements and providing advice on the investigation.’⁸² For minor administrative action, ‘the person originating the action is to gather sufficient facts in order to decide the most appropriate course. This may involve very little...’⁸³

4.4.11. Finally, the purpose of statutory service inquiries is ‘to establish the facts of a particular matter and to make recommendations in order to prevent recurrence. However, its findings will be used for other purposes, particularly where deaths occur, which include assisting the MOD in fulfilling its legal obligations, for example under the Management of Health and Safety at Work Regulations 1999, advising the Next of Kin and others of how the incident happened and informing a Coroner’s Inquest.’⁸⁴

4.4.12. **New Zealand.** Like Canada, the reality of integration is addressed in New Zealand’s fact finding procedures, so that civilians may be appointed to Courts of Inquiry provided at least one member is a military officer.⁸⁵ More generally, the New Zealand Defence Force also favours command level investigation, but permits anyone involved in a complaint of harassment or discrimination to *request* a formal investigation – the commanding officer may then decide whether there is evidence to support a Service Police investigation for disciplinary prosecution, or, if it is unclear,

79 Such as death of a person subject to service law: regulation 4, *The Armed Forces (Service Inquiries) Regulations 2008* (UK).

80 Joint Service Publication 832 *Guide to Service Inquiries* Version 1.0 (October 2008) (JSP 832), paras 1.10-11

81 Defence Select Committee (House of Commons) *Eighth Report: The Work of the Service Complaints Commissioner for the Armed Forces* (12 February 2013) (Eighth Report). The Committee supported the change, noting that the full complement of 50 HIOs had been recruited by 1 August 2012.

82 AGAI 67, Annex D-2, para 7

83 AGAI, Annex C, para 6, Annex C

84 JSP 832, para 1.3

85 Section 200A, *Armed Forces Discipline Act 1971* (NZ)

whether Service Police, an administrative inquiry appointee or designated Anti-Harassment Investigator should inquire into the complaint.⁸⁶ In 2005, a Cabinet-directed inquiry into *NZDF Policies and Practices Relating to Physical, Sexual, and Other Abuses* recommended providing 'guidance to commanders and managers on the exercise of discretion in deciding whether to take a disciplinary or administrative approach to dealing with complaints of abuse.'⁸⁷

4.4.13. **United States.** In the US Air Force, 'authority to investigate is incident to command' with administrative guidance set out in AFI 90-301 for investigations not governed by specific regulations.⁸⁸ Examples of the latter include reports of survey, line of duty and accident investigations.⁸⁹ The US Air Force distinguishes between:

- Inquiry: 'a determination of facts on matters not usually complex or serious,' handled through 'routine channels' and resulting in 'summarized' reports; and
- Investigation: 'appropriate for serious, complex matters requiring a determination of extensive facts. Investigations conducted under the commander's inherent authority should include a written report. Normally, exhibits and sworn witness testimony support the facts that are determined.'⁹⁰

4.4.14. There is some adjustment in fact finding requirements according to the seriousness of the matter and the quality of facts required to make an informed decision. For example, where it is suspected that a disciplinary offence may have been committed, 'in some cases, the commander or first sergeant may conduct the preliminary inquiry, e.g., failure to go, dereliction of duty. This may involve nothing more than talking with the member's supervisor.'⁹¹ More serious matters are investigated by specialist law enforcement agencies (including the Security Forces Office of Investigations and the Air Force Office of Special Investigations (AFOSI)), who provide a report of investigation to the commander. The commander may fulfil their inquiry requirement simply by reviewing that report and witness statements.⁹²

86 See further, *NZDF Policies and Practices Relating to Physical, Sexual, and Other Abuses*. 10 June 2005 (directed by Cabinet), para 27

87 Ibid para 40

88 *The Military Commander and the Law*, p434. Guidance to the commander and his/her legal advisor is set out in *SAF/IGQ Investigating Officer's Guide* (April 2007); *SAF/IGQ Commander-Directed Investigation Guide* (7 July 2006); and *SAF/IGQ JAG Guide to IG Investigations* (24 March 2008).

89 AFI 91-204, *Safety Investigations and Reports* and AFI 51-503, *Aerospace Accident Investigations* (accidents involving aircraft, missiles, or nuclear resources) and AFI 51-507, *Ground Accident Investigations* on the convening of Safety Investigation Boards. These Boards can take confidential evidence from witnesses and contractors, producing a 'Part II' Safety Mishap report, which is not releasable outside safety channels. Part 1 of the Board's report is releasable. Other separate investigative procedures include AFI 31-206, *Security Forces Investigations Program*; AFI 33-332, *Air Force Privacy Program*; AFI 36-2910, *Line of Duty (Misconduct) Determination*; AFI 36-2706, *Equal Opportunity Program Military and Civilian*; AFI 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*; AFI 51-503, *Aerospace Accident Investigations*; AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*; AFI 71-101, Vol. 1, *Criminal Investigations* (investigations conducted by Air Force Office of Special Investigations (OSI)); and AFI 36-2706, *Equal Opportunity Program Military and Civilian*.

90 *The Military Commander and the Law*, p435

91 Ibid 167

92 Ibid 167

4.4.15. The purpose of command-directed fact finding is to permit the commander to decide on what further action is appropriate (administrative, disciplinary or none). Commanders are advised to investigate all matters 'when another investigative channel does not exist or is less suitable.' That said, there are many matters which are identified as not appropriate for a commander's investigation, including issues covered by other established channels (eg Inspector-General complaints); reprisal, restriction and improper mental health examination complaints; senior official misconduct; self-investigation; sexual assault allegations (immediate referral to AFOSI, who must contact the Sexual Assault Response Coordinator); domestic abuse (immediate referral to law enforcement agencies. There is some latitude for fraud, waste and abuse but commanders must coordinate with the Inspector-General, who may further coordinate with AFOSI); Uniform Code of Military Justice matters (consultation with the SJA or Chief, Military Justice, about proper investigative agency); and equal opportunity (commander must inform installation EO office who have 'first right of refusal' to investigate).⁹³ That said, command-directed investigations are often 'not complex and can be completed in as little as 10 days.'⁹⁴ For complaints by civilian employees, an installation commander or delegate may investigate it personally, designate a fact-finder or select an investigator from the Department of Defense Office of Complaint Investigations.⁹⁵

4.4.16. The Inspector-General has separate fact finding investigative authority with respect to complaints within jurisdiction,⁹⁶ but may not deal with a range of complaints set out in AFI 90-301, Table 2.5, *Matters Not Appropriate for the IG Complaints Resolution Program*. Examples include privacy legislation violations and violations of any law possibly giving rise to civil liability for the US Air Force; 'command matters' unless command investigation has been exhausted and the complainant remains unsatisfied; Uniform Code of Military Justice matters; or those within other established mechanisms unless there is evidence of mishandling.⁹⁷

4.4.17. This is the form of the complex reporting and investigatory model which is sought to be addressed in this review into Australia's investigatory structure. It is to be noted that in the US Air Force, while there is a complex web of agencies responsible for various subject-based investigative jurisdictions (ie subject-based not threshold-based referral), the recording, reporting and initial assessment responsibility, as well as some initial fact finding, rests with the commanding officer.

4.4.18. **Conclusion.** International practice responds in different ways to the problems of integrated workplaces and to the complexities of some subject-specific investigative regimes. While the UK permits considerable informality in inquiry and investigation outside its statutory framework, the US Air Force policy reflects the level of policy complexity that Stage A identified in Australia. None of the nations canvassed currently have a central coordinating and referral area, as recommended in this review, but a functional arrangement of this kind would respond to the complexities common to all the nations canvassed here.

93 These guidelines are laid out in SAF/IGQ *Commander-Directed Investigation Guide* (7 July 2006), Chapter 2.

94 *The Military Commander and the Law*, para 2.4

95 AFI 36-1203 *Administrative Grievance System*, para 11.6

96 AFI 90-301, *Inspector General Complaints*

97 SAF/IGQ *JAG Guide to IG Investigations* (24 March 2008), section 2.3

4.5. Observations on current arrangements

4.5.1. The primary purpose of fact finding in Defence is to inform decisions and actions. Fact finding is therefore an incident of decision making. The tendency in recent times, however, has been to treat an investigation or inquiry as an end in and of itself, rather than the means to inform subsequent decisions. While there is clearly a place for formal investigation, preferably conducted by skilled and experienced professional investigators, most decisions are made at a unit or work area level and are informed by the information which can be collected at that level. Current policy arrangements fail to address the fundamental requirement for guidance on how these decision makers can inform their decisions.

4.5.2. The first application of this observation is administrative fact finding within the work area. For the ADF, the Quick Assessment, Inquiry Officer inquiry and routine inquiry processes go some way to meeting this requirement. However, each of these has limitations. The Quick Assessment was never intended to be a detailed fact finding tool and restrictions on its use make it an impractical fact finding tool in many cases. Inquiry Officer inquiries under the *Defence (Inquiry) Regulations 1985* are very legalistic and process driven and, as a result, are unrealistic for a vast majority of trigger events. Routine inquiries have also become very legalistic, despite the intention that they be a more informal way to gather information. While the guidance for routine inquiries was intended to address concerns about inconsistency in Defence fact finding activities, over time, it has evolved to focus users on formality rather than the purpose of their fact finding. Consultation suggests that conducting even the most basic routine inquiry will take an individual away from their primary functions for at least two weeks, usually more. This is disproportionate to the fact finding requirements for most incidents for which routine inquiries are initiated. The relationship of each of these inquiry processes with other types of investigation, in particular DFDA investigations, is also problematic.

4.5.3. For APS employees, fact finding guidance is even more limited. APS employees are required under certain policies⁹⁸ to conduct Quick Assessments, but there is no other guidance on how they can obtain information to inform decisions, apart from referring a matter for centralised APS Code of Conduct investigation. Even where there is a requirement to conduct an investigation within a work area, such as in the case of a safety incident, there is no guidance on how that investigation should be conducted or any powers it attracts.

4.5.4. The situation becomes even more confused where ADF members and APS employees are working together in an integrated environment. While ADF members who supervise APS employees are often quite familiar with their own fact finding processes, their knowledge of processes outside of the command based routine inquiry and Inquiry Officer inquiry is not as extensive. Similarly, APS employees who supervise ADF members are often unfamiliar with the detail of ADF-specific fact finding processes. Consultation suggests that lack of knowledge of corresponding processes often leads to inaction on both sides in response to an incident.

98 DI(G) ADMIN 45-2 *Reporting and Management of Notifiable Incidents*; DI(G) PERS 35-3 *Management and Reporting of Unacceptable Behaviour*

4.5.5. In the Cadet organisations, different Cadet units have different approaches to the management of incidents (for example, a school Cadet unit may apply its own school policies), and fact finding processes are often undertaken on an ad hoc basis without central policy guidance.⁹⁹ The involvement of the relevant single Service Cadet or Defence headquarters also varies, with not all incidents being reported to Defence for it to manage / provide oversight. This represents a serious risk for Defence, given the special duty of care it owes to minors and the reputational risks.

4.5.6. Treating fact finding as an incident of decision making, rather than as an end in and of itself, means that much simpler, flexible and proportionate approaches can be adopted and many of these difficulties avoided.

4.5.7. Beyond the unit or work area, there is a clear need for a professional investigative capability within Defence. Such capability already exists, but is stove-piped in various areas within the Department. There is room for consolidation, which would have advantages in terms of greater efficiency and greater consistency. There are, however, some issues that mean consolidation should be approached cautiously. As different types of investigation have different purposes (for example, human inquiries versus system inquiries), the approach to each type of investigation must necessarily differ. Moreover, different types of investigation may have different legal requirements. This is most evident is special investigation requirements under the DFDA, such as the giving of cautions in some interviews. In some cases, any perception that information will be shared with another type of investigation may interfere with the proper conduct of the first investigation, because of the first investigation's limited purpose (such as in the case of air safety investigations). Consolidation of these functions with other investigative functions should be treated with caution.

4.5.8. This variety of purposes does not mean that investigative capability should not be consolidated, simply that it needs to be recognised that not every investigation conducted by a professional investigator is conducted in the same way and for the same reason. Consolidation could actually produce benefits in terms of better identifying the prioritisation of investigations in Defence and managing the risk in a coordinated manner where resources do not permit an investigative response. The ideal would be to understand and identify priorities at the earliest possible stage, rather than the current approach where an event can be investigated several times without any recognition of the greatest need or any coordination.

4.5.9. Finally, some incidents may require very little by way of direct investigative response by Defence, but particular Defence investigators are best placed to assume a liaison and coordination function for external investigators. For example, the ADF Investigative Service currently liaises with the civilian police and coroners. Liaison is often required from Defence investigators for security and safety incidents. Specific legal protocols may arise in the course of this process. Again, these different requirements do not mean that investigative capability cannot be consolidated. Rather, the purpose(s) of an investigation must be identified before it commences in order to ensure the correct legal protocols are followed. Professional investigators in Defence will need training regarding these requirements, to the extent that

⁹⁹ The withdrawal of the Cadet Policy Manual has meant that there is now no single policy which applies to the three Cadet organisations.

consolidation would introduce them to investigative subjects or procedures beyond their current expertise.

5. Phase 3: Internal review

5.1. Introduction

5.1.1. The two primary internal review avenues for Defence personnel are the APS review of action process (for APS employees) and the redress of grievance process (for ADF members).

5.1.2. APS review of action is established under section 33 of the *Public Service Act 1999*, and current processes within Defence for handling such applications are reasonably streamlined. Changes to this process are not proposed (other than to the extent that changes to the structure of the internal review function is proposed).

5.1.3. Given the sacrifices of ADF members and the expectations of them in relation to their Service, it is essential that they have access to a fair and timely review mechanism in relation to decisions and actions that affect them. The ADF redress of grievance process is established under Part 15 of the *Defence Force Regulations 1952* and has a long history in the ADF. Similar grievance processes have a comparable historical origin in other militaries.¹⁰⁰ The Regulations provide that any ADF member can apply for redress in relation to ‘any decision, act or omission in relation to the member’s service’, where redress is capable of being granted by a member of the Defence Force or an employee of Defence or the Defence Materiel Organisation.¹⁰¹ A limited number of decisions are explicitly excluded from the redress process, including decisions of discipline tribunals and action that initiates an administrative process.¹⁰² A redress application goes at first instance to the member’s commanding officer, who is required to inquire into the complaint, make a decision, and take any other action he or she considers necessary.¹⁰³ Following this decision, the ADF member can request that the matter be referred to the member’s Service Chief, who is required to inquire into the complaint and make a decision.¹⁰⁴ ADF members of or above the rank of Warrant Officer (or equivalent) can refer the matter the Chief of the Defence Force for a third level of review.¹⁰⁵

5.1.4. ADF members make approximately 300 applications for redress of grievance per year (approximately 3 complaints per 1000 ADF members). Approximately one third of these will be referred to the member’s Service Chief. APS employees in Defence make approximately 80 applications for review of action per year (approximately 5 complaints per 1000 APS employees).¹⁰⁶

100 In *Millar v Bornholt* (2009) 177 FCR 67, Logan J provides a detailed history of the ability of military members to apply for redress of grievance.

101 *Defence Force Regulations 1952*, reg 75(1), emphasis added

102 *Defence Force Regulations 1952*, reg 75(2)

103 *Defence Force Regulations 1952*, reg 81. In certain circumstances, the application must be referred to the Service Chief rather than being dealt with by the commanding officer (regulation 77).

104 *Defence Force Regulations 1952*, reg 82

105 *Defence Force Regulations 1952*, reg 87

106 Figures are taken from the 2011-12 Defence Annual Report

5.1.5. There are other avenues of internal review available in Defence. Complaints to the Inspector General ADF typically also seek review of decisions and actions taken within Defence, including decisions made in the redress of grievance process. There are also specialist review processes for particular subjects, such as the Medical Employment Classification Review Board, the Australian Government Security Vetting Agency review process, and internal review of ADF recruiting decisions. Some of the specialist review processes exist in addition to the redress of grievance process. The relationship between the Medical Employment Classification Review Board process and the redress of grievance process, for example, delivers upwards of six levels of internal review for some ADF members. For Cadet members, requests for review and complaints regarding decisions can be dealt with by the Cadet unit or referred to higher ranking individuals in the Cadet organisation.

5.2. Brainstorming and consultation outcomes

5.2.1. The recommended model for internal review draws heavily on observations and suggestions made during the Stage B brainstorming and consultation activities. Those observations related almost exclusively to review of decisions affecting ADF members, with very little comment on the APS review of action process. Stakeholders consistently agreed that individuals need to be able to obtain internal review of decisions that adversely affect them, including review of the merits or substance of decisions. However, there was a view that the internal review process would be best accomplished through a single credible avenue of internal review.

5.2.2. Important aspects of an internal review process were identified as being:

- Timeliness (reflecting concerns that the current process can be slow and convoluted).
- Independence and impartiality, and the associated legitimacy of the process.
- Flexibility.
- Integration.

5.2.3. One suggestion was that individuals should be entitled to reasons for adverse decisions, which may actually reduce the number of individuals seeking review. The Attorney-General's Department indicated its support for this proposal.

5.2.4. During consultation, there was support for a single layer of internal review before an individual can access external review mechanisms. The single layer of review was particularly important in relation to specialist review processes where there can be duplication of review options. There was a view that it would be helpful to align the ADF and APS review processes, although participants recognised that they could not be fully integrated. It was also observed that the APS process does not always provide supervisors with sufficient information to adequately manage staff seeking an APS review of action. Another frequent observation was that the reviewer should have power to re-make the original decision, not just make a recommendation and for the matter to then be returned to the original decision maker for possible action depending on their view of the recommendation. The Attorney-

General's Department has indicated its support for a single-tier internal review proposal.

5.2.5. Other suggestions related to the power to suspend the original decision while the review application is being considered, and whether this was being used by review applicants to delay the implementation of decisions. For example, the decision in a deployed environment to send an ADF member back to Australia. There was a view that there should be discretion to refuse to consider an application to review a decision for a variety of reasons, including because an alternative review mechanism had already been used or because the decision could not be changed.

5.2.6. There was a widespread view that, for ADF review applications, there needed to be involvement from the member's commanding officer, even in cases where the commanding officer does not have the power to change or revoke the original decision. Even though a single layer of internal review should not be held at the commanding officer level, there should be a role for commanding officers to indicate their support or otherwise for ADF members applying for review. A process that facilitates this would also ensure that commanding officers are aware of matters affecting members within their command, which would assist them in managing individuals. It would also promote confidence in the chain of command and its responsibility to support ADF members. There was concern, however, that a commanding officer's involvement in the process should not act as a bottleneck or barrier to a member's ability to seek review of adverse decisions.

5.3. Commonwealth best practice

5.3.1. Several of the reports discussed in the 'Commonwealth best practice' section of the Stage A Report related to complaint handling and / or internal review:

- Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, 2009.
- Administrative Review Council, Report No 44, *Internal Review of Agency Decision Making*, 2000.
- Office of the Merit Protection Commissioner, *Not just about process: the review of actions scheme – a human resources practitioner's guide to responding to and managing employee complaints and disputes*, 2012.

5.3.2. The Ombudsman's report provides guidance for government departments in how to set up a complaint handling system. The Administrative Review Council (ARC) report offers assistance to government agencies in relation to internal merits review of decisions. The Merit Protection Commissioner report is specifically directed at the APS review of action process. Relevantly for model development:

5.3.3. The ARC report distinguishes between complaint handling and internal review. It notes that complaint handling procedures, for example under a Customer Service Charter, may encompass issues of service delivery and process. Internal review, on the other hand, involves reviewing the substance of a decision, with the possibility of a changed outcome.

5.3.4. The ARC noted that internal review can provide a useful quality control mechanism for an agency. It also provides an agency with an opportunity to change decisions before an individual pursues external review. However, internal review can often act as a barrier to external review, introducing lengthy delays and deterring complainants from reaching a genuinely independent review body.

5.3.5. The ARC suggested that an internal review structure should consist of a single layer of review by a senior officer uninvolved in the primary decision (rather than returning a matter to the original decision maker).

5.3.6. The Ombudsman report suggested that review mechanisms should provide impartial, transparent and efficient review of the original decision or action.

5.3.7. The Merit Protection Commissioner identified some best practice procedures for the APS review of action process, which are also relevant for the ADF. There need to be clear and accessible processes for lodging a review application (individuals should be routinely advised of their right to review). Review outcomes need to be fair, evidence-based, and accompanied by clear reasons.

5.4. Previous inquiries and related reform activities

5.4.1. The ADF redress of grievance process has been the subject of significant scrutiny in previous inquiries, as detailed in Annex C to the Stage A Report. Some inquiries have recommended quite radical reform, such as the Australian National Audit Office's report in 1999.¹⁰⁷ The ANAO conducted a performance audit and concluded that the process contained various inefficiencies that detracted from its cost-effectiveness. It recommended that the process be reduced to a single layer of internal review, with the matter referred to an appropriate officer with the delegated responsibility for review and resolution. Other inquiries have recommended less radical change. For example, in 2000 the Defence Personnel Executive review recommended removing the CDF level of redress.¹⁰⁸ In 2005, the Ombudsman undertook a joint review with Defence of the redress of grievance system. The review noted that the rapid increase in other complaint avenues outside of the redress of grievance process had vastly added to the complexity of managing complaints in Defence, and recommended that all complaints should be handled centrally.

5.5. Coalition practice

5.5.1. Most major Coalition partners share the difficulties of multi-tier internal review systems, particularly for personnel grievances.

5.5.2. **Canada.** Since 1998, the Canadian Forces Grievance process has comprised two levels of review through three offices. It was reformed most recently in June 2013. If a member is not satisfied with the initial review on submitting their complaint to their commanding officer (who may refer it to another 'Initial Authority' if they lack power to grant the redress sought), then Officers and NCOs may submit the

107 ANAO Audit Report No 46, *Redress of Grievances in the Australian Defence Force*, 1999 (ANAO Report No 46, Redress of Grievances)

108 Defence Personnel Executive, *Review of the ADF Redress of Grievance system*, 2000 (DPE review of redress of grievance system 2000)

grievance to the Chief of Defense Staff (CDS) for further review. CDS must refer certain classes of grievances to the separate Military Grievances External Review Committee, who will investigate and then make recommendations to CDS to resolve the complaint.¹⁰⁹ The Committee, formerly the Canadian Forces Grievance Board, is an independent administrative tribunal reporting to Parliament through the Minister of National Defence. It reviews military grievances referred to it pursuant to s 29 of the *National Defence Act* and provides findings and recommendations to the CDS and the aggrieved member. The Committee consists of Governor in Council appointees supported in reviewing grievances by analysts and legal counsel. This process includes an opportunity for the member to submit any additional information they wish, and a lawyer may assist the assigned grievance officer in investigating the matter. If necessary, the Committee may convene a formal hearing and call witnesses. In a further reform in June 2013, CDS was authorised to appoint a delegate to exercise his/her powers in the Canadian Forces grievance process.

5.5.3. The Committee's predecessor, the Canadian Forces Grievance Board, recorded approximately 790 grievances in 2012 and made recommendations in 134 matters.¹¹⁰ Both the 2012 LeSage Review and 2003 Lamer Review identified persistent problems with delays due to the inability of CDS to delegate decision making and recommended legislatively creating such a power,¹¹¹ which has since been achieved. Resolving the complaints backlog also required additional resource allocation at the commanding officer level to reduce the number of reviews lodged.

5.5.4. The April 2010 a Vice Chief of Defence Staff-directed review also recommended adjustments to time limits (more for initial authority, less for complainant) and introducing an additional administrative step in which the DGCF Grievance Authority produces a synopsis for the Board's consideration and, if supported by the Grievance Board, could issue the decision personally. Moreover, the review recommended the inclusion of active force members on the Board. In contrast, the grievance process for employees of the Canadian Department of National Defence is established under the *Public Service Labour Relations Act*, Part 2. It addresses three categories of grievances (individual, group and policy) but includes only two levels of internal review, first at managerial level and then a second tier review by the DG Labour Relations and Compensation. This process has not been included in the military justice reform project of the last decade.

5.5.5. The Canadian situation represents additional complexities compared to the already complex multi-tier Australian internal review structure. The chairperson of the new Military Grievances External Review Committee has stated publicly that part

109 Matters which must be referred are: administrative action that results in forfeiture of, or deductions from, pay and allowances; reversion to a lower rank or termination; the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities, and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct; pay, allowances and other financial benefits; and entitlement to medical care or dental treatment (Chapter 7.12, Queen's Regulations and Orders). Section 29.12 *National Defence Act* also permits the CDS to refer any other matter for review.

110 <http://www.cfgb-cgfc.gc.ca/English/home.html>. Between 2008 and 2012, issuing recommendations in 579 matters, the Board recommended complete or partial grant of redress sought in 289 cases and recommended denying the redress sought in 286 matters.

111 A proposed power of delegation for CDS is again before the Canadian Parliament in Bill C-15. The Bill also proposes to rename the Board the Military Grievances External Review Committee.

of the justification for reform was to ensure that the Committee was properly perceived as an external not an internal review body, a point they felt was obscured by the inclusion of the words 'Canadian Forces' in their title.¹¹²

5.5.6. United Kingdom. For personnel decisions involving adverse administrative action (major or minor), UK Army procedures permit internal review by a 'superior commander,' separately to a member's right to submit a grievance. During that review, the member 'should be given an opportunity to appear before the Reviewing Officer and to say why he believes the finding to be unfair or why he should not receive the sanction given.'¹¹³ However, the decision maker and internal review officer must be of the same Service as the member except for minor administrative action, 'as the other Services apply different regimes.'¹¹⁴

5.5.7. Separately, there are three levels of review available for individual 'Service complaints': the Prescribed Officer, who is usually the commanding officer, a Superior Officer who receives the complaint if the initial level is unable to grant the redress sought (but after the commanding officer has investigated the matter), and the Defence Council. If necessary to resolve the grievance the commanding officer may refer it direct to the Defence Council after consulting with the Superior Officer. An additional level of review is available to Officers, who have a legislative right to refer their complaint to the Sovereign 'to receive Her directions' on it.¹¹⁵ At Defence Council level, the complaint is normally considered by a delegated Single Service Board or Service Complaint Panel (generally two Officers of one star rank or above of the same service as the complainant, with an additional civilian independent member for certain categories of complaints).¹¹⁶ The process is supported by a Secretariat, which has a central unit in addition to one for each of the three Services.

5.5.8. In its Eighth Report, the Defence Select Committee (House of Commons) studied *The Work of the Service Complaints Commissioner for the Armed Forces* (12 February 2013) and therefore the service complaints system more generally. The Committee found that the structure was 'too complex ... three levels for the resolution of complaints is too many and adds to the length of time taken to resolve them. The MoD should reconsider the Commissioner's proposal that one level of appeal in the system should be removed.'¹¹⁷ Moreover, 'the Royal Navy practice of, where possible, resolving complaints informally is advantageous.'¹¹⁸ This is especially relevant to this report given the substantial similarity in the nature of the criticisms. Proposals for reform have not yet been presented in response to the Eighth Report.

112 Press release, 'The Canadian Forces Grievance Board's Name Changed to Military Grievances External Review Committee,' in Wall Street Journal, 21 June 2013, <http://online.wsj.com/article/PR-CO-20130621-906112.html>

113 AGAI 67, Annex C, para 12

114 D/DPS(A)/3/67/PS2(A), Volume 2, Chapter 67, *Administrative Action*, para 67.007

115 Joint Service Publication 831, *Redress of Individual Grievance: Service Complaints*, Issue 2.2 (7 June 2010) (JSP 831), para 1.23

116 Matters requiring an independent member include allegations of discrimination; bullying; harassment; dishonest, biased or improper behaviour; failure to provide required medical, dental or nursing care or negligence in the provision of care; exercise by a Service police member of their statutory powers; or a complaint about the rejection of a complaint: JSP831, para 1.18

117 Eighth Report, Conclusions and Recommendations, para 14

118 Ibid para 4

5.5.9. **New Zealand.** If NZ Service personnel are unable to obtain redress through their respective Service, they may seek second tier (and final) review by the CDF. Complaints to the CDF are referred to the Judge Advocate General who investigates and makes recommendations to the CDF. The CDF makes the final decision, and that decision is conveyed in writing through the command chain to the complainant.

5.5.10. **United States Air Force.** The complaints review system in the US Air Force is notable in its complexity, even though it generally permits only one level of review. Separate directives apply to civilian complaints of discrimination (AFI 36-1201); civilian complaints regarding employment conditions (contact Civilian Personnel Office); enlisted members' administrative separations (AFI 36-3208); officers' administrative separations (AFI 36-3206); Reserves (AFI 36-3209); Reserve complaints about assignments (AFI 36-2115); equal opportunity in off-base housing (AFPD 32-60); landlord or tenant disputes (AFI 32-6001); claims against the government (AFI 51-502); correction of military records (AFI 36-2603); appeal of Officer/Enlisted Performance Reports (AFI 36-2401); support of dependents (AFI 36-2908); private indebtedness (AFI 36-2906); and hazardous working conditions (AFI 91-302). In general, it appears that the single level of internal review is at the installation commander (or delegate) level or, depending on the subject matter, through a separate agency such as the Inspector-General.

5.5.11. US Air Force civilian employees may submit a grievance through their chain of command, excluding matters which are appealable to the Merit Systems Protection Board or that are covered by AFI 36-1201 *Discrimination Complaints*. The installation commander or 'locally designated deciding official' (delegate) makes the 'final written decision', with review only available for if the grievance is rejected without a decision on the merits or if it involved suspension without pay.¹¹⁹

5.5.12. For disciplinary matters, in addition to the statutory appeal process, complaints about military discipline may be reviewed by the Inspector-General. Administrative matters relating to discipline can be reviewed by the Air Force Board for the Correction of Military Records.¹²⁰

5.5.13. Calls for simplification of process and reduction in the number of internal review tiers in the ADF find support in Coalition practice. The US Air Force, although it has a complex web of subject-matter-based referrals, favours single tier review of decisions primarily through a commander. The three-tier UK system has been criticised for an excess of review tiers, with a recommendation for reduction. New Zealand appears to operate effectively with a two-tier structure, although the size of their force permits the final tier to be as senior as CDF. Interestingly, the need for centralised coordination and support of the process is reflected in the UK Secretariat and in Canada's DGCF Grievance Authority.

119 AF36-1203 *Administrative Grievance System*

120 AFI 36-2603 *Air Force Board for Correction of Military Records*

5.6. Observations on current arrangements

5.6.1. One of the essential components of an optimal system of inquiry, investigation and review identified in the Stage A Report is that it facilitates sound and timely decision making. The Stage A Report stated:

*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.*¹²¹

5.6.2. The current arrangements in relation to internal review clearly contain more than a 'single layer of formal internal review'. In particular, the two or three layers of review available through the redress of grievance process (depending on the rank of the ADF member) are excessive. The delays associated with reviewing a matter through multiple internal layers are effectively denying ADF members the opportunity to apply for external review by the independent Defence Force Ombudsman.

5.6.3. As noted by the Ombudsman in 2005, there are a range of other complaint avenues for ADF members other than the redress of grievance process. Some of these provide ADF members with a mechanism to complain outside the chain of command. Understanding the relationship between these complaint processes and the redress of grievance system is difficult. As noted in the ARC report, there is an important conceptual difference between complaint handling and internal review. Best practice in relation to complaint handling would ordinarily require multiple portals through which an individual can complain.¹²² However, best practice in relation to internal review is for there to be a single and expeditious layer of review.¹²³

5.6.4. Defence personnel need to be able to make complaints or allegations about other people's conduct, including misconduct. Individuals should be encouraged to make complaints about unacceptable behaviour, fraud, security and safety risks and similar. As well as helping individuals to resolve workplace situations, complaints of this nature offer Defence an opportunity to fix systemic problems and address behavioural concerns. Avenues to make complaints outside the chain of command are particularly important for ADF members, given the demands of Service life and the fact that they are subject to command authority. Current complaint avenues within Defence, including complaining to the chain of command and the Defence Whistleblower scheme (a mechanism for complaint outside the chain of command), are consistent with this rationale.

5.6.5. In the decision making framework, complaints are 'trigger events', which will then be subject to Phase 1: Recording, Reporting and Initial Assessment and Phase 2: Fact Finding. Regardless of who made the complaint and how it was made, a Defence decision will be made as to how to deal with the complaint. While

¹²¹ Stage A report, page 47

¹²² Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, 2009 (Ombudsman's Better Practice Guide 2009)

¹²³ Administrative Review Council, Report No 44, *Internal Review of Agency Decision Making*, 2000 (ARC Report No 44, Internal Review 2000)

multiple complaint portals are essential to provide individuals with a choice of how they complain, including opportunity for confidential or anonymous complaints, it can lead to multiple investigations of the same matter. The recommended model in Phase 1 assists in channelling complaints and enables Defence to take a consistent approach and provide a holistic resolution to individuals' complaints.

5.6.6. Internal review, as defined for the purposes of this Review, is not the same as complaint handling. Internal review is re-considering a decision or action, rather than addressing a first instance complaint. Internal review, as discussed in the Stage A Report, should be provided only once. Any right to review of a decision should be a right that an individual can exercise only once in relation to that decision. Further, the focus of internal review should be on the substance or merits of the decision, rather than the process followed in reaching the decision. The process cannot always be separated from the substance, for example where process flaws reduce the reliability of evidence or even, in rare cases, where process flaws mean that the power to make the decision does not even exist.¹²⁴ However, the internal review process would be simpler and more substance focused if Defence specified the purpose of internal review: *to provide individuals with an independent assessment as to what the correct and preferable decision is based on the evidence available.*

124 For example, failure to follow the process of providing a termination notice as required in regulations 85 or 87 of the *Defence (Personnel) Regulations 2002* means that there is no power to terminate an individual's service in accordance with those regulations.

6. Phase 4: External review

6.1. Introduction

6.1.1. Under current arrangements, individuals in Defence are able to access a range of external review options in relation to decisions made within Defence. The agencies providing external review options are integral components of the external integrity system, and include:

- Commonwealth Ombudsman.
- Defence Force Ombudsman.
- Presidents or Commissioners within the Australian Human Rights Commission (for example, the Sex Discrimination Commissioner or the Race Discrimination Commissioner).
- Information Commissioner.
- Merit Protection Commissioner.
- Fair Work Commission.
- Courts.
- Administrative Appeals Tribunal.
- Defence Force Discipline Appeals Tribunal.
- Ministers in the Defence portfolio, through Ministerial representations.¹²⁵
- Media, including social media, through which freedom of speech is exercised.

6.1.2. These mechanisms all have different integrity functions in relation to decisions made within Defence. For example, the Australian Human Rights Commission focuses on discrimination claims, while the Information Commissioner's role is in relation to privacy and access to information through the *Freedom of Information Act 1982*. They are part of the whole-of-government integrity system whose role is to monitor particular aspects of the exercise of public power, and Defence should not be excluded from their jurisdiction. Of particular interest to this project are the functions performed by the Merit Protection Commissioner, the Defence Force Ombudsman and the Administrative Appeals Tribunal.

6.1.3. **Merit Protection Commissioner.** The Merit Protection Commissioner provides review of decisions affecting APS employees, and has jurisdiction in relation

¹²⁵ Merits review can be and is informally carried out by Members of Parliament contacting the Minister on behalf of an individual. However, it has been pointed out that 'the effectiveness of this process may depend upon: whether or not the Member is a Member of the Government and this raises issues of independence and bias... and on the Member's personal rapport with the Minister and on the preparedness of the Minister to become involved in reviewing the matter. This may depend upon how politically sensitive the Minister's intervention, or failure to intervene, would be or on the personal interests of the Minister.' Paper presented by Barry Cotterell to the 7th Annual Australasian Institute of Judicial Administration Tribunals Conference, 11 June 2004 accessible at: <<http://www.aija.org.au/Tribs04/papers/cotterell.pdf>>.

to the entire Australian Public Service. APS employees are able to access review by the Merit Protection Commissioner, and this arrangement should not be changed.

6.1.4. **Defence Force Ombudsman.** Part IIA of the *Ombudsman Act 1976*, which establishes the office of Defence Force Ombudsman, was inserted by the *Ombudsman Amendment Act 1983*. The Defence Force Ombudsman investigates complaints that are ‘with respect to a matter that is related to the service of a member of the Defence Force or that arises in consequence of a person serving or having served in the Defence Force’.¹²⁶ Matters related to disciplinary proceedings and honours and awards are excluded, and matters related to allowances and other benefits are explicitly included. Like the Commonwealth Ombudsman, the Defence Force Ombudsman has wide-ranging powers including coercive powers to obtain information and records. The Ombudsman Act also overrides the secrecy provisions in other legislation, the privilege against self-incrimination, and the official use of legal professional privilege.

6.1.5. At the request of the Attorney-General in 1979, the Administrative Review Council (ARC) considered the establishment of a Defence Force Ombudsman. It reported in 1981 and recommended the model that was ultimately adopted.¹²⁷ The ARC report outlines the history of the Defence Force Ombudsman proposal:

- The original proposal, which was part of the platform of the 1972 Labor Government, was for a Defence Force Ombudsman to be established separately from the Commonwealth Ombudsman. Justification for its establishment included the difference between ADF members and APS employees in terms of engagement, the distinct nature of a disciplined service, and the incidents of continual shifts in residence. The proposal noted that ADF members do not have access to a union or arbitration processes that are otherwise associated with employment disputes.
- A Bill to establish the Office passed the House of Representatives in 1975, but lapsed in the Senate with the dissolution of Parliament in November 1975.
- The proposal was adopted by the new government, and a draft Bill was prepared in 1976 but it did not proceed with it.
- Defence later adopted most of the content of the draft Bill in drafting instructions to the Attorney-General’s Department.
- The Attorney-General requested the ARC to consider the proposal for the creation of the office.
- The ARC considered that the small scale of a Defence Force Ombudsman’s operations (based on the relatively small number of complaints expected), and the existence of two ombudsmen with overlapping jurisdictions posed significant administrative difficulties in establishing a separate office, and recommended that it be incorporated in the proposed jurisdiction in the Commonwealth Ombudsman’s office. The insertion of Part IIA was directed at the ARC’s acknowledgment that there were ‘valid demands that the Defence Force jurisdiction be exercised by a person who can be identified readily by

¹²⁶ *Ombudsman Act 1976*, section 19C

¹²⁷ Administrative Review Council, Report No 5, *Defence Force Ombudsman*, 16 July 1979

servicemen as somebody concerned with their complaints only'. The ARC also noted that it may be appropriate to appoint a Deputy Ombudsman (Defence Force) to address this concern.

6.1.6. The Senate Foreign Affairs, Defence and Trade References Committee considered the role and functions of the Defence Force Ombudsman in its 2005 inquiry into the military justice system.¹²⁸ The Committee concluded that one of the major strengths of the Defence Force Ombudsman was its independence from the ADF. However, the Committee noted that the Ombudsman's 2004 Client Satisfaction Survey highlighted that complainants in the Defence Force Ombudsman's jurisdiction were less satisfied than complainants in other jurisdictions. The instances of dissatisfaction related to the inability of the Defence Force Ombudsman to investigate a complaint until after the redress of grievance process is complete, which it noted was an internal Defence process that was frequently prolonged. The Committee did not suggest any change in role for the Defence Force Ombudsman, but proposed another external review agency be established to review military grievances, very much in line with the Canadian Forces Grievance Board.

6.1.7. The Defence Force Ombudsman and Commonwealth Ombudsman have overlapping jurisdictions, and it is not always clear when a complaint is made to the Ombudsman which jurisdiction is being invoked. Indeed, the Ombudsman's most recent annual reports do not attempt to distinguish between complaints about Defence made in the Commonwealth Ombudsman's jurisdiction and complaints made in the Defence Force Ombudsman's jurisdiction. It is understood that staff who work on Defence Force Ombudsman complaints are not allocated exclusively to that jurisdiction, and so the two functions are effectively melded. Where a matter has already been reviewed by the Inspector General ADF, the Defence Force Ombudsman will usually do a paper review only of the Inspector General ADF's report. It is questionable as to the extent, if any, the Defence Force Ombudsman is providing a genuine value-add in such circumstances.

6.1.8. **Administrative Appeals Tribunal.** The Administrative Appeals Tribunal provides independent review of a wide range of decisions made by government agencies. It aims to provide fair, impartial, high quality and prompt review with as little formality and technicality as possible. Review of decisions is merit based: it considers whether, on the facts presented, the *correct or preferable decision* was made in respect of the applicable law(s) and government procedures, and it has the capacity to substitute its own decision for that of the original decision maker.

6.1.9. An enactment can provide that an application can be made for review of decisions made in the exercise of powers conferred by that enactment.¹²⁹ A number of Defence decisions are already reviewable by the Administrative Appeals Tribunal, including:

- Decisions under Defence Determination 2005/15 regarding the payment of 'Severe Injury Adjustment' or 'Additional Death Benefit'.

128 Senate Committee report 2005, chapter 11

129 *Administrative Appeals Tribunal Act 1975*, section 25

- Decisions under regulation 57 of the *Defence Force Regulations 1952* regarding compensation for loss, injury or damage in relation to a 'Defence practice area'.
- Decisions of the Defence Force Retirement and Death Benefits Authority (under the *Defence Force Retirement and Death Benefits Authority Act 1973*).
- Decisions under the *Defence Force (Superannuation) (Productivity Benefit) Determination 1988*.
- Decisions under the *Defence Home Ownership Assistance Act 1988*.

6.1.10. Many government decisions reviewable by the Tribunal relate to the payment of benefits.¹³⁰ There is a case for increasing the number of Defence-related decisions that are reviewable in this way, particularly in relation to the payment of allowances and other benefits under the *Defence Act 1903*.

6.1.11. ADF members do not have an employment contract with the Commonwealth, but instead are commissioned or enlisted. Pay and conditions are paid in accordance with determinations made under the *Defence Act 1903*. The determinations set up a complicated regime for payment of salary, allowances, and other benefits associated with military service:

- Section 58B determinations are made by the Minister's delegates, who are usually civilians within the Department. They cover matters such as the administration of salaries, leave, travel, housing, and many allowances for ADF members. Most matters are covered in Determination 15/2005, as amended. Section 58B determinations are disallowable instruments, but are not legislative instruments within the meaning of the *Legislative Instruments Act 2003*. Disallowable instruments are instruments that must be tabled and are open to Parliamentary veto (disallowance) for a set period, usually fifteen sitting days.
- Section 58H determinations are made by the Defence Force Remuneration Tribunal, and are also disallowable instruments. They provide salaries and pay-related allowances to ADF members.

6.1.12. Decisions about whether a member is entitled to a particular allowance or other benefit under a determination are made by Defence decision makers, including ADF commanders, APS supervisors and both ADF and APS staff in various areas within the Department. Some decisions involve contestable questions of fact and, on occasion, contestable interpretations of a determination. For example, decisions about whether a member is in an interdependent relationship, whether a member's child is their dependant, or whether an application for a particular benefit was made within a time period specified in a determination.

6.1.13. Under current arrangements, external options available to ADF members in relation to allowances and other benefits including review by the Defence Force Ombudsman or judicial review. The Defence Force Ombudsman only has power to make recommendations, while making a court application can be incredibly expensive and resource intensive. There is a range of challenges for an individual who pursues this avenue but is unable to afford legal representation.

130 For example, many Social Security and Veterans' Affairs decisions are reviewable by the Administrative Appeals Tribunal.

6.1.14. Decisions as to eligibility and access to benefits are perfectly suited to review by the Administrative Appeals Tribunal, given eligibility for allowances and other benefits is based on objective criteria under legislation. These types of decision are not inherent aspects of command, and external review that re-makes the decision, rather than simply providing recommendations, gives ADF members an opportunity to seek accessible, independent and definitive review.

6.2. Brainstorming and consultation outcomes

6.2.1. Generally, participants in the consultation process did not provide a great deal of feedback on external review processes. One suggestion was to combine the functions of the Inspector General ADF and the Defence Force Ombudsman, noting that the Defence Force Ombudsman will refer complaints about discipline matters to the Inspector General ADF as it does not have the jurisdiction to review disciplinary matters. Another suggestion was to establish an external review agency outside of the Commonwealth's Ombudsman's office in lieu of the Defence Force Ombudsman.

6.3. Previous inquiries and related reform activities

6.3.1. The 2005 Senate Foreign Affairs, Defence and Trade References Committee *Report on the Effectiveness of Australia's Military Justice System* considered review options for ADF members. It analysed the functions of the Defence Force Ombudsman and Inspector General ADF and concluded that an ADF Administrative Review Board (ADFARB) should be established.¹³¹ The ADFARB was to have, *inter alia*, a statutory mandate to review military grievances and submit its findings and recommendations to the CDF. All complaints were to be referred to the ADFARB unless they had been resolved at unit level within 60 days. The CDF was to be required to give a written response to ADFARB findings and recommendations, including reasons where a recommendation was not followed. The then Government did not agree with the recommendation to establish an ADFARB.¹³²

6.4. Coalition practice

6.4.1. There is some uniformity in the availability of external review of military decision making. Judicial review and disciplinary appeals before civilian courts are available in all jurisdictions. In addition, all jurisdictions permit resort to external review agencies responsible for human rights, equal opportunity and the like.

6.4.2. New Zealand, Canada and Australia all also permit complaints to an external and independent Ombudsman. However, the efficacy of the system varies. In Canada, for example, the Ombudsman has reportedly been unable to resolve the problem of delays in finalising redresses at the Chief of Defence Staff level, because of a statutory requirement that he or she postpone external review until internal review processes are complete.¹³³

131 Senate Committee report 2005, recommendation 29

132 Government Response to Senate Committee report 2005, recommendation 29

133 Lamer Review, p 102

6.4.3. There are currently calls in the UK Parliament for an ‘independent authority’ to be appointed to investigate and review allegations of bullying and harassment.¹³⁴ Currently, the Secretary of State statutorily appoints a Service Complaints Commissioner ‘to provide an alternative point of contact for individuals, either Service personnel or third parties, who wish to make an allegation of discrimination, bullying or harassment or similar issues’ about a Service member and decide whether to refer the complaint to the chain of command. If the SCC refers a complaint, the commanding officer is obliged to ascertain whether the member wishes to make a Service complaint.¹³⁵ The SSC is an external review body, but is not an Ombudsman – in February 2013, the Commons Defence Select Committee supported the SSC’s recommendation that her role change to that of an Armed Forces Ombudsman, noting the opposition to that change in Service leadership wishing instead ‘to preserve the chain of command.’¹³⁶

6.4.4. Aside from the National Defence and Canadian Forces Ombudsman, Canada incorporates additional elements which are described as external review bodies offering internal review. Chief among these is the Military Grievances External Review Board which makes recommendations to the Chief of Defence Staff to resolve redresses at the second tier of internal review. True external review of grievance is available to civilian departmental employees, who may bring individual, group or policy complaints to the Public Service Labour Relations Board for adjudication. Finally, there is the Military Police Complaints Commission, whose difficulties have been detailed above at paragraph 3.5.4.

6.4.5. The need for a form of independent external review of complaints is apparent across jurisdictions, in addition to typical legal rights for review of administrative decision making. Most prefer an Ombudsman structure, although it operates imperfectly in some jurisdictions. It appears to be common practice to permit public servants access to review by a specific external integrity agency, as is the case in Australia. In reference to military personnel, while a true external integrity agency has not yet emerged in other Coalition jurisdictions, the support given to the idea of an ‘independent authority’ to investigate bullying and harassment rather than internal review lends weight to the reform proposed in this review.

6.5. Observations on current arrangements

6.5.1. Most decisions in Defence are already reviewable by external integrity agencies. This includes decisions that are peculiar to the exercise of command, such as posting and promotion decisions (for example, the Defence Force Ombudsman can examine such matters). The exception is discipline matters, although these can be reviewed through the Courts on very limited grounds.¹³⁷ The Inspector General ADF provides an oversight role in relation to military discipline that is not available externally, although the position of the Inspector General ADF as an internal review mechanism (or equally, an external review mechanism) is difficult to

134 For example, ‘Bullying claims in military must be tackled by outsider, say MPs,’ *The Times*, 4 January 2013, <http://www.thetimes.co.uk/tto/news/uk/defence/article3647662.ece> at 14 March 2013.

135 JSP831, para 1.19

136 Eighth Report, Conclusions and Recommendations, paras 15-16

137 While the Courts have jurisdiction to review DFDA matters, this is a very limited jurisdiction and Court fees and costs can be prohibitive.

characterise as the position is a hybrid with characteristics of both internal and external review models. As stated previously, no aspect of Defence decision making should be exempt from external scrutiny. Discipline decisions, which affect the rights of individuals and can have significant career and financial implications for ADF members, are no exception to this general principle. This is not to say that, for example, command decisions made in an operational context should be subject to review by an external agency before they are actioned. Such decisions should not, however, be immune from comment and corrective action at an appropriate time.

6.5.2. As well as ensuring that Defence decisions are subject to external scrutiny, greater resources should be directed to providing independent scrutiny that has previously been lacking or is insufficient. The power imbalance inherent in military concepts of command and control is a high-risk environment in terms of potential abuse of power. Other agencies that have similarly high-risk operations, such as law enforcement and intelligence agencies, have dedicated external integrity agencies to conduct review and provide independent oversight. These agencies play a significant role in ensuring government and public confidence in their operation. While the Defence Force Ombudsman has important integrity functions in relation to Defence, its general effectiveness and ability to provide the level of external scrutiny that is required appears constrained by resourcing and also possibly by co-location with the Commonwealth Ombudsman. For these reasons, consolidation of the Defence Force Ombudsman's current functions with some of the functions now performed by the Inspector General ADF into a Defence-specific external integrity agency has significant merit.

7. Interoperability with coalition partners

7.1.1. The ADF must have the capacity to employ military power in collaboration with international allies and partners. The ADF may lead military coalitions when that is necessary to secure relevant shared strategic interests, or contribute to a military coalition such as the current Australian commitment to NATO in Afghanistan.

7.1.2. As a competent military power, the ADF would be expected to participate in coalition and multilateral operations with minimal support from the lead nation, including maintaining national responsibility for command systems, discipline and administration arrangements associated with its involvement. If Australia were the lead nation, we would expect contributing nations to have their own (credible) national processes. However, in a coalition operating environment, there is some practical need to be accountable to coalition commanders regarding the conduct and outcomes of inquiries and decisions. This is of particular importance where coalition commanders undertake investigations into operational incidents to inform decisions and fulfil accountabilities at the coalition headquarters level, in parallel with national contingent responsibilities to manage, investigate and respond. The situation is not dissimilar from the problem of overlapping investigations within Defence or with external Australian agencies, except that the external element is beyond the control of Australian law.

7.1.3. As a particular issue of concern, ADF inquiries into operational incidents in a coalition setting will often involve evidence collection from coalition military sources, for example witness statements, UAV¹³⁸ footage and aviation accident investigation reports. Conversely, the ADF may be required to provide similar information to a coalition partner. Evidence collection processes and mechanisms for dealing with classified information, including cases where it is proposed that inquiry outcomes are to be made public, also need to be anticipated. Coalition partners will be as concerned as the ADF about passage of classified information and privacy.

7.1.4. ADF processes need to be sufficiently flexible to be able to address these issues, and they also need to be capable of being used anywhere with a minimal resource impost. Supporting arrangements for liaison and information sharing of the outcomes of inquiries need to be planned, ready for activation when an incident occurs. Overall, ADF systems and processes need to be flexible and meet relevant international and national legal obligations, as well as the expectations of our coalition partners. These observations have significant implications for the development of models, and in particular for their utility in deployed settings.

¹³⁸ Unmanned aerial vehicle