THE INTERRELATION OF MILITARY AND CIVILIAN INQUIRIES

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> I have learnt that the relationship of the military justice system to the broader systems of statute and common law is a fascinating topic. Our military-specific microcosm clearly reflects the delicate balance between executive authority, human rights and judicial power which is the foundation of the rule of law in our society.
>
> David Morrison[1]

I INTRODUCTION

On 28 August 2012, an Australian platoon of 24 soldiers travelled 23 kilometres north of Tarin Kowt to Wahab Patrol Base in Afghanistan to join an Afghan National Army ('ANA') outpost in Taliban territory. The mission was to engage in a 10 day mentor exercise with the ANA and to assist coordination with others in the region. On the evening of 29 August 2012, a single ANA soldier, Sergeant Hekmatullah, attacked the Australian soldiers while they were relaxing and playing cards. Hekmatullah fired from an M16-A2 assault rifle, fatally wounding Sapper James Martin aged 21, Private Robert Poate aged 23 and Lance Corporal Stjepan Milosevic aged 40 years, and injuring two others.

These kinds of attacks have been described as 'green on blue' or 'insider attacks' and such killings account for 7 of the 40 deaths of Australians serving in Afghanistan to March 2015.[2] Such attacks, although resulting in a smaller number of casualties overall, often result in high casualty numbers from a single incident. They disturb the conduct of peacekeeping and post conflict operations

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1 Lieutenant General David Morrison, 'Chief of Army Address to the Australian Army Legal Corps Conference' (Speech delivered at the Australian Army Legal Corps Conference, 3 October 2013) <http://www.army.gov.au/Our-work/Speeches-and-transcripts/Chief-of-Army-address-to-the-Australian-Army-Legal-Corps>.

2 *Battle Casualties in Afghanistan,* Australian Government Department of Defence <http://www.defence.gov.au/operations/afghanistan/personnel.asp>. Australians killed in 'green on blue' attacks were Lance Corporal Andrew Jones on 30 May 2011; Captain Bryce Duffy, Corporal Ashley Birt, and Lance Corporal Luke Gavin on 29 October 2011, with another seven injured in that incident; and Lance Corporal Stjepan Milosevic, Sapper James Martin, Private Robert Poate on 29 August 2012, with another two injured in that incident.

as they undermine trust and inhibit the mission of training and handover to local military personnel.[3]

The fatal shooting of the three soldiers on 29 August 2012 resulted in an Inquiry Officer Inquiry ('IOI') being established by the Chief of the Defence Force to report on the facts and circumstances of the incident. This method of inquiry was described as 'a quick, cheap, opaque and relatively low-level inquiry method … rather than the mandatory Chief of Defence's Commission of Inquiry'.[4]

The Inquiry was conducted by an unnamed colonel and a redacted version, available in the public domain, made a number of findings regarding the conduct of the operation, none of which were considered to be causal factors contributing to the deaths.[5] Consequent upon the families' demands, a civilian coronial inquest was held in Queensland in 2014–15.[6] It is generally rare in Australia to have a civilian body inquire into the death of soldiers and actions of military personnel in a conflict zone.[7]

In 2005, the Senate Inquiry into 'The Effectiveness of Australia's Military Justice System' ('*Senate Inquiry 2005*')[8] presented one of the most comprehensive reports to date on military inquiries in Australia. Many witnesses complained at the processes operating within the Australian Defence Force ('ADF') inquiry system at the time.[9] A former ADF member's comments encapsulate the criticisms: 'The bottom line is really quite easy to state: the Defence Force … cannot investigate itself on the one hand and defend itself on the other. This simply cannot be done fairly, without bias, thoroughly or properly'.[10]

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3 The US has suffered greater numbers of casualties from 'green on blue' attacks: Bill Roggio and Lisa Lundquist, *Green-on-Blue Attacks in Afghanistan: The Data* (17 May 2016) Foundation for Defence of Democracies Long War Journal <http://www.longwarjournal.org/archives/2012/08/green-on-blue_attack.php#ixzz3Os6Mn9s6>.

4 Sarah Elks, 'ADF Ordered Cheap, Opaque Inquiry into Diggers' Deaths, Inquest Hears', *The Australian* (online), 14 October 2014 <http://www.theaustralian.com.au/news/adf-ordered-cheap-opaque-inquiry-into-diggers-deaths-inquest-hears/news-story/f31b532f2cb41b1f6b5f96c2d75a30e7>.

5 'Inquiry Officer's Report into the Facts and Circumstances Surrounding a Shooting Incident in Afghanistan that Resulted in the Deaths of LCPL S Milosevic, SPR JT Martin and PTE RHF Poate and Injuries to Other Australian Soldiers on or about 29 August 12' (Report, Australian Defence Force, 28 February 2013) <http://www.defence.gov.au/publications/coi/reports/IOReportInsiderAttack29Aug12.pdf> ('Wahab Inquiry').

6 See *Inquest into the Deaths of James Thomas Martin, Robert Hugh Frederick Poate, Stjepan Rick Milosevic* (unreported, Coroners Court of Queensland, 22 September 2015) ('*Milosevic et al*').

7 The 2008 NSW coronial inquest into Pte Jake Kovco's death in Iraq in 2006 was the last such coronial inquest. This inquest was surrounded by a great deal of controversy: see, eg, ABC Radio, 'Coroner Criticises Media over Kovco Reports', *The World Today,* 17 October 2007 (Eleanor Middleton); Malcolm Brown, 'Soldier Refuses to Answer Kovco Inquest Questions', *Brisbane Times* (online)*,* 13 March 2008 <http://www.brisbanetimes.com.au/news/national/soldier-refuses-to-answer-kovco-inquest-questions/2008/03/12/1205126014164.html>.

8 Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (2005).

9 Ibid 166 [8.70]–[8.71].

10 Evidence to Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, Adelaide, 29 April 2004, 4, quoted in ibid 163 [8.62].

In 2011, another major suite of reviews and audits were commissioned within the ADF.[11] These have resulted in acceptance of some recommended changes, in particular in regard to the Inspector-General ADF ('IGADF') being given responsibility for inquiry into service-related deaths and an enhanced separation from the chain of command to ensure greater efficiency and integrity.[12] However, with the findings of the coroner in the *Milosevic et al* inquest in 2015, it is now timely to consider further the relationship between military and civilian inquiries into military deaths. Although a different jurisdiction, the UK experience of coronial inquests into military events, where the requirements of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* ('*Convention*')[13] and the *Human Rights Act 1998* (UK) apply, see increasing expectations of family members for greater transparency and rights. This is informative for the Australian context. While Australia is not subject to the *Convention* or similar human rights legislation at the federal level, and a direct comparison is therefore not available, the *Senate Inquiry 2005* saw fit to look to common law countries with similar military inquiry arrangements so that we may learn from their experience. This is important as Australia participates in multinational forces with *Convention* countries' military forces, such as the UK. The cases provide insight for future possibilities involving interaction between the civilian and military legal systems. They acknowledge the interaction of international humanitarian law ('IHL') and human rights law ('HRL'). This is a matter that has caused consternation for the UK Ministry of Defence ('MoD').[14] Likewise, the ADF has reportedly exhibited discomfort with a coronial inquest into the death of soldiers in a conflict zone.[15]

The demands for human rights and the influence such concerns have on bereaved parents of military personnel are growing concerns in the Australian environment. Civilian values are at play in the increasing demand for transparent investigations such as coronial inquests into deaths in the military. This article reports the circumstances of the events leading up to the coronial inquest into the deaths of the three Australian service personnel on 29 August 2012, in

11 Secretary of Defence, 'Re-thinking Systems of Inquiry, Investigation, Review and Audit in Defence: Report on Stage A (Department of Defence, 1 August 2012); Secretary of Defence, 'Re-thinking Systems of Inquiry, Investigation, Review and Audit in Defence: Report on Stage B: Models (Department of Defence, 28 February 2014) <http://www.defence.gov.au/Publications/Reviews/SystemsInquiry/>; Geoff Earley, 'Review of the Management of Incidents and Complaints in Defence Including Civil and Military Jurisdiction' (Report, Inspector General Australian Defence Force, 6 September 2011); Roger Gyles, 'HMAS *Success* Commission of Inquiry Allegations of Unacceptable Behaviour and the Management Thereof' (Redacted Report, Department of Defence, 23 December 2011).

12 See *Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Act 2015* (Cth); *Inspector-General of the Australian Defence Force Regulation 2016* (Cth); *Defence Legislation (Enhancement of Military Justice) Act 2015* (Cth).

13 *Convention for the Protection of Human Rights and Fundamental Freedoms,* opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

14 See, eg, Thomas Tugendhat and Laura Croft, *The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power* (Policy Exchange, 2013) 24 <https://policyexchange.org.uk/wp-content/uploads/2016/09/the-fog-of-law.pdf>.

15 Vanda Carson, 'Army Commander Accused of Intimidating Families of Dead Soldiers', *The Courier Mail* (online), 24 October 2014 <http://www.couriermail.com.au/news/queensland/army-commander-accused-of-intimidating-families-of-dead-soldiers/story-fnihsrf2-1227101440193>.

Afghanistan while on active duty. The article considers the UK experience when looking to any lessons learned in light of the coronial inquest in Queensland. The responses of bereaved families to military inquiries into deaths of soldiers have been the subject of research in Israel. This research suggests further lessons for civil–military relations ('CMR'), including consideration of the consequences that arise from the interaction between military and civilian inquiry systems. The *Defence (Inquiry) Regulations 1985* (Cth) ('*DI Regulations*'), *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) and the Defence Force Ombudsman govern all administrative inquiries, sanctions and grievance or complaint processes within the ADF, except for routine inquiries. This is distinct from the separate military discipline system which operates in a quasi-criminal environment. The focus of this article is on the administrative inquiry process. The article addresses the reactions by both the civilian families and the ADF to the military IOI, and the civilian coroner's findings. It argues that greater civilian scrutiny and integration will improve military accountability, operational effectiveness, reduce litigation risk and lessen pain, cost and loss – particularly to families of deceased members. First, it sets out a brief overview of the wider context within which this debate should be understood, namely the extent to which civil legal norms or structures apply to the military as a consideration of overall CMR.

II CIVIL–MILITARY RELATIONS

Janowitz, a sociologist, maintained that for CMR to experience a positive outcome, military values must align more with civilian values.[16] To do this they must be open to changing values. An isolated military, such as an all-volunteer professional military, can more easily lose sight of these values than perhaps a military comprised of citizen-soldiers. In the case of the UK and Israel, the former comprised of all-volunteer soldiers and the latter a citizen-soldier conscripted military, both contain a world of legislated and protected human rights. In Australia, an all-volunteer professional military force operates in an environment where no federal legislated or entrenched bill of rights exists. Former Chief of Army, Lieutenant General Morrison emphasised the need for

> discussion as to how our disciplinary and legal frameworks cope with a much more individualistic workforce most of whom are avid users of social media. Both of these trends empower individuals, but at considerable risk to the reputation of the Army.[17]

A separated military and civilian legal system does not support the integration of civilian and military values. The military experience of an all-volunteer force can create a disjuncture between citizen and soldier, what Feaver

16 Morris J Janowitz, *The Professional Soldier: A Social and Political Portrait* (Free Press, 2nd ed, 1960) 10, 39.

17 Morrison, above n 1, 6.

and Kohn refer to as the 'civil–military gap'.[18] This gap refers to the differing values of military and civilian society and how this influences both military effectiveness and the polity as regards upholding democratic principles. Greater difference in values and culture increases the opportunity for misunderstanding, and in turn the likelihood of isolation and development of a separate military society.[19]

While military discipline, including administrative sanction, is said to have undergone a 'civilianisation'[20] – a process that brings the military system into closer alignment with fundamental concepts available in the civilian system – it remains separate and outside the constitutional Chapter III Courts in Australia.[21] In the situation of inquiries, for instance, under the *DI Regulation*s, the investigating officer in the Wahab Inquiry, a non-lawyer, remained protected from testifying at the inquest because he had the 'immunity of a High Court judge'.[22]

In the changing environment in which wars are fought, states are defended and soldiers are recruited, there is need for consideration of CMR.[23] Civil–military theory requires the civil control of the military, and is the operating principle by which the military works under civilian institutions of governance and through which military power is contained vis-a-vis the individual. The principle holds a tension between the demand that a force is strong and disciplined in order to defend society, but also that the military is not so strong as to threaten the society it protects. This latter aspect not only demands an understanding of the society's behavioural expectations, but also that a strong institutional respect for the separation of powers ensures balanced power is maintained.

Arguments for separate treatment based on 'command and control' and the exceptional nature of the activities undertaken by particular bodies, such as the military, are used to justify exclusion of groups from normal civilian procedures.[24] These exceptions highlight the need for careful scrutiny of why and

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18 Peter D Feaver and Richard H Kohn, 'Conclusion: The Gap and What It Means For American National Security' in Peter D Feaver and Richard H Kohn (eds), *Soldiers and Civilians: The Civil–Military Gap and American National Security* (MIT Press, 2001) 459.

19 See, eg, Andrew Podger, Catherine Harris and Rodger Powell, 'Final Report of the Learning Culture Inquiry: Inquiry into the Learning Culture in ADF Schools and Training Establishments' (Report, Australian Defence Force, July 2006).

20 Gerry R Rubin, 'United Kingdom Military Law: Autonomy, Civilianisation, Juridification' (2002) 65 *Modern Law Review* 36.

21 See Alison Duxbury, 'Comments: The Defence Power, Chapter III and *White v Director of Military Prosecutions* (2007) 235 ALR 455; [2007] HCA 29' (2007) 18 *Public Law Review* 233, 233; Kathryn Cochrane, '*Lane v Morrison* [2009] HCA 29' (2010) 61 *Australian Institute of Administrative Law Forum* 62, 67.

22 *Defence (Inquiry) Regulations 1985* (Cth) reg 61(1). See also Secretary of Defence, 'Re-thinking Systems of Inquiry, Investigation, Review and Audit in Defence (Stage B): Annex B: Model Development' (Report, Department of Defence, 28 February 2014) 33 [4.2.18].

23 See, eg, Michael C Desch, *Civilian Control of the Military: The Changing Security Environment* (John Hopkins University Press, 1999).

24 See Administrative Review Council, 'Federal Judicial Review in Australia' (Report No 50, September 2012) 220–1 (Recommendation B21), 249 (Recommendation C24).

how the civilian realm should control the military. Therefore, it is appropriate to take account of how these institutional positions are likely to impact on CMR.[25]

If important lessons are forgotten or actions never properly investigated or taken, this can have an adverse effect on CMR that should not be overlooked. Soldiers and citizens represent the two sides of CMR, and what happens to either one affects the health of the relationship. Civilians may have lost sight of the principles involved here, not to mention the importance of monitoring a military that acts in their name.[26] In turn, military personnel may become disillusioned with the society they defend.[27] When civilians are out of touch with military operations, the military risks developing a lack of respect for their civil governance.[28] This sense of alienation from citizens has been expressed by Australian Defence Association members: 'Many Australians are completely disengaged from their defence force on a day-to-day basis'.[29]

Until such time as this 'nettle is grasped', bereaved parents are likely to increase their demands for open civilian investigations. Most concerning is the unacknowledged potential consequences of failure by government to establish the proper systems to transparently investigate ADF incidents and deaths which may ultimately lead to further threats to ADF personnel. Upholding the *Geneva Conventions* and observing human rights through proper and transparent oversight that engages civilian values is connected to stopping the payback motive of insider attacks. The Defence Science and Technology Organisation ('DSTO') Cultural Study[30] demonstrated that cultural 'slights' may induce insider attacks. Thus, far from protecting the state's national interests, not dealing with these matters in an open and transparent manner may result in future violent

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25 See, eg, Harry Evans, 'The Senate, Accountability and Government Control' (Papers on Parliament No 48, Parliamentary Studies Centre, Australian National University, 16 November 2007); Bruce George and J David Morgan, 'Parliamentary Scrutiny of Defence' (1999) 5 *Journal of Legislative Studies* 1.

26 See, eg, Australian Broadcasting Corporation Radio National, 'Modern Warfare', *Public Forum from the Perth Writers' Festival,* 26 March 2013 (Phillip Adams).

27 See Glen Segell, 'The Nation-State, Nationalism, and Civil–Military Relations Theory' in Constantine P Danopoulos, Dhirendra Vajpeyi and Amir Bar-or (eds), *Civil–Military Relations, Nation-Building, and National Identity: Comparative Perspectives* (Praeger Publishers, 2004) 51–2. See also Anthony Forster, 'The Military Covenant and British Civil–Military Relations: Letting the Genie Out of the Bottle' (2012) 38 *Armed Forces & Society* 273.

28 See Glenn Sulmasy and John Yoo, 'Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror' (2007) 54 *University of California Law Review* 1815; Andrew J Bacevich and Richard H Kohn, 'Grand Army of the Republicans: Has the US Military Become a Partisan Force?' (1997) 217(23) *The New Republic* 22.

29 Editorial, 'Disengagement, Deficient Debate and Defeat' (2007) 24(1) *Defender* 1. See also Australian National University, 'Public Opinion Towards Governance: Results from the Inaugural ANU Poll' (poll findings, 2008) <http://politicsir.cass.anu.edu.au/sites/politicsir.anu.edu.au/files/2008-04-16_ANU poll_governance_report_0.pdf>. In 2008 the least popular areas of government expenditure included the military, culture and the arts, and unemployment benefits: at 12. See also Ian McAllister, 'Public Priorities for Government Expenditure' (Report No 15, ANU College of Arts and Social Sciences, January 2014) 4 <http://politicsir.cass.anu.edu.au/sites/politicsir.anu.edu.au/files/ANU_Attitudes PollExpenditureReport_0.pdf>.

30 Defence Science and Technology Organisation, 'Cultural Compatibility Study' (Report, Department of Defence, 22 June 2012) 2 <http://www.defence.gov.au/publications/coi/reports/DSTO%20Cultural%20 Compatibility%20Study.pdf>. See also David A Arenas, 'Inside *the Wire Threats – Afghanistan: Green-on-Blue'* (Handbook No 12-07, Centre for Army Lessons Learned, February 2012).

incidents. Failure to consider there may be better methods, or to be open to change in order to improve operations and raise values and cultural awareness, mean the military never really has to change, which may continue to put lives at unnecessary risk.

III MILITARY INQUIRIES

The *Senate Inquiry 2005* stressed the need for investigating authorities to be 'above any suspicion of partiality'[31] and proposed the establishment of an independent Australian Defence Force Administrative Review Board ('ADFARB'). The then Howard Government rejected the recommendation, instead regulating for a Chief of Defence Force Commission of Inquiry ('COI'). This followed the normal procedure of providing for inquiry bodies via regulation when such bodies are dealing with defence.[32] The COI was an addition to the existing arrangements for appointing investigating officers and boards of inquiry. Inquiries are separate from military disciplinary processes and administrative sanctions, both of which are possible outcomes from an inquiry process. However, inquiry findings, the focus of this article, may inform others when making administrative or disciplinary decisions. At times, military events have resulted in parliamentary inquiries[33] or appointment of inquiries independent of the military.[34] A culture of inquiry and review seems prevalent in

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31 *Senate Inquiry 2005*, above n 8, 254 [12.75].

32 Department of Defence, 'Government Response to the Senate Foreign Affairs, Defence and Trade References Committee: *Report on The Effectiveness of Australia's Military Justice System*' (Report, Department of Defence, October 2005) 20–1 <http://www.defence.gov.au/mjs/docs/mji_government_response_4oct052.pdf>. See also *Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Act 2015* (Cth); *Inspector-General of the Australian Defence Force Regulation 2016* (Cth). Note that 'Court of Inquiry' means any of the following according to *Defence (Inquiry) Regulations 1985* (Cth) reg 3(1):

(a) a General Court of Inquiry under Part II;
(b) a Board of Inquiry under Part III;
(c) a Combined Board of Inquiry under Part IV;
(d) a Chief of the Defence Force Commission of Inquiry under Part VIII.

33 See, eg, Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Sexual Harassment in the Australian Defence Force* (1994); Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice Procedures in the Australian Defence Force* (1999); Joint Standing Committee for Foreign Affairs, Defence and Trade, Parliament of Australia, *Rough Justice? An Investigation into Allegations of Brutality in the Army's Parachute Battalion* (2001); *Senate Inquiry 2005*, above n 8.

34 See, eg, Kathryn Quinn, 'Sexual Harassment in the Australian Defence Force' (Report, Department of Defence, 1996) <http://www.defence.gov.au/fr/reports/shinadf.pdf>; Brigadier A R Abadee, 'A Study into the Judicial System under the *Defence Force Discipline Act*' (Report, Department of Defence, 1997); J C S Burchett, 'Report of an Inquiry into Military Justice in the Australian Defence Force' (Report, Department of Defence, 2001); Sir Laurence Street and Les Fisher, 'Report of the Independent Review on the Health of the Reformed Military Justice System' (Report, Department of Defence, 23 January 2004); Foreign Affairs, Defence and Trade Group, 'Women in the Armed Forces: The Role of Women in the Australian Defence Force' (Report, Department of Defence, 23 January 2009) <http://www.aph.gov.au/library/intguide/fad/women_armed.htm>; Elizabeth Broderick, 'Review of the

the ADF with 24 reviews from 1995 to 2012, 18 being external.[35] While it is acknowledged that the ADF needs to respond immediately to incidents for reasons of operational effectiveness, it is important to address a cultural shift that enables the benefits provided by the civilian system's transparency and equality of treatment for all citizens, including soldiers.

The standard practice where deaths occur in the Australian military is for the military to conduct its own internal review of the matter. This can extend to a number of different types of inquiry, not including the initial Defence Incident Report, which replaced the Quick Assessment ('QA') or initial assessment that logically takes place.[36] Administrative inquiries are created under authority of the *Defence Act 1903* (Cth) sub-sections 124(1)(gc) and (h), the latter relating to IGADF inquiries, and each have different legal and procedural requirements. The IGADF has been tasked to undertake inquires relating to the military justice system.[37] Boards of Inquiry may inquire into accidents and injury, other than death, or matters relating to defence assets.[38] The COI is mandated where deaths of military personnel have occurred, and are not conducted in public unless the appointing authority specifically directs otherwise.[39] The appointing authority can appoint a legal practitioner to assist the COI[40] and the President must have judicial experience and be a civilian.[41] A COI, and inquiries above an IOI level, are used very infrequently.[42] It has been reported that:

> There have been 66 service-related deaths in the ADF in the five years prior to April 9, 2014. Of those, 32 occurred in Afghanistan. Only one of those was investigated by a COI, that of the death of a soldier in 2011 in a helicopter crash. Colonel Waddell said the higher level investigation was ordered in that case because it was a 'major loss of capital equipment'.[43]

The most common inquiry used is an IOI which can inquire into any matter for which it has been appointed to inquire into and that is under its control. The scope of the inquiry is determined by the ADF and such inquiries are closed with no evidence taken on oath or affirmation, and no witness examination by

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Treatment of Women at the Australian Defence Force Academy' (Audit Report, Australian Human Rights Commission, July 2013) <http://www.hreoc.gov.au/defencereview/index.html>.

35 See, eg, Clint Arizmendi, 'A Culture of Reviews' (2013) 192 *Australian Defence Force Journal* 81.

36 See Department of Defence, 'The Reporting and Management of Notifiable Incidents' (Defence Instructions (General) 45-2, 26 March 2010); Department of Defence, 'Incident Recording' (Defence Instructions (General) 67-2, Department of Defence, 1 August 2015); Earley, above n 11; Gyles, above n 11, 59–61.

37 *Defence Act 1903* (Cth) ss 110C(1), (3), 110DA; *Defence (Inquiry) Regulations 1985* (Cth); *Inspector-General of the Australian Defence Force Regulation 2016* (Cth).

38 *Defence (Inquiry) Regulations 1985* (Cth) reg 23; Pt III. Pt IV also provides for the establishment of a Combined Board of Inquiry where members of another state's military forces are involved.

39 *Defence (Inquiry) Regulations 1985* (Cth) reg 117(2)(a). See also Gyles, above n 11.

40 *Defence (Inquiry) Regulations 1985* (Cth) reg 51.

41 *Defence (Inquiry) Regulations 1985* (Cth) reg 112(2)(a)–(b).

42 See Department of Defence, *Defence Publications*: *Commissions of Inquiry* (2016) <http://www.defence.gov.au/publications/coi/>.

43 Elks, above n 4. See also in relation to soldier deaths on Australian territory: Chief of the Defence Force, 'Commission of Inquiry Report Concerning the Death of ABBM Ewan Keith McDonald on October 23, 2011' (Report, 16 August 2013); Chief of the Defence Force, 'Commission of Inquiry Report into the Death of Private Jacob Lee Lazarus on 19 January 2011' (Report, 26 May 2013).

lawyers.[44] Coercive powers enabling gathering of information are provided for by the regulations.[45] Notwithstanding these developments and the many layers of inquiry at significant cost, the question regarding the suitability of the military investigating itself remains outstanding.

Inquiries by the ADF are not preclusive of civilian investigations such as coronial inquests,[46] although a coroner may, and has, declined to conduct an inquest when satisfied that the military inquiry is sufficient.[47] Only one other civilian inquest into a soldier's death while stationed overseas has occurred in recent times: the inquest into the death of Private Jake Kovco whilst stationed in Iraq. That inquest in 2008 attracted considerable controversy for a number of reasons, including the need for improvements in weapons handling training, scene protection, evidence gathering, investigative abilities and repatriation processes.[48] In the *Milosevic et al* inquest, the Queensland Minister for Justice and Attorney-General took the rare step of directing the coronial inquest under the powers provided by the *Coroners Act 2003* (Qld).[49]

Undertakings in the form of a memorandum of understanding or a protocol between the coroner and any military inquiry have been encouraged, and exist to assist cooperation and ensure that the civilian and military systems can operate side by side. Protocols created after the *Senate Inquiry 2005* aim to ensure efficient management of the processes and avoid duplication of effort where the circumstances surrounding the death of ADF personnel are investigated.[50] To facilitate this process further, the Queensland Coroner, for example, has a Memorandum of Understanding ('MOU') with the ADF.[51]

Neither the coronial inquest nor military inquiries is judicial in nature, nor subject to the rules of evidence,[52] although natural justice applies.[53] Both operate

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44 *Defence (Inquiry) Regulations 1985* (Cth) regs 72–3. Eligibility to be an Inquiry Officer is provided for in *Defence (Inquiry) Regulations 1985* (Cth) regs 70, 70A. The practice with IOIs is appointment of a legal officer as an inquiry assistant and thus lawyers are often involved in IOI witness examination.

45 See, eg, *Defence (Inquiry) Regulations 1985* (Cth) regs 12, 30, 53, 74. See especially reg 12 regarding General Court of Inquiry coercive powers in regard to any witness and reg 74 regarding IOI coercive powers as it relates to Defence Force personnel.

46 Federal, State or Territory agencies, such as State or Territory coroners or police, Comcare and the Commonwealth Ombudsman can also be involved.

47 *Senate Inquiry 2005*, above n 8, 188 [9.30]: 'Mrs McNess … was distressed by the decision of the coroner not to conduct an inquest despite the request by both families that one be held'.

48 See ABC Radio, above n 7; Brown, above n 7. See also Australian Defence Force Board of Inquiry, 'Report of the Board of Inquiry into the Death of 8229393 Private Jacob Kovco at the Secdet Accommodation in the Australian Embassy Compound Baghdad on 21 April 2006' (Report, Australian Defence Force, 30 October 2006) <http://www.defence.gov.au/publications/kovcoreport.pdf>; Robert Payne, '"Skylarking": Homosexual Panic and the Death of Private Kovco' (2008) 14(2) *Cultural Studies Review* 34.

49 *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 3 [23] (Deputy State Coroner Lock); *Coroners Act 2003* (Qld) Pt 3: An inquest can be directed by the Attorney-General: at s 27(1)(b); and by the Minister: at s 11(4)(b).

50 See, eg, Chief of the Defence Force, 'Commission of Inquiry into the Death of Private Edward Alexander McBride' (Report, Australian Defence Force, 31 January 2010) 7 [51]–[52] ('McBride Inquiry').

51 Queensland State Coroner, 'State Coroner's Guidelines Chapter 11: Memoranda of Understanding' (Guidelines, Version 2, Queensland Coroner's Court, November 2014) 2. See also *Milosevic et al* (unreported, Coroners Court of Queensland 22 September 2015) 3 [24] (Deputy State Coroner Lock).

52 *Defence (Inquiry) Regulations 1985* (Cth) reg 50.

under an inquisitorial system. In the case of the coronial inquest, in most Australian jurisdictions, it is to answer who, how, when, where and what in relation to a person's death, and also to comment on ways to prevent such deaths, improve matters of public health or safety, or the administration of justice where these may be connected with the death.[54] Military inquiries aim to improve processes and operations in the military through lessons learned. The civilian coronial inquest and military inquiry are complementary and, for instance, a coronial inquest can serve a number of benefits:

> Quite apart from the advantage to the Commission of Inquiry in utilising the expertise available from the Queensland Coroner's office, an additional usefulness is the perception that a civil authority has been involved in what would otherwise be an all military proceeding. In other Inquiries relatives of deceased service personnel have on occasions been dissatisfied with the ADF proceedings and sought Coronial inquests, expressing them to be a more open type of Inquiry.[55]

It may be argued there is value in continuing both processes acknowledging that they serve very different purposes: one to inform ADF command in a quick and timely manner for operational purposes, and the other to provide public accountability and context for families in particular. However, undertaking one cannot satisfy the purpose of the other. Anything beyond initial incident assessments and operational purposes may be better served by a civilian process. Notwithstanding, military inquiries continue to run alongside the civilian inquiry mechanism with a difficult overlap occurring. This not only has the potential to increase costs but, if operating as a substitute for a civilian inquest, an internal military inquiry may continue to be challenged by families of deceased soldiers for lack of transparency. It was suggested in 2008 that:

> It is probably too early to make generalised comments concerning the recently instituted Commissions of Inquiry but properly controlled (whilst still according natural justice/procedural fairness) they should become a useful method of providing necessary advice to CDF in a timely and cost effective manner.[56]

In 2016, it is clear that the COI has been under-utilised and therefore the dissatisfaction of bereaved defence families, in particular, remains. It leaves the question: why, if such a process is available, is it not used in circumstances such as *Milosevic et al* when Australian service personnel lose their lives?

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53 '[T]his does not mean that all rules of evidence may be ignored as of no account … although rules of evidence … do not bind, every attempt must be made to administer "substantial justice"': *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, 256 (Evatt J).

54 See, eg, *Coroners Act 2003* (Qld) ss 45(2), 46(1). See also *Coroners Act 1997* (ACT); *Coroners Act 2009* (NSW); *Coroners Act 1993* (NT); *Coroners Act 2003* (SA); *Coroners Act 1995* (Tas); *Coroners Act 2008* (Vic); *Coroners Act 1996* (WA).

55 Andrew Kirkham, 'Administrative Law as It Affects Commissions of Inquiry' (Paper delivered at the Defence Watchdogs Seminar: 'Administrative Oversight of Military Justice', Canberra, 26 November 2008) 9 <http://www.ombudsman.gov.au/__data/assets/pdf_file/0013/36211/Speech-AndrewKirkham-DefenceWatchdogsSeminar26Nov08.pdf>.

56 Ibid 10. See also McBride Inquiry, above n 50, 6 [46]–[50].

IV THE INCIDENT

The Australian platoon sent on the mentoring mission to Wahab on 28 August 2012 was part of an exercise to improve trust between the ANA and the international forces after a number of incidents had undermined it.[57] Allegations concerning soldiers from other states killing civilians,[58] mutilating insurgents[59] and disrespecting Afghan customs and religious beliefs had contributed to the general atmosphere of tension.[60] The filming and distribution of events such as US military personnel on Bagram Air base allegedly burning the Koran inflamed Afghan people and resulted in riots.[61] Koran burning was mentioned by Hekmatullah after his arrest when interviewed by Australian journalists.[62]

The Australian soldiers were led by Lieutenant Lopez, a junior officer who first arrived in Afghanistan in June 2012. While he had conducted several local patrols, he had had no previous operational experience.[63] After arrival at Wahab base on 28 August, the Australians participated in a joint patrol with ANA soldiers during which they located a large unexploded device requiring the US forces to attend. Conducting the operation in overwhelming 48-degree heat and in full protective armour meant the soldiers were relieved when they arrived back at base to be allowed to relax and wear Physical Training ('PT') dress.[64] This included the roving guard.[65] Soldiers considered this was necessary to rest their bodies and air their feet in the extreme conditions.[66]

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57 It was the first time a force element patrol was deployed to Wahab base: Wahab Inquiry, above n 5, 18 [62].

58 Taimoor Shah and Graham Bowley, 'US Sergeant Is Said to Kill 16 Civilians in Afghanistan', *The New York Times* (online), 11 March 2012 <http://www.nytimes.com/2012/03/12/world/asia/afghanistan-civilians-killed-american-soldier-held.html?pagewanted=all&_r=0>; 'Afghan Soldier Killed at Massacre Scene as Afghans Rage on Streets', *Russian Times News* (online), 13 March 2012 <http://rt.com/news/afghanistan-massacre-shooter-protest-431/>.

59 Mark Boal, 'The Kill Team: How US Soldiers in Afghanistan Murdered Innocent Civilians', *The Rolling Stone* (online), 2 March 2011 <http://www.rollingstone.com/politics/news/the-kill-team-20110327#ixzz3QBGcmbV7>; Patrick Cockburn, 'Soldier Who Killed and Mutilated Afghan Villagers is Jailed for Life', *Independent News* (online), 12 November 2011 <http://www.independent.co.uk/news/world/americas/soldier-who-killed-and-mutilated-afghan-villagers-is-jailed-for-life-6261035.html>.

60 Austin Long, '"Green on Blue": Insider Attacks in Afghanistan' (2013) 55(3) *Survival: Global Politics and Strategy* 167.

61 Alissa J Rubin, 'Afghan Protests over the Burning of Korans at a US Base Escalate', *New York Times* (online), 22 February 2012 <http://www.nytimes.com/2012/02/23/world/asia/koran-burning-in-afghanistan-prompts-second-day-of-protests.html>.

62 ABC, 'The Enemy Within', *Four Corners*, 27 October 2014 (Quentin McDermott and Clay Hichens) <abc.net.au/4corners>.

63 Wahab Inquiry, above n 5, 39 [133]. Lieutenant Lopez was subsequently promoted to Captain: *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 9 [54] (Deputy State Coroner Lock). Note Captain Lopez is referred to by the rank of Lieutenant throughout this article as that was the rank he held at the time of the incident discussed.

64 Wahab Inquiry, above n 5, 18 [63], 35 [118]. See also *The Army Dress Manual* (15 April 2016) Australian Army <http://www.army.gov.au/Our-work/Equipment-and-clothing/Army-Dress-Manual>. The policy settles all protocols for army dress.

65 Wahab Inquiry, above n 5, 36 [121].

66 Ibid 35 [118]; *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 18 [114]–[115] (Deputy State Coroner Lock).

The order to segregate Australian and ANA soldiers was made difficult by the unusual layout and terrain. A decision was made to station the Australians at the northwest end of the camp under makeshift tarpaulin shades strung between the Australian military vehicles.[67] Lieutenant Lopez reported in the IOI that he chose not to station Australian soldiers in any of the lookout posts, considering that there was insufficient manpower to patrol all of the watch towers, and the mission was meant to build trust.[68] He stated:

> The first couple of days are all about building a rapport and then seeing the results of that on the ground in the future. There's such a high degree of trust that you need to place in them with the mission that we have. I was keen to encourage as much interaction as I could, because I believe that facilitates our mission.[69]

The atmosphere was described as relaxed and friendly.[70] Earlier in the day both ANA and Australian soldiers had worked out in a makeshift gym. Hekmatullah had participated in this.[71] In the evening Australian soldiers played cards, watched movies or wrote letters. A roving guard was placed on duty but no barrier or stationary guards were in place between the Australian and ANA troops. The arrangement of having a roving guard in the evening was supported by Sergeant Burke and the section commanders.[72] That the roving guard was also allowed to wear PT dress was criticised at the IOI.[73] The unescorted access by ANA soldiers into the Australian area was a matter that Lieutenant Lopez said caused him concern, and he had intended to place restrictions on, but admitted 'it's something I didn't do immediately'.[74] These factors were considered a weakness and error of judgment on the part of Lieutenant Lopez, Sergeant Burke and Major Gordon, by the IOI.[75]

At approximately 9.45pm on 29 August, Hekmatullah, who had been in the Australian sector earlier in the evening, went to attend to night guard duty but instead walked towards the Australian 'encampment' and from approximately five metres opened fire with a M16-A2 discharging 26 rounds.[76] The scene was described as both 'surreal and chaotic'.[77] Two soldiers returned fire, one shooting towards the north guard tower and the other towards the southern facing tower. No further fire was returned and no other shots were fired by Australians.[78] The fact the ANA in the watch towers were not shot was credited to the Australian soldiers' professional control in the circumstances.[79]

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67 Wahab Inquiry, above n 5, 19 [65], [96].
68 Ibid 28 [98].
69 Ibid 28 [97](c).
70 Ibid 35 [118]–[119].
71 Ibid 20–1 [70], 34 [114].
72 Ibid 28–9 [99].
73 Ibid 36 [121]–[122].
74 Ibid 33 [112].
75 Ibid 34 [116].
76 Ibid 2 [4], 10 [36]; *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 1 [6]–[7] (Deputy State Coroner Lock).
77 ABC, above n 62.
78 Wahab Inquiry, above n 5, 10 [37].
79 Ibid 41 [142].

An ADF Investigative Service Team arrived on the Wahab base within a short time of the incident to investigate, and all Australians left the base on 30 August 2012.[80] Hekmatullah escaped, only to be captured in February 2013, after a significant search operation.[81] After three months he confessed, and was tried before an Afghan court and is currently facing the death penalty in Afghanistan.[82] His alleged motives for the shootings included having seen the film of the burning of the Koran by US soldiers and the cartoon of the prophet Muhammad.[83]

V THE MILITARY INVESTIGATION IN *MILOSEVIC ET AL*

The redacted version of the Wahab Inquiry[84] indicates a colonel of unknown name was appointed to head the Inquiry. An initial Quick Assessment[85] to establish the facts was headed by Major Travis Gordon (Officer Commander Mentoring Task Unit). Major Gordon was the commanding officer responsible for the deployment of the mission and was asked to investigate his own activity. This drew criticism from the coroner.[86] An investigative team also travelled to Afghanistan and between 14 September and 3 October 2012, interviewed 35 personnel from the Australian and the International Security Assistance Force ('ISAF').[87] The team were prevented from visiting the scene at Wahab base.[88] The IOI drew on documents provided by the Investigative Team in coming to an assessment of the incident. The IOI concluded there was no evidence of collusion among those interviewed.[89] Unlike civilian investigations where attempts are

80 Ibid 2 [7], 11 [41].

81 *Ian McPhedran and Patrick Lion,* 'How Super-Spies Tracked Down Rogue Afghan Sergeant Hekmatullah', *News Limited (online),* 2 October 2013 <http://www.news.com.au/world/how-superspies-tracked-down-rogue-afghan-sergeant-hekmatullah/story-fndir2ev-1226731791900>.

82 *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 1 [9] (Deputy State Coroner Lock). See also Jeremy Kelly, 'Afghan Soldier Loses Final Appeal against Death Penalty for Murdering Three Australian Troops', *News Limited* (online), 27 October 2014 <http://www.news.com.au/entertainment/tv/afghan-soldier-loses-final-appeal-against-death-penalty-for-murdering-three-australian-troops/news-story/15c755bba04b16ec46b8b33ad3960b8a>.

83 ABC, above n 62. See also Foreign Staff, 'Prophet Mohammed Cartoons Controversy: Timeline', *The Telegraph* (online), 4 May 2015 <http://www.telegraph.co.uk/news/worldnews/europe/france/11341599/Prophet-Muhammad-cartoons-controversy-timeline.html>.

84 Wahab Inquiry, above n 5.

85 The Quick Assessment has been superseded by a Defence Incident Report DI(G) PERS 20-6 Death of Australian Defence Force Personnel: see Secretary of Defence, 'Re-thinking Systems of Inquiry, Investigation, Review and Audit in Defence (Stage B): Annex H: Current Defence Reporting Requirements' (Report, Department of Defence, 19 February 2014), which contains an indicative (not exhaustive) list compiled during Stage B of numerous reporting requirements in Defence documents. For criticism of the Quick Assessment, see Secretary of Defence, 'Re-thinking Systems of Inquiry, Investigation, Review and Audit in Defence (Stage B): Annex A: Summary of Observations from Brainstorming and Consultation' (Report, Department of Defence, 19 February 2014). See also Earley, above n 11.

86 *Milosevic et al* (unreported, Coroners Court of Queensland 22 September 2015) 7 [43] (Deputy State Coroner Lock).

87 Wahab Inquiry, above n 5, 7 [21], 8 [22].

88 Ibid 7 [20].

89 Ibid 8 [22].

made to gather evidence from any relevant witnesses, none of the ANA soldiers provided statements.[90]

The IOI, in Findings 4 and 5, was unable to determine the reasons Hekmatullah attacked the Australian soldiers but ruled out cultural factors. The IOI concluded there was no evidence of personal or cultural offence, insulting language or behaviour by any Australian soldier.[91] The 'atmospherics' were considered good.[92] The IOI noted that Hekmatullah had participated in the makeshift gym with Australian soldiers earlier in the day. It was also noted that Hekmatullah may have been disgruntled as he had not been given leave and could not send pay to his wife.[93] The IOI determined Hekmatullah's actions were not linked to the Taliban although there was evidence of family sympathies and he may have sought their assistance when hiding after the incident.[94] This varied from the ANA investigation which, in a brief two page report, declared the incident a 'planned terrorist attack'.[95] The IOI dismissed this report as providing 'insufficient detail and analysis to enable the Inquiry to fully understand the report's findings as presented'.[96]

The most significant finding, Finding 6, was that prior to the patrol there was no awareness by ADF or Coalition Force members of any intelligence or information relating to a specific insider threat and therefore there were no weaknesses or deficiencies in intelligence preparation or advice.[97] The IOI noted that there was no specific discussion of insider threats in the intelligence presentation to the mission, but that it was a background matter regularly present in daily battle updates as an increase in such attacks had occurred in August 2012.[98] This came under scrutiny by the coronial inquest with a very different conclusion being drawn.

Findings 17 and 18 of the IOI were not approving of the decisions and actions taken by two soldiers in relation to the force protection arrangements at Wahab, which the IOI found were inadequate to protect from insider attack but could not go so far as to find that these decisions and actions were direct or indirect causal factors leading to Hekmatullah's attack. The failure to occupy at least one of the towers in the northwest that overlooked the Australians on a fulltime basis was determined to be inadequate force protection that placed the soldiers at potential significant risk.[99] Further, the use of only one guard

90 Ibid 48–9 [166]: the Inquiry noted that the justification for this was ANA commanders would most likely prevent individual comment.
91 Ibid 3 [10], 13 [44], 13 [49].
92 Ibid 19 [66].
93 Ibid 11–12 [42]–[43].
94 Ibid 12–13 [43].
95 Ibid 48 [165].
96 Ibid 48–9 [166].
97 Ibid 14 [51]. But see at 22 [77].
98 Ibid 14–15 [52]–[53], 17 [58]. See also Roggio and Lundquist, above n 3.
99 Wahab Inquiry, above n 5, 29 [100] (Finding 11).

('guardian angel') was heavily criticised[100] and found to be an inadequate level of force protection.[101]

In relation to the state of PT dress the IOI concluded the 'relaxed tactical disposition' and some personal discipline aspects were not in accordance with existing standing operating procedures or tactics, techniques and procedures employed by other patrols in Afghanistan.[102] Given this, it was reasonable to conclude that the Australian soldiers' state of readiness and response was less than could justifiably be expected and was described as 'complacent'.[103] This resulted in disciplinary action regarding the inappropriate state of dress of the roving picket[104] and a finding that there was a shortfall in decision-making regarding the wearing of PT dress.[105] This was despite the soldiers claiming having weapons and body armour was sufficient in the overwhelming heat as they needed to wind down and rest the body.[106]

The IOI made three recommendations. Two were for the Chief of Defence Force to consider whether administrative action should be taken against the two soldiers in relation to Findings 17 and 18. The third was that a COI would not be warranted as there was unlikely to be any new material or evidence uncovered.[107] In conducting the IOI it is noted that the families of those killed were not spoken to,[108] although they were provided with briefing updates, and the autopsy report was not available at the time of the IOI or made available to the parents.[109] These findings were significantly adjusted by the civilian coronial inquest exposing responsibility at a higher level for some of the issues that the IOI had placed with lower-order soldiers.

VI THE RESPONSE

Following the IOI a number of changes took place within the ADF. These included developing a Centre for Army Lessons Learned 'Inside the Wire' Green on Blue Handbook and educating Australian soldiers on the DSTO Cultural Compatibility Study before deployment.[110] ISAF also communicated with the Government of the Islamic Republic of Afghanistan in regard to the green on blue attacks.[111] As to the effectiveness of these changes, the public are unable to

100 Ibid 30–1 [104]–[105].
101 Ibid 31–2 [106] (Finding 12).
102 Ibid 32 [108]–[110] (Finding 13).
103 Ibid 32 [108].
104 Ibid 37 [124].
105 Ibid 37 [125] (Finding 15).
106 Ibid 35 [118].
107 Ibid 51 [173] (Finding 22).
108 Ibid 47 [161]. See also the need to consider carefully family needs where a sudden and violent death has occurred: Pål Kristensen, Lars Weisæth and Trond Heir, 'Bereavement and Mental Health after Sudden and Violent Losses: A Review' (2012) 75 *Psychiatry* 76.
109 Wahab Inquiry, above n 5, 47–8 [162].
110 Ibid 46 [159](e), (f); Arenas, above n 30. See also Defence Science and Technology Organisation, 'Cultural Compatibility Study', above n 30.
111 Wahab Inquiry, above n 5, 50 [171].

judge as most of the responses are redacted in the IOI report. However, it is known that after the IOI, incidents of insider attacks continued.[112] Certainly, the coroner noted that after the Hekmatullah attack the security posture took precedent over the mentoring focus.[113] The coroner was concerned around the training preparation for mentoring, indicating:

> What I can say is that should there be future mentoring operations undertaken by Australian forces, the ADF should review the training that exists to ensure it is indeed 'World Best Practice' … and meets the 'gold standard' as characterised by LTCOL Scott.[114]

Hugh Poate, Poate's father, alleged there were serious failures in planning and intelligence.[115] Fragmentary Order ('FRAGO') 13: Force Protection Measures to the Inside the Wire Threat *had specifically highlighted the dangers of green on blue attacks* and set a key task as assessing this risk for *every* mission. Despite this, no information or intelligence on this issue, or the layout of the base, had been provided to the patrol which had never been to Wahab base before. This is so even though the base had been constructed by Australians and at least three patrols had previously been to Wahab.[116]

Family members rejected the IOI conclusion that it was an unprovoked and random attack. Instead they supported the conclusion drawn by the ANA assessment of the incident that it was a planned terrorist attack carried out in a prepared and calculated manner. It was argued if intelligence had properly been communicated to Lieutenant Lopez and a risk assessment carried out as FRAGO 13 required, then the mission may never have been undertaken, or Major Travis Gordon and Lieutenant Lopez may have weighed these things more heavily when making decisions as to the level of security to be observed.[117] Despite this, the IOI and Defence's own intelligence report concluded there had been no intelligence failure, but did concede there was little knowledge about the Wahab base and the use of a single roving picket with no watchtower personnel to guard the Australian soldiers was concerning.[118]

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112 The incident the subject of this article occurred following prior IOI into 'green on blue' attacks in October and November 2011 that also had resulted in Australian soldiers' deaths: Inquiry Officer, 'Inquiry Report – Matter Concerning Joint Operations Command' (Report, Australian Defence Force, 27 July 2012), in which one of the findings of the IOI reported: 'The "lessons learnt" cells and structures across Defence did not enhance the effectiveness of ADF command decision making, to adequately identify and evaluate observations and findings of incidents involving an "insider threat" [redacted] prior to the incidents at PB Sorkh Bed and PB Nasir occurring': at 38 <http://www.defence.gov.au/publications/coi/reports/inquiry%20report%20into%20green%20on%20blue%20incidents%2029%20oct%20and%2008%20nov%2011.pdf>.

113 *Milosevic et al* (unreported, Coroners Court of Queensland 22 September 2015) 20 [129].

114 Ibid 12 [77].

115 ABC, above n 62. See also McPhedran and Lion, above n 81. See also similar complaints by the family of Pte J Kovco: 'Kovco Mother Demands Inquest', *The Sydney Morning Herald* (online), 30 March 2007 <http://www.smh.com.au/news/national/kovco-mother-demands-inquest/2007/03/30/1174761707505.html>.

116 ABC, above n 62; *Milosevic et al* [2015] Coroners Court of Queensland (22 September 2015) 14 [90], 15 [95].

117 *Milosevic et al* (unreported, Coroners Court of Queensland 22 September 2015) 14 [86], 15 [92]–[94] (Deputy State Coroner Lock).

118 Wahab Inquiry, above n 5, 30–1 [104]–[106] (Finding 12).

The families alleged the communication between Major Gordon and Lieutenant Lopez seemed deficient as it relied on certain assumptions. Major Gordon assumed Lieutenant Lopez had enough experience and would inform him on arrival at the base if there were any concerning issues, and that he would ensure the Australian and ANA soldiers were appropriately segregated and force protection was adequate. Major Gordon was unaware that Wahab base did not allow for adequate separation.[119] The Tactical Infrastructure Review by Major Gordon was only completed in a cursory manner after the deployment of the platoon to Wahab base. Major Gordon had rated the risk of insider attack as low. However, an intelligence officer, while sitting in close proximity to Major Gordon, was at the same time rating the risk as high.[120] The IOI noted that Major Gordon inadequately addressed force protection issues with Lieutenant Lopez prior to departing for the base, although the IOI could not find this was a causal link to the shooting.[121]

Further criticism was levelled at Lieutenant Lopez for failure to maintain segregation of the ANA and Australian troops. One could think he had a difficult task in this given that the mission was to improve trust and relations between the two groups. The IOI acknowledged the difficulty a task force commander is put in when asked to engage in mentoring activities which are often at odds with force protection requirements.[122] Local engagement with ANA was a significant requirement of the mentoring role.

The family members of the deceased soldiers were not satisfied with the internal IOI, suggesting it raised more questions than it answered.[123] They expressed concern that serious intelligence failures were possible and the military mission was flawed and not worth the potential loss of life, nor at minimum were appropriate safeguard arrangements in place for the Australian soldiers at Wahab base.[124] Certain family members expressed outrage at the lack of transparency in being issued only with the redacted report into the circumstances of the death of their loved ones.[125] They considered it was about time the army was scrutinised by the independent civilian system, so deficiencies could be faced and addressed

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119 Ibid 22 [77]–[79], 23 [84], 24 [85], 25 [88], 25–6 [91].

120 *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 15–16 [95]–[96] (Deputy State Coroner Lock).

121 Wahab Inquiry, above n 5, 26 [93], [94]; ibid 15 [92]–[94].

122 Wahab Inquiry, above n 5, 20 [68]–[69]. See also Vanda Carson, 'Captain Dominic Lopez Backers Create Facebook Page after His Emotional Evidence at Coronial Inquiry into Deaths of Three Soldiers', *The Courier Mail* (online), 20 October 2013 <http://www.news.com.au/national/captain-dominic-lopez-backers-create-facebook-page-after-his-emotional-evidence-at-coronial-inquiry-into-deaths-of-three-soldiers/story-fncynjr2-1227096097361>.

123 Ian McPhedran, 'Defence Report Raises More Questions than Answers', *News Limited* (online), 25 September 2013 <http://www.news.com.au/national/defence-report-raises-more-questions-than-answers/story-e6frfkp9-1226726514701>. This is a repetition of unhappiness expressed by the family members of Pte Kovco: Payne, above n 48.

124 Vanda Carson, 'Soldier Robbie Poate's Family Declare Inquiry into Son's Murder in Afghanistan Not Meant to Be "Personal Attack or Vendetta"', *The Courier Mail* (online), 21 October 2014 <www.couriermail.com.au/news/...of.../story-fnihsrf2-1227101440193>.

125 'Diggers' Families "Intimidated" at Inquest', *Brisbane Mag* (online), 24 October 2014 <http://bmag.com.au/your-brisbane/daily-news/2014/10/24/diggers-families-intimidated-at-inquest/>.

and accountability and transparency observed to ensure the ADF learnt from mistakes and did not risk repeating them.[126]

VII THE CORONIAL INQUEST

In response to the bereaved families' agitation, a coronial inquest was held in Brisbane during 14–21 October 2014. A final report by the coroner, John Lock, was delivered on 22 September 2015. The coroner was required to address the following issues under section 45(2) of the *Coroners Act 2003* (Qld):

1. The identity of the deceased persons, when, where and how they died and what caused their deaths;
2. The adequacy of the ADF risk mitigation plan along with the execution of that plan to prevent green on blue attacks at Wahab Patrol Base; and
3. Whether any recommendations can be made to reduce the likelihood of such deaths in similar circumstances or otherwise contribute to public health and safety or the administration of justice.

A number of important matters relating to the interrelation between the military and civilian inquiry mechanisms were addressed by Coroner Lock. These included dealing with evidence that was claimed to require national security protection while also providing for a transparent and open inquiry as demanded by the civilian system;[127] dealing with defence 'jargon and acronyms';[128] challenges for the families involved; and the federal/state structure, along with the costs involved in the inquest.

After discussing some of the options that have been proposed for dealing with deaths of military personnel in overseas combat zones such as a Commonwealth coronial body, the coroner favoured the current state-based coronial system. However, the coroner suggested a more neutral proposal for consideration of a funding model that supports the costs in such investigations where federal issues such as defence deaths are prominent.[129]

Regarding the interaction with the families, Coroner Lock's findings in many ways supported the claims made by the family members. He was concerned with the lack of transparency and information provided to the families, indicating he was also concerned with the decision not to hold a COI.[130] Despite the ADF refusing to accept the claim that transparency did not exist, the family experienced this as a reality. The coroner indicated other regimes survive a more open disclosure process which the ADF should reflect on, along with the 'therapeutic principles' involved in a more transparent process.[131]

126 ABC, above n 62.
127 *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 6–7 [34]–[38].
128 Ibid 6 [36], noting the assistance of two experienced ADF legal officers overcame any issues.
129 Ibid 28 [183]–[184], 30–1 [187].
130 Ibid 27 [178].
131 Ibid 27 [175]–[177].

Significantly, a thread of criticism of more senior level military personnel was apparent throughout the coroner's report. This was not suggested by the IOI and internal inquiries and lends support to the claim that inquiring into oneself raises the perception of the possibility that lessons are not learned. Failure in communication between intelligence and more senior officers exhibiting a 'tick and flick' attitude, without genuine regard to the threat of insider attacks as conveyed by FRAGO 13, was expressed.[132] The coroner noted Lieutenant Lopez and Sergeant Burke 'appeared … to be consummate soldiers. They obey orders'.[133] However, he found the activities of more senior personnel inadequate, suggesting 'failure at a number of levels in the chain of command'.[134]

Coroner Lock made a number of recommendations for future mentoring missions relating to training: providing for an appropriate balance between rapport building and force protection, improvement in the storing and dissemination of intelligence, and improvement of communication from command to tactical level, and between command and intelligence.[135] Recommendations were also made for review and improvement in dealing with bereaved family members,[136] and for the future conduct of such coronial inquests.[137]

Many of the indications by the coroner for lessons to be learned from this case indicate the benefit that could be gained by consideration of factors that others, such as the UK system, have already grappled with. For this reason, it is suggested that it is useful for Australia to look to the UK experience as discussed in the following section.

VIII THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE UK AND BEYOND

The passing of the *Human Rights Act 1998* (UK) has placed questions of *Convention* rights squarely before the UK courts. Both the Strasbourg jurisprudence and the UK courts confirm that human rights run alongside IHL in conflicts, particularly when it comes to those detained and under the control of UK armed forces in conflict zones outside of the UK.[138] Despite this, the UK MoD prefers to maintain that IHL is the *lex specialis* that takes precedence over

132 Ibid 24 [159], 14 [90], 26 [169].
133 Ibid 26 [167].
134 Ibid 26 [170].
135 Ibid 30 [185].
136 Ibid 30 [186].
137 Ibid 30 [187].
138 *Hassan v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014) [83] ('*Hassan*') citing *Özkan v Turkey* (European Court of Human Rights, Second Section, Application No 21689/93, 6 April 2004) [85], [319]; *Varnava v Turkey* [2009] V Eur Court HR 13, 78 [191]; *Al-Jedda v United Kingdom* [2011] IV Eur Court HR 305, 375 [105] ('*Al-Jedda*'); *Al-Skeini v United Kingdom* [2011] IV Eur Court HR 99, 178 [164]–[167], ('*Al-Skeini*'). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('*Israeli Wall*').

HRL, with the *Convention* not applying extra-territorially in armed conflicts.[139] The Grand Chamber of the European Court of Human Rights ('ECHR') in *Hassan v United Kingdom,*[140] relying on *Al-Skeini v United Kingdom*,[141] advisory opinions and judgments of the International Court of Justice,[142] concluded in relation to international armed conflict: 'As the Court has observed on many occasions, the *Convention* cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part'.[143]

The Grand Chamber was concerned to ensure the rights of an individual to have access to an effective remedy for any contravention, stating 'a narrowing of the rights of individuals in respect of their treatment by foreign armed forces would be unprincipled and wrong'.[144] The UK government argued that only the *Geneva Conventions* applied and an individual has no justiciable rights under the *Geneva Conventions*. The Grand Chamber found the detention of the Iraqi citizen, Hassan, was arbitrary and not supported under either article 5(1) of the *Convention* or IHL.[145] This decision followed *Al-Jedda v United Kingdom*,[146] in which the ECHR held that UN Security Council Resolution 1546 could not, without very clear language, override obligations under the *Convention*, and even if such language existed the Court should choose an interpretation that enabled 'harmony' between the UN Charter and the *Convention*.[147]

The UK High Court in *Mohammed v Ministry of Defence*[148] found that UK detention policy and practice in Afghanistan in a 'non-international armed conflict' ('NIAC') was unlawful, requiring the MoD to compensate Afghanis that had been detained 'in pursuit of military objectives which went beyond the legal

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139 *Hassan* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014) [76], [99]: this was the first case in which a respondent State requested the court to interpret obligations under art 5 in the light of powers of detention available to it under IHL. See also *Al-Saadoon v Secretary of State for Defence* [2015] 3 WLR 503, 575 [254] (Leggatt LJ) ('*Al-Saadoon*'); *Al-Saadoon v Secretary of State for Defence* [2016] EWCA Civ 811 ('*Al-Saadoon* CA') [184]–[185] (Lloyd Jones LJ): 'it is necessary to effect an accommodation between the two'.

140 *Hassan* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014) [77].

141 Ibid 46 [88], citing *Al-Skeini* [2011] IV Eur Court HR 99.

142 See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 ('*Nuclear Weapons*'); *Israeli Wall* [2004] ICJ Rep 136; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, 231 [178].

143 *Hassan* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014) [77]. See also *Al-Adsani v United Kingdom* [2001] XI Eur Court HR 79, 100 [55]: this applies equally to art 1 as to the other articles of the *Convention*. See also *Mohammed v Secretary of State for Defence* [2015] HRLR 20 ('*Mohammed*').

144 *Hassan* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014) [84].

145 Ibid [85]: the court accepting a modification of art 5 (a)-(f) in IAC to accommodate Geneva Conventions III and IV regarding prisoners of war and detention of civilians.

146 [2011] IV Eur Court HR 305.

147 Ibid 373–4 [102].

148 *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014). See also UK Defence Committee, *UK Armed Forces Personnel and the Legal Framework for Future Operations*, House of Commons Paper No 12, Session 2014–15 (2014).

powers available to the UK'.[149] In reaching this decision, Leggatt J rejected claims by the MoD that the *lex specialis* was international humanitarian law, and that this could operate to qualify human rights law such as article 5 of the *Convention*.[150] On appeal to the UK Supreme Court in *Al-Waheed v Ministry of Defence; Mohammed v Ministry of Defence*[151] a 7:2 decision found the power to detain in a NIAC enabled a Security Council Resolution ('SCR') to modify article 5(1) (a)–(f) to enable the detention where it was in the words of the SCR 'necessary for imperative reasons of security'.[152] The need to provide prisoners with an effective right to challenge detention (article 5(4)) was still essential.[153] While this judgment brings with it controversy and is likely to face further consideration by the Strasbourg courts in due course, what this and other UK decisions demonstrate is that the UK courts now engage in deeper consideration of matters of war and defence, showing less deference than the executive arm may wish.[154] The new reality is noted by Sumption LJ:

> Since the Second World War there has been considerable expansion of the range of matters with which international law is concerned … growing importance of the international protection of human rights is one aspect of this change … International law increasingly places limits on the permissible content of municipal law and on the means available to states for achieving even their legitimate policy objectives.[155]

This is particularly so where civilians and the right to life are involved.[156] However, the human rights of UK soldiers present a more contested space, and it is soldiers and their families' rights that are the focus of this article.

A State Duty to Armed Forces Personnel under the *Convention*

The duty imposed on the state in relation to its armed forces comes up against the special relationship and demands on a soldier required to act in the national interest. Article 2 of the *Convention* imposes on state parties both substantive and procedural obligations to protect the right to life and to investigate deaths. The substantive obligation involves both a negative duty to refrain from taking life without legal justification, and a positive obligation to protect the lives of those

149 [2014] EWHC 1369 (QB) [424] (Leggatt J).

150 Ibid [288]–[292]; In *Mohammed* [2015] HRLR 20, the Court of Appeal (Lord Thomas CJ, Lloyd Jones and Beatson LJJ) confirmed the lower court decision that the detention was unlawful under both Afghan law and art 5 of the *Convention*. See also *Al-Saadoon* [2015] 3 WLR 503, 575 [254] (Leggatt J); *Al-Saadoon* CA [2016] EWCA Civ 811.

151 [2017] UKSC 2 ('*Al-Waheed*').

152 SC Res 1546, UN SCOR, 4987th mtg, UN Doc S/RES/1546 (8 June 2004) 11.

153 *Al-Waheed* [2017] UKSC 2, 25 [44] (Sumption LJ), 94 [204] (Mance LJ).

154 Dominic McGoldrick, 'The Boundaries of Justiciability' (2010) 59 *International and Comparative Law Quarterly* 982, 1051. See, eg, *Ismail v Secretary of State for Defence* [2013] EWHC 3032 (Admin) (27 June 2013)*; R (Mousa) v Secretary of State for Defence* [2013] HRLR 32; *R (Hassan) v Secretary of State for Defence* [2009] EWHC 309 (Admin) (25 February 2009); *Hassan* (European Court of Human Rights, Grand Chamber, Application No 29750/09, 16 September 2014); *R (Al-Saadoon) v Secretary of State for Defence* [2010] QB 486 (21 January 2009); *Al-Saadoon* [2015] 3 WLR 503; *Al-Saadoon* CA [2016] EWCA Civ 811.

155 *Belhaj v Straw; Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3, 119 [251] (Sumption LJ).

156 See *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB) (2 May 2014) [381] (Leggatt J); *Belhaj v Straw; Rahmatullah (No 1) v Ministry of Defence* [2017] UKSC 3.

within jurisdiction.[157] The procedural duty follows from this and it is implied that the state will 'establish a framework of laws, precautions, procedures and means of enforcement to the greatest extent reasonably practicable, in order to protect life'.[158] This includes initiating an effective public investigation by an independent official body into any death occurring in circumstances where it appears one or other of the substantive obligations may have been violated and where agents of the state may be implicated.[159] That an article 2 argument regarding an obligation on the state to protect its soldiers' lives could be made in relation to soldiers in combat relies on the outcome of the controversial decision in *Smith v Ministry of Defence* ('*Susan Smith*'),[160] in which the Supreme Court, following *Al-Skeini,* accepted that article 2 of the *Convention* covers UK soldiers. This means extraterritorially securing the protection of the right to life for soldiers operating 'beyond the wire'.[161] *Susan Smith* was the first case in which the UK civil courts had to consider a positive duty to safeguard soldiers' lives from negligent error when conducting military operations. The Supreme Court, in finding that such a positive duty could exist stated:

> the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of article 2 if the decisions … [were] closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. *But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down.* It will require the exercise of judgment. This can only be done in the light of the facts of each case.[162]

The positive duty to safeguard soldiers' lives was refined in more detail in the case of *R (Long) v Secretary of State for Defence*[163] where the content of the 'middle ground' of the duty of the state to safeguard soldiers' lives when on

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157 See *LCB v United Kingdom* [1998] III Eur Court HR 49; *Osman v United Kingdom* [1998] VIII Eur Court HR 101; *Al-Skeini* [2011] IV Eur Court HR 99.

158 *Savage v South Essex Partnership NHS Foundation* [2009] 1 AC 681, 709–10 [76] (Baroness Hale). See *Makaratzis v Greece* [2004] XI Eur Court HR 195.

159 See *McCann v United Kingdom* (1996) 21 EHRR 97, 163 [161]; *Jordan v United Kingdom* (2001) 11 BHRC 1, 30 [105]; *Edwards v United Kingdom* (2012) 12 BHRC 190, 210 [69]; *McKerr v United Kingdom* (2002) 34 EHRR 20; *Tanlı v Turkey* (European Court of Human Rights, Third Section, Application No 26129/95, 10 July 2001) [139]–[154]; *Öneryildiz v Turkey* (European Court of Human Rights, First Section, Application No 48939/99, 18 June 2002) [90]–[91]; *Mastromatteo v Italy* [2002] VII Eur Court HR 151; *Solomou v Turkey* (European Court of Human Rights, Fourth Section, Application No 36832/97, 24 June 2008) [80]–[82]; *Andreou v Turkey* (European Court of Human Rights, Fourth Section, Application No 45653/99, 27 October 2009) [50]–[51]; *Giuliani v Italy* [2011] II Eur Court HR 275.

160 [2014] 1 AC 52.

161 Ibid 117 [55] (Lord Hope DP). See also *Al-Saadoon* (2015) 3 WLR 503, 527 [55] (Leggatt J).

162 *Susan Smith* [2014] 1 AC 52, 124 [76] (Lord Hope DP) (emphasis added).

163 [2014] 1 HRLR 20 ('*Long*'); *R (Long) v Secretary of State for Defence* [2015] 1 WLR 5006 ('*Long* CA').

active duty and the article 2 obligation to investigate were subjected to further scrutiny. In that case,[164] the mother of Corporal Paul Long, Mrs Pat Long, brought an action for judicial review in regards to the death of her son, along with five other members of the Royal Military Police ('RMP'), at the hands of a mob storming a police station which the soldiers were visiting on 24 June 2003. At issue was the suitability of the telecommunication equipment the RMP had been issued with, and whether the process for ensuring the correct procedures for carrying telecommunication devices had been followed.

Various military investigations were undertaken. These included a joint commanders investigation, designed to get a clear picture of the incident in the immediate aftermath and any immediate lessons learned. This investigation submitted a report on 8 July 2003 to the Chief of Joint Operations.[165] The Land Accident Prevention and Investigation team produced a report on 12 March 2004, to assist the Board of Inquiry which completed its inquiry on 18 June 2004. As a consequence, the Army considered, but rejected, that any disciplinary action was required and appointed a Brigadier to report on whether administrative actions were appropriate. The Brigadier recommended administrative action should be considered against two individuals. This recommendation was rejected by the Chief of Staff of the relevant area as it could be seen as 'apportioning blame' to individuals and

> administrative sanctions … not originally designed for operational context – may actually harm long-term operational effectiveness because of the signal that it would send … that we are not prepared to tolerate mistakes … [making us] too risk averse.[166]

Finally, a coronial inquest held in March 2006 found that all six soldiers had been unlawfully killed and raised issues regarding the availability of effective communication devices.[167]

The families, not satisfied with this, sought a civilian police investigation which ended back with a further internal military review concluding no further investigation was necessary. After the families were informed of this in October 2007, they remained unsatisfied, seeking an application before the ECHR. This was rejected in March 2010, the court declaring the case inadmissible for not having exhausted local remedies.[168]

In what is becoming a familiar refrain, the families were concerned that there had not been an independent and transparent inquiry, and persisted in bringing a claim for judicial review before the civil courts in the UK. Initially the claim was rejected based on the delay in bringing the hearing, but a renewed application by Mrs Long succeeded in having the matter argued before Justice Leggatt.[169] While

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164 *Long* [2014] 1 HRLR 20.

165 Ibid 624 [14] (Leggatt J).

166 Ibid 625 [19] (Leggatt J).

167 Ibid 625 [21]–[22] (Leggatt J).

168 Civil claims in negligence brought by the widow of Corporal Long and Mrs Long against the MoD were respectively settled in 2006 and 2009. But see ibid 644 [100] (Leggatt J): 'the facts of this case did not disclose any potential civil liability on the part of the MoD either for negligence at common law or for breach of a positive obligation under article 2'.

169 *Long* [2014] 1 HRLR 20.

accepting that *Long* fell within 'the middle ground' described by the Supreme Court in *Susan Smith,* the Divisional Court did not accept that every case falling within the 'middle ground' would require an investigation satisfying article 2.[170]

Leggatt J made the distinction between ECHR jurisprudence[171] requiring an article 2 investigation to address the identification and punishment of those responsible as applicable in the context of cases involving the positive duty to protect life when state agents are accused of unlawful killing, and the situation in *Long* where unintentional negligent omission was involved:

> a duty to protect the lives of individual soldiers by safeguarding them from the risk of a negligent failure in the chain of command to ensure compliance with a particular order would be to impose a duty that was wholly unrealistic, excessively burdensome and calculated to impede the work done by the armed services in the national interest.[172]

In the situation of negligent omission, criminal sanctions are not the outcome sought and civil redress in the form of a damages claim is sufficient.[173] As no substantive breach of article 2 was found, there was no duty to investigate. Further, the Divisional Court held if there was a duty to investigate, this had been satisfied by the various internal military investigations and the civilian inquest.[174] The Court addressed the considerable delay, being 11 years since the deaths, stating 'the time for learning any lessons from failings in this area has … long passed'[175] and 'we do not think it reasonable to expect the state to institute such an investigation now, more than a decade after the soldiers' deaths, and some eight years after the inquest'.[176] Most importantly, the court considered any shortcomings in the ability of the military investigation to satisfy article 2 were overcome by the coronial inquest.[177]

Unsatisfied, Mrs Pat Long proceeded to take the matter to the Court of Appeal. In 2015, the Court of Appeal[178] refused Mrs Long's claim for a fresh investigation, accepting the Divisional Court's findings that the military inquiry and coroner's inquiry satisfied article 2 investigative purposes for lessons learned,[179] or if they did not, then the number of years lapsed meant the likelihood of any useful information for lessons learned was low, and a fresh inquiry would not be justified.[180] In contrast to the Divisional Court, however, was the Court of Appeal's acceptance that the circumstances surrounding Corporal Long's death gave rise to a positive obligation on the state to safeguard the lives of members of its military.[181] The Court of Appeal accepted that there was a failure in the system

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170 Ibid 637 [69] (Leggatt J).
171 See *Jordan v United Kingdom* (2003) 37 EHRR 52.
172 *Long* [2014] 1 HRLR 20, 641 [87], 638 [73], (Leggatt J).
173 Ibid 643 [95] (Leggatt J). See also *Pearson v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 40957/07, 13 December 2011).
174 *Long* [2014] 1 HRLR 20, 648 [124], 683.
175 Ibid 645 [106].
176 Ibid 644[102].
177 Ibid 642 [91].
178 *Long* CA [2015] 1 WLR 5006.
179 Ibid 5022 [54] (Dyson MR).
180 Ibid 5024 [65] (Dyson MR).
181 Ibid 5016 [29] (Dyson MR).

of control and chain of command, rather than an isolated incident, in ensuring observance of a standing order on use of communications equipment. This activated article 2 and the duty to have an article 2 investigation as to why a practice had developed that enabled a routine ignoring of the standing order.[182]

The families in *Long* were seeking, amongst other things, to hold individuals accountable. The facts related to alleged negligence and a communication failure in the chain of command. The Divisional Court supported the MoD reasoning for resisting individual accountability in this situation, referring to combat immunity: meaning exemption from tortious liability for injuries arising during combat. This is one reason the threat of an article 2 investigation may have adverse impacts on operational effectiveness.[183] The Court of Appeal, while noting that the scope of an article 2 investigation depends on the individual circumstances of a matter,[184] in this case held the military inquiry and the coroner's inquest had sufficiently revealed the facts to satisfy the purpose of an article 2 investigation.[185]

Long must be read with the Supreme Court reasoning in *Susan Smith* that combat immunity cannot be used as a general ground for avoiding considering article 2 obligations, but rather each case must be individually assessed.[186] *Long* addresses the 'middle ground' referred to by the Supreme Court in *Susan Smith*.[187]

The *Convention* requirement of state parties to prevent and suppress offences against the person, when that person is a military member, was outlined in *Stoyanovi v Bulgaria*,[188] where the ECHR held it must be established:

> that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[189]

The ECHR in *Stoyanovi*[190] rejected an application by the family of a soldier who died during a parachute exercise despite accepting there were deficiencies in communication between a helicopter crew and the paratroopers.[191] The Court distinguished between risks a soldier must expect to incur within ordinary military duties and '"dangerous" situations of specific threat to life which arise exceptionally from risks posed by violent, unlawful acts of others or man-made

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182 Ibid 4016 [28] (Dyson MR): 'the failure of the RMP to comply with the communications order was a failure of system or control … it was a system failure by the military authorities to permit soldiers routinely to disregard the order'.

183 *Long* [2014] 1 HRLR 20 639 [78], 640 [81], 643 [98] (Leggatt J).

184 *Long* CA [2015] 1 WLR 5006, 5023 [58] (Dyson MR).

185 Ibid 5022 [54] (Dyson MR).

186 *Susan Smith* [2014] 1 AC 52.

187 Ibid 123–4 [76] (Lord Hope DP).

188 *Stoyanovi v Bulgaria* (European Court of Human Rights, Fifth Section, Application No 42980/04, 9 November 2010) ('*Stoyanovi*').

189 Ibid 9–10 [59], citing *Osman v United Kingdom* [1998] VIII Eur Court HR 101 [116].

190 (European Court of Human Rights, Fifth Section, Application No 42980/04, 9 November 2010).

191 Ibid 11–12 [64].

or natural hazards'.[192] An operational obligation would only arise in the latter situation:

> in the present case, parachute training was inherently dangerous but an ordinary part of military duties. Whenever a State undertakes or organises dangerous activities, or authorises them, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum. If nevertheless damage arises, *it will only amount to a breach of the State's positive obligations if it was due to insufficient regulations or insufficient control, but not if the damage was caused through the negligent conduct of an individual or the concatenation of unfortunate events*.[193]

The claimants in *Stoyanovi* were not alleging 'that any specific risk to life … arose that should have been foreseen in advance'.[194] This, if Convention-like requirements applied in Australia, would in cases such as *Milosevic et al*, draw consideration to the existence of FRAGO 13.[195] Lieutenant Lopez had not been advised of FRAGO 13 which had been issued two and half weeks in advance, foreseeing the need to take extra precautions against frequently occurring insider attacks.[196] Nor indeed was it the situation in Australia in *Comcare v Commonwealth*,[197] where findings of systemic failure occurred in relation to a heat stroke death, resulting in an order to pay compensation under workplace relations laws for a situation that the ADF was aware of and indeed should have anticipated.[198] It was argued in *Comcare* that '[t]he ADF had for some time been aware of the risk of serious heat injury … For reasons which are not clear, little regard was paid to the risk … There was systemic disregard … [and this] was a serious failure'.[199] The applicant referred to findings of the Charles report, including that the failure could be attributed to a lack of proper equipment or adequately trained medical personnel being present in a climate in which 'training overrode all other considerations'.[200] Madgwick J, sympathising with these arguments, felt strongly about the situation, noting: 'Had this case occurred in the private sector, a criminal prosecution of at least the employer would have been likely'.[201] Perhaps fortunately for the ADF the *Convention* article 2 obligations do not apply in Australia. The Army in *Comcare* affirmed it was not required by law to submit to the jurisdiction of the Northern Territory Coroner, notwithstanding that it placed in mitigation the fact it had voluntarily done so.[202]

The requirements for conducting coronial inquests in the UK that are article 2 compliant were clarified in *R (Middleton) v West Somerset Coroner*.[203] This case

192 Ibid 10–11 [59]–[61].
193 Ibid 11 [61] (emphasis added).
194 Ibid 11 [62].
195 Wahab Inquiry, above n 5, 32 [107].
196 Ibid 14 [51], 17 [59].
197 (2007) 163 FCR 207 ('*Comcare*').
198 Ibid 210 [17] (Madgwick J).
199 *Ibid 223–4* [105] (Madgwick J).
200 Ibid 225 [106] (Madgwick J).
201 Ibid 230–1 [134].
202 Ibid 227 [115]. A fine of $198,000 was imposed for breach of the *Occupational Health and Safety (Commonwealth Employment) Act 1991* (Cth): at 230 [132].
203 [2004] 2 AC 182 (*'Middleton'*). See also *Hugh Jordan v United Kingdom* (Europeam Court of Human Rights, Third Section, Application No 24746/94, 4 May 2001).

indicated that the inquest must go beyond 'how' the death happened, in the sense of 'by what means' to include wider considerations assessing the 'circumstances' leading to the death. Lord Bingham in the House of Lords in *R (Amin) v Secretary of State for the Home Department*[204] summarised the duty:

> To ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.[205]

This has caused some concern in the UK as '[i]n the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that [the] inquest is the means by which the state will discharge its procedural investigative obligation under article 2'.[206] In so doing the coroner may now need to inquire into matters the MoD considers as its domain alone. In *Susan Smith*,[207] Mrs Smith relied upon the *Human Rights Act 1998* (UK) to argue the state owed her son, a soldier in Iraq, a duty to respect his right to life under article 2 of the *Convention* and that any inquest had to satisfy the procedural requirements of the article. The Court confirmed any inquest must satisfy article 2 requirements.[208] This includes the need for a timely public hearing, initiated by the government's own motion, in which victims' families can fully participate in an effective investigation in order to determine whether any force used was justified, and to identify and punish those found responsible.[209]

Notwithstanding this, there has been criticism of the UK government in failing to ensure resources and legislative requirements in coronial inquests fulfil the *Convention*'s demands. Two cases concerning deaths in Northern Ireland at the hands of police and soldiers, in which article 2 procedural investigative obligations had not been met due to extensive delays, confirm the UK still has further to go.[210] Coronial inquests in Australia follow a similar requirement to address the circumstances surrounding a death. For this reason, a coronial inquest is more likely to be sought by bereaved families in relation to soldiers' deaths when they feel the internal military inquiries serve a different purpose that does not satisfy their needs.

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204 [2004] 1 AC 653.

205 Ibid 672 [31].

206 *Middleton* [2004] 2 AC 182, 206 [47] (Lord Bingham).

207 [2014] 1 AC 52. See also an earlier case in which an opinion on the matter was sought from the court: *R (Smith) v Oxfordshire Assistant Deputy Coroner (Equality and Human Rights Commission intervening)* [2011] 1 AC 1 ('*Catherine Smith*').

208 *Susan Smith* [2014] 1 AC 52, 123–4 [76] (Lord Hope DP).

209 *Al-Skeini* [2011] IV Eur Court HR 99, [165]–[167].

210 *Hemsworth v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 58559/09, 16 October 2013): 13 years delay; *McCaughey v United Kingdom* (European Court of Human Rights, Fourth Section, Application No 43098/09, 16 October 2013): 23 years delay.

IX CONSEQUENCES OF MILITARY AND CIVILIAN INQUIRIES INTO DEATHS OF SOLDIERS

Mrs Pat Long's 11 year battle to seek a transparent civilian investigation in the UK speaks of the parents of deceased soldiers' pain in bereavement. Lebel[211] has done extensive research on the impact that bereaved families of military personnel can have on the military organisation and wider civilian society within the Israeli context. He notes a distinct shift in the 1990s from what he refers to as the security–political complex, securing to the army a hegemonic status which he describes as excluding civil–public discourse in regard to the elite within the security–political complex. Bereaving parents under this complex were seen to support collective nationalistic formulae in which bereavement was mediated by legislation governing military cemeteries and commemoration, in return for which the parents suppressed their pain for the greater good of soldier morale and the heroic status accorded 'fallen soldiers'.[212] Questioning the circumstances of their children's deaths was not contemplated in such an environment.[213]

Lebel suggests the beginning of change, to what he describes as the 'civil diversity model' of parental bereavement, occurred when the unpopular Yom Kippur War in 1973 resulted in significant numbers of casualties leading to civilian protests against the war.[214] It took another two decades before significant changes toward a 'confrontational victim' space occurred, in which parents challenged the conduct of military operations utilising the civilian courts and the media. Lebel describes the marked change in the jurisprudence of the Israeli High Court of Justice in the 1990s as a result of the introduction of rights through the *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation*.[215] The Israeli High Court gave these Basic Laws constitutional status and priority over ordinary laws.[216] The change from patriotic collectivism to individualism and rights enabled the Court to become a source of support for those seeking to question the activities of the security–political elite in a transparent manner that civil society had not previously experienced in Israel.[217]

The combination of media reporting, ability to access and enforce rights in a civilian court as an independent public body, and a bereaved mother in 1991[218] led to an overcoming of the norms of heroism and suppressed pain of parents of deceased soldiers. This combination of factors resulted in public challenges to the

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211 Udi Lebel, 'Civil Society versus Military Sovereignty: Cultural, Political, and Operational Aspects' (2007) 34 *Armed Forces & Society* 67. See also Udi Lebel, 'Panopticon of Death: Institutional Design of Bereavement' (2011) 54 *Acta Sociologica* 351; Jill Harrington Lamorie, 'Operation Iraqi Freedom/Operation Enduring Freedom: Exploring Wartime Death and Bereavement' (2011) 50 *Social Work in Health Care* 543.

212 Lebel, 'Civil Society versus Military Sovereignty', above n 211, 73.

213 Ibid 72.

214 Ibid 74–5.

215 *Basic Law: Human Dignity and Liberty 1994* (Israel) SH No 1454, 90; *Basic Law: Freedom of Occupation 1994* (Israel) SH No 5754, 90.

216 *United Mizrahi Bank Ltd v Migdal Cooperative Village* [High Court of Justice] No 6821/93, 9 November 1995.

217 Lebel, 'Civil Society versus Military Sovereignty', above n 211, 75.

218 Ibid 77, referring to the '"net roulette" accident at Hatzerim Air Force Base … and Shula Mellet'.

conduct of the military. Lebel describes defence's opposition to the parents by attempting to 'subvert' and undermine their calls for external investigations that demanded norms of transparency, accountability and openness.[219] Lebel states the Israel Defence Force's 'poor behavior accumulated into an impression of ubiquitous systemic incompetence: an inability to learn from mistakes, whitewashing negative findings, unfair treatment of recruits, and a lack of professionalism'.[220]

Lieutenant General David Morrison, former Chief of Army has noted the impact of individualism and rights assertions within the Australian army, stating:

> Part of our subjection to the law of our land must reflect the recognition of individual rights, and the balancing of those rights with the exercise of judicial and executive power … it is the introduction of the concept of the individual, and their rights vis-a-vis the exercise of prerogative power (especially in the context of military discipline), that defines the modern discourse … Nonetheless, it seems to me that balance has shifted in an alarming way. I would suggest that the pendulum has swung towards the individual to a point which is now having a very practical and immediate effect on our ability to command.[221]

The requirement of the *Coroners Act 2003* (Qld) to look also to the circumstances (much like the *Convention* article 2 requirements) means a more than cursory inquiry is demanded into the obligations on the ADF, in circumstances where there was knowledge of increased 'green on blue' attacks occurring, in a transparent and public domain.[222] The unique purpose a coroner serves in a democracy by providing public transparency around deaths and accommodating sensitivity for grieving family members is embedded in the historical institution.[223] The UK has acknowledged the important role of a coronial inquest in addressing family bereavement with the introduction of the *Coroners and Justice Act 2009* (UK).[224] Although the UK and Israel are different societies, there are lessons here for the ADF. The learning is enlightening when considering the sentiments echoed by the family demands in *Milosevic et al* for transparency and accountability in which the military should put in place greater safeguards to ensure there is no longer any chance of actual or perceived bias through internal investigation into cases in which deaths have occurred.[225] The bereaved parents of soldiers can shape public opinion in a powerful way. While

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219 Ibid 79.

220 Ibid. See also Eitan Adres, Pieter Vanhuysse and Dana R Vashdi, 'The Individual's Level of Globalism and Citizen Commitment to the State: The Tendency to Evade Military Service in Israel' (2012) 38 *Armed Forces & Society* 92.

221 Morrison, above n 1, 5.

222 See, eg, 'Counsel Assisting's Opening Remarks', *Lindt Café Siege Inquest* (ongoing, Coroner's Court Sydney, 29 January 2015) (Jeremy Gormly QC). During argument, Gormly QC emphasised the importance of the Inquest inquiring into Monis' actual motivation for the killing of two people.

223 See, eg, Christoper P Dorries, *Coroners' Courts: A Guide to Law and Practice* (Oxford University Press, 2nd ed, 2004); Philip Guy and Margaret Holloway, 'Drug-Related Deaths and the "Special Deaths" of Late Modernity' (2007) 41 *Sociology* 83.

224 See, eg, James Pilpel et al, 'The Coroner Service' (1999) 319 *British Medical Journal* 1072, 1072: 'Inquests often facilitate grief'.

225 McPhedran, above n 123. The changes to the role of the IGADF attempt to address this, but despite reporting to the Minister of Defence, the association of the IGADF with the military through previous employment still can affect perceptions.

Australia may not have reached the level of rights based protection existing in the UK and Israeli law, the engagement in multinational forces and the opening up of review of military conduct in these nations cannot escape notice, nor impact, in Australia.

Australia has certain rights legislation at the federal level,[226] but there remains no overarching rights legislation that bereaved Australian families can rely on.[227] Nevertheless, both the Australian Capital Territory[228] and the state of Victoria[229] have human rights instruments, and there is a growing agitation for greater rights following other Western states. The coronial inquest and the response of the families discussed in this article signify a furtherance of changes called for since the *Senate Inquiry 2005*. The Senate then called for the establishment of an independent Australian Defence Force Administrative Review Board,[230] stating:

> there appears to be no mechanism in place to ensure that the requirements set down in Defence regulations and instructions are rigorously enforced. Furthermore, evidence suggests that the ADF has had little success in removing the perception that administrative inquiries lack impartiality and independence.[231]

A subsequent audit in 2006 of the ADF investigative ability produced a less than satisfactory report card of the service police, citing lack of investigative experience, capacity, skill and impartiality producing untimely and inferior quality evidentiary material.[232]

The UK is grappling with push back by the security–political complex, with calls in the 2014–15 Defence Committee Report for strong and strategic legislative changes that will give the military more ability to conduct its affairs behind a veil of protection.[233] The Report appeals to the cost of scrutiny and the ability to serve public national interest with genuine protection if soldiers' hands are tied by the intrusion of the civilian courts, media and an individual rights mentality. On the other hand, the families in *Milosevic et al* felt pressure from the military during the coroner's inquest.[234]

A rise in claims to 'lawfare' like this are often heard.[235] Lawfare alleges legal interventions and court cases burden the ability of the military to maintain

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226 See, eg, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth).

227 *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015); *Defence Determination 2014/22*, *Family Assistance for Attendance at a Coronial Inquest 2015* (Cth), enacted under *Defence Act 1903* (Cth) s 58B demonstrate there is no overarching rights legislation families can rely on.

228 *Human Rights Act 2004* (ACT).

229 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

230 *Senate Inquiry 2005*, above n 8, 229 [11.67].

231 Ibid 178 [8.122].

232 Department of Defence, 'Report of an Audit of the Australian Defence Force Investigative Capability' (Report, Australian Government Department of Defence, July 2006) 6 [2.1]. See generally David Lovell, 'Introduction: The Challenges of Investigating Operational Incidents' in David Lovell (ed), *Investigating Operational Incidents in a Military Context: Law, Justice, Politics* (Brill Nijhoff, 2014) 1–20.

233 UK Defence Committee, above n 148. See also Tugendhat and Croft, above n 14.

234 See Carson, above n 15; *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 27 [175] (Deputy State Coroner Lock).

235 See Morrison, above n 1. See also, on the question of command control, Gyles, above n 11, [2]: 'Erosion of Command?'.

operational effectiveness.[236] However, what must be acknowledged is that a country under the rule of law means 'the country is bound, in any event, to comply with the decisions of the court in obedience to the rule of law'.[237] It must also be remembered that the legislature invites the courts to adjudicate rights matters. These concerns – if unaddressed – reflect a potential for divide occurring in CMR. This has important consequences for future conduct of ADF operations.

X CONCLUSION

The *Milosevic et al* inquest saw the coroner uncover complacency in the senior ranks of military leadership that the military inquiry system did not. These events suggest sometimes blame is placed on junior ranks or, as argued by counsel for the ADF, dismissed as a factor of conflict: 'Sadly, but inevitably, combat operations cause death and injury'.[238] This process opens the possibility that genuine lessons are not gained and change does not readily occur.

That a fundamental cultural shift in the ADF is required is suggested by these events. Such a shift would obviate the almost ongoing review culture.[239] It is time for a brave next step in the civilianisation process if the gap in civil–military values and relations is not to widen. Moving towards civilian inquiries is that next step. Civilian integration will improve accountability, operational effectiveness, reduce the likelihood of litigation as well as the pain and cost to families of deceased members. Australia would do well to heed the call, taking account of former Chief of Army, Lieutenant General Morrison's acknowledgment that 'legal frameworks [must] cope with a much more individualistic workforce',[240] together with the experience of other democracies.

Despite the major 'Rethinking Systems of Inquiry, Investigation, Review and Audit in Defence' in 2011, and the recent legislative amendments, the adjustments and recommendations tend to be piecemeal and slow to see fruition. Often change is attempted with minimal disruption to the current structures, resulting in complex layering and unclear outcomes with much that still does not overcome the inherent challenges raised here. As Coroner Lock stated: 'To be effective, open disclosure has to become part of the culture of the organisation, requires planning and needs to be conducted by appropriately trained persons'.[241]

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236 See, eg, Christopher P M Waters, 'Is the Military Legally Encircled?' (2008) 8 *Defence Studies* 26, 28–9; Anthony Forster, 'British Judicial Engagement and the Juridification of the Armed Forces' (2012) 88 *International Affairs* 283.

237 *R (Khan) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3728 (Admin) [16] (Moses LJ). See also *R (Campaign for Nuclear Disarmament) v Prime Minister* [2003] 3 LRC 335, [43] (Brown LJ). See also Danny Nicol, 'The Legal Constitution: United Kingdom Parliament and European Court of Justice' (1999) 5 *Journal of Legislative Studies* 135, 136–7.

238 Miranda Forster, 'ADF Failures Led to Digger Deaths: Inquest', *The Sydney Morning Herald* (online), 24 June 2015 <http://www.smh.com.au/breaking-news-national/adf-failures-led-to-digger-deaths-inquest-20150624-3ya32.html>.

239 See, eg, above n 11.

240 Morrison, above n 1, 6.

241 *Milosevic et al* (unreported, Coroners Court of Queensland, 22 September 2015) 27 [176] (Deputy State Coroner Lock).

Ignoring the *Senate Inquiry 2005* recommendation to establish the ADFARB, and notwithstanding subsequent reviews, there remains a duplication of matters in an expensive process with rather complicated MOU requiring the military inquiry process and coroners to work together. While this relationship is currently respectful, it may not always be so and it would be foolish to disregard the issues. Australia needs to keep abreast of the developments in other states. Further research is required with a re-imagining of the current inquiry system beyond the 2011 changes. This article has argued more reputational damage to the ADF and cost to the Australian public will occur while continuing reaction against this inevitable change persists. Taking, and learning, lessons from other states' experiences may reduce some of the pain, cost and loss of regard their military forces have had to face.