



# Human Rights Advocate calls for Defence Inquiry reforms

Dr Kay Danes, OAM

“Truth never damages a cause that is just.” — Mahatma Gandhi

---

## Do Defence-led inquiries constitute Human rights abuses?

Human rights, truth and justice form the foundation of a robust and democratic society. This is the essence of a familiar message often repeated by Western Governments as a justification for military intervention on foreign soil. Indeed, the very principle of human rights and the rule of law is founded on the belief that no one should be judged in the absence of a fair trial. All persons should be afforded equal protection before the law and entitled without discrimination to equal protection of the law.<sup>1</sup>

In December 2020 the Chief of the Australian Defence Force (ADF) proposed to strip the Meritorious Unit Citation from over 3000 ADF members who served with distinction in Afghanistan between 2005 and 2016, including those who were killed during that service. This decision was made after it was revealed in a report of inquiry that several individuals were identified as having possibly been involved in some kind of misconduct while serving. Indeed, the allegations against them are extremely troubling, with claims of unlawful killings and other possible breaches of the law of armed conflict.<sup>2</sup> However, the decision to collectively punish the innocent for the possible actions of just a few individuals goes against the principle of human rights, to recognise and respect the inherent value and dignity of all people. Australia is a strong proponent of such human rights principles.

No one can deny that mistakes have been made on both sides of the Afghanistan conflict. But for the truth to become known and to bring forth justice for the families of the victims, the investigation into those allegations should have been conducted by an independent and lawful authority. Many believe that it was wrong to allow Defence the unvetted power to investigate itself.

David Savage is a former Australian federal police officer and UN war crimes investigator who has spoken out publicly about how the ADF perverts justice by ignoring key evidence to protect the military's reputation. In one interview he said: 'How can you have any faith in anything that Defence does in their inquiries ... if their fallback position seems to be to lie and cover-up?'<sup>3</sup>

---

<sup>1</sup> United Nations, 2021. 'Article 26: International Covenant on Civil and Political Rights, 23 March 1976.' Office of the High Commissioner. Retrieved 17 Jan. 21 from <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>2</sup> Human Rights Law Centre, 2020. 'Afghan and Australian human rights groups welcome release of the Brereton Afghanistan Inquiry Report.' 20 November 2020. Retrieved 18 Jan 21 from <http://www.hrlc.org.au/news/2020/11/20/afghan-aus-human-rights-brereton-afghanistan-inquiry>

<sup>3</sup> Dylan Welch, 2019. 'Australian injured in Afghanistan suicide bombing says Defence inquiry ignored crucial evidence.' ABC

Savage is not the only one to criticise the Defence Inquiry process. A common feeling runs through the ADF, Veterans and broader community who feel this process enables a culture of cover-up to exist, which defies the principles of human rights and Australian values. But after decades of silence, ADF members and Veterans are finally speaking out about systemic failings and maladministration they have faced during their service.

Each year, hundreds of internal complaints are submitted by ADF members to their service chiefs, under the Redress of Grievances Scheme.<sup>4</sup> Many are escalated for investigation under key employment legislation governing the ADF, known as —*Defence (Inquiry) Regulations 2018*. Most ADF members and Veterans having experienced these processes believe them to be mechanisms, merely by which the ADF uses the full weight of its resources, human, legal and financial, to minimise liability and reputational harm to itself.

The ADF disagrees and says ‘there is no need for radical revision of the current complaints handling structure. Policies, including those relating to the interface between civilian and military jurisdiction, are generally sound.’ The recommendations from past reviews, however, tell a very different story. An analysis of the findings from the various reviews and inquiries by the Senate Foreign Affairs, Defence and Trade References Committee (2005); the Commonwealth Ombudsman (2007), and the Independent Review (2009) suggest that policy reforms are needed to:

- Ensure independence and impartiality of the inquiry process;
- Address the problems which arise from failure to accord natural justice and legal representation;
- Improve the competence and integrity of ADF members conducting inquiries; and
- Provide greater protection in the inquiry process for those affected by the Inquiry.<sup>5</sup>

A key take-away point from the 2011 Review conducted by the Inspector General Australian Defence Force (IGADF) recommended that ‘Funding should be made available as a matter of priority to contract out the task of reducing the current grievance backlog of cases to suitably qualified legal firms.’<sup>6</sup>

Many ADF members and Veterans would agree with this, but only if legal firms have Defence and complaints management experience, and providing that complainants are as equally resourced—human, legal and financially—as the ADF, in order to access a fair and equitable process. In its current form, Defence Inquiries continually fail ADF members, and almost always impose a detrimental effect on their career. Current policy failings compound existing detriments because the ADF does not have any corrective action policy.

---

News 7.30 Report. 3 December 2019.

<sup>4</sup> Commonwealth Ombudsman, 2005. ‘Review of Australian Defence Force Redress of Grievance System 2004.’ Department of Defence and the Office of the Commonwealth Ombudsman. April 2005.

<sup>5</sup> Professor Robin Creyke, 2008, ‘Military Administrative Inquiries’ Commonwealth Ombudsman, Retrieved 15 Jan 2021 at [www.ombudsman.gov.au/publications/speeches/all-speeches/speech-and-presentation-documents/commonwealth-ombudsman/2008/military-administrative-inquiries?fbclid=IwAR2WiUtpTRb7gttXbaTtwpgfKS7CVehmKRe0Iiu0iH4IW5OwV5dPgH7FZol](http://www.ombudsman.gov.au/publications/speeches/all-speeches/speech-and-presentation-documents/commonwealth-ombudsman/2008/military-administrative-inquiries?fbclid=IwAR2WiUtpTRb7gttXbaTtwpgfKS7CVehmKRe0Iiu0iH4IW5OwV5dPgH7FZol)

<sup>6</sup> Geoff Earley, 2011. ‘Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction.’ Inspector General Australian Defence Force. 6 September 2011. Retrieved from [http://www.defence.gov.au/pathwaytochange/\\_Master/docs/Review-of-the-Management-of-Incidents-and-Complaints-in-Defence\\_complete-report.pdf](http://www.defence.gov.au/pathwaytochange/_Master/docs/Review-of-the-Management-of-Incidents-and-Complaints-in-Defence_complete-report.pdf).

## Case Study 1 (Summary of information obtained under the *Freedom of Information Act 1982*):

An Army officer made scandalous and false assertions to a Senior Warrant Officer Personnel Advisory Committee (SWOPAC) knowing it would result in a significant detriment to my career. The SWOPAC were told that I had misappropriated between \$7-10 million dollars from the a Trust fund whose beneficiaries are the dependants of soldiers killed or severely disabled during, or as a result of, operations or training. The Army officer further asserted that I had been punished and posted out of my Regiment as a consequence, and that the ADF covered it up so it would not tarnish the name of my Regiment. I submitted a complaint through my chain of command that I then escalated to the Inspector General of the ADF, the Defence Minister, and the Defence Ombudsman. Each of these organisations defaulted to the Defence's position that accepted that I had been afforded procedural fairness because Defence said I had. But this is untrue. Moreover, no-one investigated the allegations that I had committed a potential crime (eg., major fraud/theft/embezzlement) because, as the Defence Minister wrote that these “*were not within the Terms of Reference of the IOI. They were not investigated by the IO and no comment or findings in relation to the [name of trust redacted] Trust were made by the IO. The IO was not required to seek [my name redacted] comment on alleged past matters or the witness statement about the [name of trust redacted] Trust, and they had no impact on the outcome of the IOI.*” Procedural fairness was denied to me on the basis that I was not informed that false assertions had been made about me, either during the SWOPAC or the Defence Inquiry.

This single case study reflects the prevalence of normalised deviance often found within the findings of Defence Inquiries, which almost always favour the ADF. So-called independent decision-makers also always invariably default to the ADF’s decision. This happens even when it can be substantiated that investigating officers have failed to uphold Defence policy and common law.<sup>7</sup> The limited, independent research available on complaints in service reveals that the number of complaints submitted each year by ADF members, is increasing. However, given the lack of transparency and vague labelling of the categories (e.g., Career, Conditions of Service, Discharge, Discrimination, Adverse Reporting, Medical, and Other) it is difficult to undertake a thorough analysis of the data provided. Arguably, the findings of Defence Inquiries should not be read with the assumption that they are independent, ethical or competent.<sup>8</sup>

### **How independent are Defence Inquiry investigations?**

The Australian Government established the IGADF as a statutory appointment outside the chain of command, which independently monitors and assesses the health and effectiveness of the military justice system. The present IGADF, Mr James Gaynor, is a former Army officer who has held a range of military justice roles and multiple overseas deployments.<sup>9</sup> As IGADF, he appointed Major General Paul Brereton from the Australian Army Reserves, and with a team of several uniformed officers, was tasked to investigate allegations of ADF misconduct in Afghanistan. The fact that the Inquiry was conducted by such senior members of the ADF casts serious doubts over its legitimacy as an independent inquiry. Least of all, within the findings released in 2020, Defence Inquiry Officers and members of the ADF ‘lacked some of

<sup>7</sup> Kay Danes, 2021. ‘Stand tall for ADF PTS reform.’ *Civil Liberties Australia*. 5 Jan 2021. Retrieved 17 Jan. 21 from <http://www.cla.asn.au/News/stand-tall-for-adf-pts-reform/?fbclid=IwAR0nFUz8BQNPh181EMe7Bs-hBH8Si9DUkAoKlmyfIReYZrDiksKjVtOYmtA>

<sup>8</sup> IGADF (*INQ30/18*) and Commonwealth Ombudsman (*2018-100648*) information released under the Freedom of Information Act 1982.

<sup>9</sup> Australian Government, 2021. ‘Inspector General of the Australian Defence Force- Biography. Mr James Gaynor, CSC.’ Military Justice. Retrieved 16 Jan 2021 from <http://www.defence.gov.au/mjs/igadf-biography.asp>.

the forensic skills and experience to conduct a complex inquiry into what were, essentially, allegations of murder.<sup>10</sup> And so begs the question: How will the truth about what happened to those alleged to have been unlawfully killed in Afghanistan ever be adequately known, especially when the very mechanism for investigating such acts, appears to be flawed, and profoundly so? Moreover, there is a lack of independence and transparency that governs Defence Inquiries. How then will the truth become known while the Australian Government allows military commanders to conduct Defence Inquiries in secret? Or allows them to avoid the same level of intense scrutiny as their subordinates? These questions remain only partially answered for now with the appointment of a Special Investigator tasked to conduct yet another *investigation* into allegations of ADF misconduct in Afghanistan.<sup>11</sup> On this point, Horia Mosadiq, Executive Director at the Conflict Analysis Network, said that ‘What is important is not only justice and accountability for the victims, but that this process should lead to the elimination of a culture of cover-up and self-policing by the military.’<sup>12</sup> Just how long it will take to *re-investigate* these matters cannot be quantified.

Many are doubtful that the truth will ever be made transparent, given the many attempts to intimidate and prosecute whistleblowers. As reported in the public domain, many of those have been threatened with long prison terms for exposing alleged ADF misconduct in Afghanistan. Former ADF Legal Officer, Major David McBride, faces life imprisonment for revealing what he believed were serious breaches of the law of armed conflict by ADF members.<sup>13</sup> His repeated assertions to the media uphold that he lodged detailed complaints up the chain of command and exhausted every possible avenue of internal disclosure, and was both ignored and victimised.<sup>14</sup>



Defendant David McBride talks to the media before his court appearance in Canberra, Australia, on Friday, Feb. 14, 2020. His lawyer Bernard Collaery is charged with conspiring to reveal classified information that expose a diplomatic scandal and McBride is charged with leaking secret documents alleging military misconduct in Afghanistan. (AP Photo/Rod McQuirk)

McBride is on the record, publicly expressing grave concerns about the impunity and cover-up culture set by defence leadership, and again was ridiculed for those articulations. It seems absurd to continue politically-motivated charges against the former Defence Legal Officer, particularly since the IGADF has reported on those same allegations raised by McBride. Civil Liberties

<sup>10</sup>Paul Brereton, 2020. ‘Inspector General of the Australian Defence Force Afghanistan Inquiry Report.’ *Commonwealth of Australia*, 2020. Retrieved 15 Jan 2021 from <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

<sup>11</sup> Andrew Greene, 2020. ‘Former federal court judge named as special investigator for Afghanistan war crime allegations.’ *ABC News*. 16 Dec 2020. Retrieved from <http://www.abc.net.au/news/2020-12-16/afghanistan-war-crime-allegation-investigators-appointed/12991386>.

<sup>12</sup> *Ibid*, 2.

<sup>13</sup> Bill Rowlings, 2019. ‘Right from wrong.’ Speech, Canberra (190926). 05 October 2019. Retrieved 18 Jan. 21 from <http://www.cla.asn.au/News/right-from-wrong/>

<sup>14</sup> Nick Xenophon, 2020. ‘If moral courage matters, this whistle-blower needs defending.’ *The Age Newspaper*. 18 Nov 20. Retrieved 16 Jan 21 from <http://www.theage.com.au/national/if-moral-courage-matters-this-whistleblower-needs-defending-20201116-p56ey4.html>.

Australia argue that 'Australia needs better laws and regulations to supervise parliaments, politicians and public servants who are largely protected from their own misfeasance, malpractice and lawbreaking by a legal system and a secrecy culture that emphasises covering up bad behaviour rather than correcting it and learning from it.'<sup>15</sup> The author of this article agrees, and concludes that human rights advocates, media agencies anyone concerned by the denigration of human rights in Australia should be demanding urgent policy reforms to the *Defence (Inquiry) Regulations 2018*, that govern the way Defence investigates itself and matters of public interest.

Author:

Dr Kay Danes, OAM  
Human Rights & Social Justice Advocate

LinkedIn: [linkedin.com/in/kaydanes](https://www.linkedin.com/in/kaydanes)

Email: [kay.danes@gmail.com](mailto:kay.danes@gmail.com)

Relevant publications:

Danes, Kay. 2021. '[Stand Tall for ADF PTS Reforms.](#)'

Danes, Kay. 2020. '[How dare the ADF Leadership tarnish our 1st Commando Regiment.](#)'

Danes, Kay. 2020. '[Defence Lives Matter... call for Senate Inquiry](#)' CLArion.

Danes, Kay. 2019. '[Army 'Regs' lead to institutional abuse by Defence](#)' CLArion.

Danes, Kay. 2018. '[Command Failings that are defence-less](#)' CLArion.

Danes, Kay. 2016. '[The Moral Ethic of ADF Employment Rights.](#)' CLArion.

*Dr Kay Danes OAM is a member of Civil Liberties Australia. She is the spouse of a 42-year ADF/Special Air Service Regiment veteran, Kerry, and is passionate about fighting for the rights of ADF members.*

**CLA** Civil Liberties Australia A04043  
Box 3080 Weston Creek ACT 2611 Australia  
Email: [secretary \[at\] cla.asn.au](mailto:secretary[at]cla.asn.au)  
Web: [www.cla.asn.au](http://www.cla.asn.au)  
[11 Feb 2021](#)

---

<sup>15</sup> Civil Liberties Australia, 2019. 'Special Report: Media law, public right to know.' *CLArion Newsletter (No. 1907 – A04043)*. 01 July 2018. Retrieved 18 Jan. 21 from <http://www.cla.asn.au/News/wp-content/uploads/2019/06/2col-07-JULY-2019-CLArion.pdf>.

*This petition, below, closed on 10 Feb 2021 with more than 3000 signatories, indicating a substantial number of people agree with the sentiments above – Ed.*

**Petition EN2256 - Apply ADF Policy Reforms to include corrective action**

[Petitions List – Parliament of Australia \(aph.gov.au\)](https://www.aph.gov.au/petition_list?id=EN2256)

**Why do we need this?**

Reforms to the Redress of Grievance and Defence inquiry processes are urgently needed. Currently they are seriously flawed, and often result in significant professional employment failures that create mental trauma and reputational harm to serving ADF members. Genuine workplace reforms are needed. If these issues are not addressed then ADF members will continue to carry unresolved grievances into life beyond service which will impact the Government's efforts to realistically reduce the number of suicides currently plaguing the ADF veteran community.

**What are we asking?**

We are asking that the House support changes to the Defence (Inquiry) Regulations 2018 so that Defence Inquiries are subject to legal technicalities, rules of evidence, principles of open justice and common law; Defence Inquiry officers undertake legal training; witness testimony taken under oath/affirmation; introduce an appeal process outside the Chain of Command and corrective action policy to ensure procedural fairness, and access to genuine mediation for ADF members to resolve workplace complaints.

**Petition details.** [https://www.aph.gov.au/petition\\_list?id=EN2256](https://www.aph.gov.au/petition_list?id=EN2256)

Closing date: 10 February 2021 (11.59pm AEST)

**About the petitioners**

WO1 (Retd) Kerry Danes, CSM (Conspicuous Service Medal)  
42 year ADF career Veteran (Enlisted in ADF in August 1976, joining SASR in 1981, serving with distinction in Special Operations Command (SOCOMD) until reaching Compulsory Retirement Age October 2018)

Dr Kay Danes, OAM  
Human Rights & Social Justice Advocate