

**Senate Committee on Foreign Affairs, Defence and Trade**

**QUESTION ON NOTICE – COMMITTEES**

**Public hearing of the Senate inquiry into ‘The report of the review of allegations of sexual and other abuse in Defence, conducted by DLA Piper, and the response of the Government to the report’**

**Q1: Complaints eligible for assessment by the Defence Abuse Response Taskforce.**

**Senator Johnston asked on 14 March 2013, Hansard p 24-25:**

That is correct in all circumstances save for mismanagement. Mismanagement must have occurred before and the complaint must have been in writing prior to 11 April. If someone was the subject of mismanagement but did not make a complaint then they do not qualify?

**Response:**

On 12 April, the Chair of the Defence Abuse Response Taskforce, the Hon Len Roberts-Smith RFD, QC wrote to the Committee providing a response to the issue of eligibility:

*Under the Guidelines if a complainant makes an allegation to either DLA Piper or the Taskforce, prior to 31 May 2013, that they allegedly suffered abuse in Defence which occurred before 11 April 2011, they may receive a reparation payment of up to \$45,000.*

*A separate additional reparation payment of \$5,000 may be available under clause 3.1.4(d)(ii) of the Guidelines to a complainant who alleges (prior to 31 May 2013) (i) that they made a verbal or written report or complaint about the alleged abuse to Defence or otherwise prior to 11 April 2011 (notwithstanding that the mismanagement by Defence may have occurred after 11 April 2011), and (ii) that the verbal or written report or complaint that the person made was then allegedly mismanaged by Defence.*

**Senate Standing Committee on Foreign Affairs, Defence and Trade**

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**DLA Piper Hearing – 14 March 2013**

**Q2: Time limitations**

**Senator Xenophon asked on Thursday, 14 March 2013 Hansard page 27**

Given that limitation of time points has been taken in previous matters before the Administrative Appeals Tribunal, as I understand it, will there be a continuation of the previous policy? Would you be prepared to take it on notice, that in the course of the next few weeks you will be in a position to indicate to this committee whether time limitation points will be taken in such civil actions?

**Response:**

Defence does not have a formal policy in relation to time limitation provisions in AAT proceedings. As a matter of practice if a late application is made to the AAT, Defence generally would not object to the application if there were no prejudice to Defence's ability to properly represent itself.

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**DLA Piper Hearing – 14 March 2013**

**Q3: Time Limitations**

**Senator Xenophon asked on Thursday, 14 March 2013 Hansard page 27**

At what point in time, if there has been a point in time, did the department consider the issue as to whether, since the DLA Piper review was instigated, the time limitation points would be taken by the department or not?

**Response:**

Defence is bound to comply with paragraph 8 of the *Legal Services Directions* 2005 in relation to reliance on limitation periods. In accordance with paragraph 8.1, Defence would be required to plead a defence based on the expiry of an applicable limitation period unless exceptional circumstances existed and the Attorney-General consented (a copy of paragraph 8 is attached). Exceptional circumstances would include where Defence has through its own conduct contributed to the delay in the claimant bring the claim.

Similarly, if a claimant made an application for an extension of a limitation period, Defence would be required under paragraph 8.2 to oppose the application unless approval to consent were given by the Attorney-General. Such consent would normally be given only in exceptional circumstances which would justify not pleading a limitation defence or where it was expected that the application would succeed.

Given the above requirements and noting that the details of the claims have not been communicated to Defence, Defence has not considered its position on the question of limitation periods other than it will continue to comply with paragraph 8 of the *Legal Services Directions* 2005.

**8 Reliance on limitation periods**

*Agencies are to get approval before waiving or agreeing to extend limitation periods*

- 8.1 A defence based on the expiry of an applicable limitation period is to be pleaded by an FMA agency, unless approval not to do so is given by the Attorney-General. Approval will normally be given only in exceptional circumstances, for example, where the Commonwealth has through its own conduct contributed to the delay in the plaintiff bringing the claim.
- 8.2 An application for an extension of a limitation period is to be opposed by the agency unless approval to consent to the application is given by the Attorney-General. Approval will normally be given only in exceptional circumstances which would justify not pleading a limitation defence or where it is expected that the application will succeed (in which case not consenting would be likely to result in unnecessary costs and delay.)

*When Attorney-General's approval is not required*

- 8.3 Although paragraph 8.1 requires an FMA agency to plead a defence based on the expiry of an applicable limitation period, this does not prevent the agency from settling a claim involving a limitation period without the approval of the Attorney-General in the following circumstances:
- (a) where legal advice has been obtained recommending settlement of a claim, based (among other things) on an assessment of the plaintiff's prospects of success regarding the limitation period issue; and
  - (b) to the extent that there are perceived to be weaknesses in the plaintiff's position in that regard, these weaknesses are taken into account when determining an appropriate discount to the offer of settlement.

*Meaning of 'limitation period'*

- 8.4 Reference to the term 'limitation period' in paragraphs 8.1 and 8.2 is intended to cover only the initial commencement of court proceedings where the court is exercising original jurisdiction. It is not intended to cover, for example:
- (a) time limits applicable to procedural steps in litigation (eg time for filing a statement of claim or providing discovery);
  - (b) periods in which to appeal (eg from a single judge of the Federal Court to the Full Court of the Federal Court); or
  - (c) time limits that apply to the judicial or merits review of administrative decisions.

## Senate Standing Committee on Foreign Affairs Defence and Trade

### QUESTIONS ON NOTICE – COMMITTEES

#### DLA Piper Review inquiry – 14 March 2013

#### **Q4: Report recommendations update**

**Senator Fawcett** asked on 14 March 2013 Hansard page 28:

I want to take you to a submission to the inquiry from the Inspector-General. He refers to the report of September 2011 looking at the review of the management of incidents—the complaints in Defence. There were some 38 recommendations that were made in that report. It does not clearly indicate in the covering letter of his submission the status of the implementation of those.

#### **Response:**

The Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction by Mr Geoff Earley, Inspector General Australian Defence Force (ADF) (the IGADF review) forms part of the suite of reviews that were commissioned following the ADFA ‘Skype’ incident in April 2011. These reviews have been consolidated into the *Pathway to Change* strategy, which is a strategy for cultural change and reinforcement in Defence.

The IGADF review focuses on arrangements for the management of complaints and incidents in Defence, and the interface between military and civilian jurisdictions when dealing, in particular, with matters such as the ADFA ‘Skype’ incident. The review recommendations suggest changes to current Defence guidance, instructions, and policies in relation to complaint and incident management. All recommendations were generally accepted by Defence, some in-principle only.

In November 2011, the then-Secretary and Chief of the Defence Force (CDF) commissioned a review of all inquiry, investigation, review and audit systems, processes and structures across Defence (*Re-Thinking Systems Review*). The review responds to concerns that current systems are complex, resource-intensive, and not delivering effective outcomes. The review is to make recommendations for an optimal system that is fair, timely, efficient and able to deliver co-ordinated and consistent outcomes across Defence. The review has been split into two phases. Phase One is examining systems and processes for inquiries, investigations and reviews. Phase Two will examine audit systems and processes.

The *Re-Thinking Systems Review* differs from those which have preceded it because it is examining systems holistically, in terms of their application to Defence’s integrated ADF and Australian Public Service (APS) workforce. It addresses ADF military justice arrangements, but not exclusively. The intention is to develop systems that operate effectively in regional, deployed and integrated environments. It encompasses more than management of complaints or incidents of misconduct.

The *Re-Thinking Systems Review* is considering a number of recommendations in the *Pathway to Change* strategy, including those in the IGADF review. The aim is to ensure that there is a coherent reform agenda. A number of the *Pathway to Change* recommendations may be overtaken by the *Re-Thinking Systems Review*. However, the underlying intent of the recommendations will be addressed in the models under development.

## Status of recommendations

The status of recommendations in the IGADF review is as follows:

### Recommendations 2, 6, 11, 15, 17, 26, 30, and 37

Action in response to these recommendations has been completed.

- (a) Plain language 'fact' sheets on the redress of grievance process have been produced. (Recommendation 2)
- (b) Funding was made available to contract out the task of reducing the grievance backlog, and the backlog was reduced from 162 cases to 85 cases. The remaining cases will be progressed using Departmental resources, as no further funding is available at this time. As of March 2013, there were 70 cases outstanding. (Recommendation 6)
- (c) After careful consideration, further action is not required in relation to Recommendation 11, as existing policy guidance reflects the intent of the recommendation.
- (d) Explicit warning about dissuading members from making complaints has been included in the fact sheets, and will be included in the forthcoming annual unit induction package and the Complaint and Alternative Resolution Manual. (Recommendation 15)
- (e) A triage system will be implemented for processing applications for redress of grievance and a review of the content and style of briefs for Service Chiefs has been undertaken and recommendations from that review have been incorporated into current processes. (Recommendation 17)
- (f) The viability of a complainant-focused ADF-wide regional approach to managing sexual offences has been explored and will be addressed through the creation of the Sexual Misconduct Prevention and Response Office (SeMPRO). (Recommendation 26)
- (g) DI(G) 35-4 has been amended to permanently remove the requirement for form AC875-4. (Recommendation 30)
- (h) Review of the interface between APS and ADF complaint management processes was conducted in the *Re-Thinking Systems Review* and will be addressed in its recommendations. (Recommendation 37)

### Recommendations 1, 8, 9, 10, 14, 16, 20, and 29

Implementation of these recommendations is currently on hold pending the completion of the Re-Thinking Systems of Inquiry, Investigation, Review and Audit in Defence review (*Re-Thinking Systems Review*). These recommendations relate to matters such as quick assessments, administrative inquiries and the redress of grievance process, the continuing viability of which are all being considered as part of the *Re-Thinking System Review*. The underlying concerns of these recommendations, including complexity and delay associated with these processes, will be addressed in the *Re-Thinking Systems Review*, having regard to the direction of the overall *Pathway to Change* strategy.

Defence recognises that piecemeal reform in response to historic recommendations has not always achieved optimal outcomes. The *Re-Thinking Systems Review* provides the opportunity to take a step back and consider these systems from first-principles, making recommendations based on what the ADF and Defence needs, rather than based on ever-increasing adaptation of processes that are unsuitable in the modern military environment. The *Re-Thinking Systems Review* is developing models on the basis of a decision-making framework encompassing four phases: initial assessment and reporting; fact finding; internal review and external review.

Once the *Re-Thinking Systems Review* outcomes have been considered by the Secretary and CDF, decisions will need to be made about what approach to take. Decisions will be required within Defence whether it is necessary and appropriate to directly implement these IGADF review recommendations, or whether their underlying intent has been appropriately addressed in the *Re-Thinking Systems Review* outcomes.

Recommendations 3, 4, 5, 12, 13, 18, 19, 22, 23, 24, 27, 28, 31, 32, 33, 34, 35, and 38

These recommendations are either being progressed or are under further consideration.

Recommendations 7, 21, 25 and 36

These recommendations are closed.

- (a) Implementation of Recommendations 7 and 36 would require additional APS personnel resources in the Directorate of Complaint Resolution, which are not available at this time. Some of the concerns underlying the recommendations have been addressed in other ways (such as enhancing Comtrack functionality to assist in maintaining it at optimum currency).
- (b) The intent behind Recommendation 21 (simplification of policy) is to be implemented through establishment of a new Complaint and Alternative Resolution Manual, rather than through the recommended consolidation of DI(G) PERS 35-3 and DI(G) PERS 35-4.
- (c) Recommendation 25 is inconsistent with the Broderick Phase 2 report (Women in the ADF), which recommended restricted reporting. Consideration is being given to restricted reporting and limitations on it in the context of implementing the Broderick Phase 2 recommendation.

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**DLA Piper Hearing – 14 March 2013**

**Q5: Procedures for reporting sexual assault**

**Senator Eggleston asked on 14 March 2013 Hansard page 31:**

You must have some sorts of procedures in place for reporting of sexual assault, so I wonder if you could take us through that procedure. These are the questions I want answers to. Who can the victim complain to? What are the responsibilities and choices open to the commanding officers? What are the procedural fairness protections for those who are accused? And, lastly, when are local law enforcement authorities informed of a complaint?

**Response:**

Defence Instruction (General) PERS 35-4 *Management and Reporting of Sexual Offences*, stipulates that

All alleged sexual offences involving Australian Public Service (APS) employees, Australian Defence Force (ADF) members, and/or external service providers which occur in the Defence workplace, or which have any association to the Defence workplace (eg conferences, work related social gatherings etc) must be immediately reported to the Australian Defence Force Investigative Service (ADFIS), who will coordinate and determine the appropriate jurisdiction for the handling of the matter.

Sexual offences are 'notifiable incidents' and must be reported to ADFIS who must then act in accordance with Defence Instruction (General) ADMIN 45-2— *The Reporting and Management of Notifiable Incidents*. Irrespective of the decisions made by ADFIS, any sexual offence complaint involving an ADF member, Defence APS employee or Defence contracted staff member as the complainant, respondent or witness must be managed as a workplace issue and in accordance with Defence Instruction (General) PERS 35-4.

(a) In essence, this is subject to the wishes of the complainant. Defence policy provides multiple options for the complainant to report an incident of sexual offence. While Defence's policy is that a complaint should be made to the complainant's commander or manager, other options remain available to the complainant. These include health provider, civilian or Service police, a more senior person in the chain of command or line management.



If a person witnesses, or becomes aware of, a sexual assault that person must report the matter to their Commander or manager. Commanders and managers are required to report the complaint to ADFIS.

(b) Commanders and managers are responsible for the management of sexual offence complaints in the workplace involving people under their supervision.

Therefore, commanders and managers are responsible to ensure the matter is immediately notified to ADFIS, and with the advice of ADFIS, to determine the most appropriate way to manage the matter in accordance with Defence Instruction (General) PERS 35-4.

Commanders and managers are responsible and accountable for:

- i) taking an active approach in preventing sexual offences;
- ii) reporting all sexual offences as a Notifiable Incident to ADFIS, irrespective of the wishes of the complainant;
- iii) managing the complaint, including immediate mandatory reporting to ADFIS, immediate and progress reporting pursuant to command directives, organising support services for affected personnel (called crisis intervention), securing the crime scene and supporting the investigative agency;
- iv) ensuring confidentiality of the matter to protect the privacy of all parties involved;
- v) preventing and discouraging improper discussion of the complaint;
- vi) assisting victims/complainants, in that, they are informed of:
  - the complaint process;
  - the mandatory requirement to report the incident to ADFIS, irrespective of their wishes;
  - availability of medical, psychological, legal, padre and other support services,
  - the complainant's wishes in relation to the management of a complaint,
  - the determination of how the matter is to be managed;
- vii) initiating crisis intervention and the provision of a long-term support strategy in order to appropriately manage sexual offence complaints. This support is provided to both the victim/complainant and respondent;
- viii) appointing a separate case manager to assist the complainant, respondent and witnesses during the complaint management process;
- ix) reporting progress to all parties involved in the complaint, in particular, every month for the complainant and respondent;

x) reporting to ADFIS and Values, Behaviours and Resolutions Branch of the incident; and

xi) maintaining detailed records of the incident.

(c) Procedural fairness protections are embedded in Defence policies relating to the implementation of procedures under the Defence Force Discipline Act 1982, the imposition of administrative sanctions for ADF members, and the APS code of conduct.

(d) Upon notification to ADFIS of a Notifiable Incident, ADFIS must take into account the range of jurisdictional and operational considerations and, where appropriate, report the alleged offence to civilian police. Serious sexual assaults cannot be investigated by ADFIS without consent pursuant to section 63 of the Defence Force Discipline Act. Therefore these matters are referred to the civilian police and ADFIS remains the Defence liaison. As Defence liaison, ADFIS assists the civilian police investigation and provides regular reports back to the chain of command to assist the commanders in the management of personnel pursuant to Defence Instruction (General) PERS 35-4.

As a matter of policy, all serious sexual offences are reported by ADFIS to the relevant State or Territory Police Service. ADFIS does not report sexual offences to State or Territory Police where the incident occurred on deployment or outside Australia.

If a sexual offence complaint involves a member of the Defence Force Cadets it must be immediately referred to ADFIS who must manage referral of the matter to civilian police as Defence has no jurisdiction.