



## DEFENCE ABUSE RESPONSE TASKFORCE

D13#314882DOC  
2013/1049

28 April 2014

Air Commodore G Bates AM (Ret'd)

**By email:**

Dear Air Commodore Bates

### RECONSIDERATION

I refer to your request for reconsideration of the assessment of your complaint of abuse in Defence notified to you in the letter from Ms Wandmaker dated 14 February 2014, and to the additional documentation provided by you in support of that request.

In particular, I note your Personal Account by statutory declaration made 14 April 2014.

In her letter to you, Ms Wandmaker advised the Taskforce was unable to progress your complaint about the decisions made by senior Defence officers in relation to a selection process because that did not fall within the definition of "abuse".

I appreciate you contend that is an inaccurate description of your complaint because that "is about the denial of natural justice and the attendant intimidation, denigration, character assassination, career termination and denial of future civilian employment in [your] field of expertise that [you] endured as a result of this deliberately flawed process".

I also note you seek to rely upon an alleged "Abuse of Power" which you say was when the Defence Delegate made you a bona fide offer of \$400,000 but later withdrew that offer by falsely claiming it to be a settlement negotiation without prejudice after he had received further direction from the Minister.

May I say at the outset that I fully accept that you and your family have plainly experienced a protracted saga which has caused you considerable distress over many years and continues to do so. In your own case that has also resulted in a need for you to obtain psychological support.

Nor can there be any doubt that the events you describe took place in a volatile political and departmental environment, as you clearly document.

You have put forward material which does on the face of it demonstrate various aspects of defective administration and some failures to afford you procedural fairness (for example, as noted in the report of the IGADF).

But accepting all of that, the question still remains whether the matters upon which you rely constitute "abuse" within the remit of the Taskforce. In this context, the relevant category of abuse would have to be workplace bullying and harassment. I understand you characterise them in those terms, but simply describing them in that way begs the question.

For example, "abuse of power" is not a category of abuse with which the Taskforce can deal, unless it amounts to workplace bullying and harassment and the circumstances on which you rely in that respect do not do so.

As to the wider allegation encompassing the whole process you have described, I note that the "Family Impact Statement" of your son and daughter, is said to be prepared in support of your application

"...to seek compensation from the Department of Defence, for personal and professional detriment as a result of defective administration of [your] ultimate career which amounted to unfair dismissal" (my emphasis)

And your Chronology document is headed

"...Claim for Compensation for Detriment caused by Defective Administration"

Having reviewed the material on file and considered the additional material you have provided in support of your request for reconsideration, the matters you raise (however flawed they may otherwise have been) do not appear reasonably to justify your characterisation of them as workplace bullying and harassment. That being so, they do not constitute "abuse".

Accordingly, and whilst I realise how seriously disappointing this must be for you, I am obliged to confirm the original assessment and that the Taskforce is unable to progress your complaint.

Yours sincerely

A handwritten signature in black ink that reads "Len Roberts-Smith". The signature is written in a cursive, slightly slanted style.

**The Hon. Len Roberts-Smith RFD, QC**  
**Chair**  
**Defence Abuse Response Taskforce**

## ***EXTRACTS FROM:***

# **INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE**

## **REVIEW OF THE MANAGEMENT OF INCIDENTS AND COMPLAINTS IN DEFENCE INCLUDING CIVIL AND MILITARY JURISDICTION**

INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE  
91 NORTHBOURNE AVENUE, CANBERRA, ACT 2600

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**Author:** Mr Geoff Earley AM, Inspector General Australian Defence Force

**Sponsor:** Vice Chief of Defence Force

**Contact:** Inspector General Australian Defence Force

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### **Acknowledgements**

The Inspector General Australian Defence Force thanks the following for their assistance in this review:

*Review Director:* Colonel James Gaynor, CSC

*Review Assistant:* Mrs Jenny O'Reilly

*Resources:* Mr Simon Lustenberger

*Research:* Ms Loretta Kurzawa, Captain Steve Foldesi, RANR; Commander Allan Rankin, RAN; and

Warrant Officer Class Two Olaf Peisert

## **Compensation for Detriment caused by Defective Administration (CDDA) scheme**

82. Where, after due process, a grievance related to a decision or action has been found to be substantiated, a complainant may wish to seek financial compensation for the detriment suffered. This will usually take the form of an application for compensation under the Defective Administration Scheme. As a vehicle for providing relief in cases where some form of financial compensation would in all the circumstances be appropriate, the Defective Administration scheme is not ideal. Compensation may only be awarded where it can be shown that the detriment suffered was due to administrative error.

83. The focus on administrative error as a pre-requisite for access to this scheme is not well suited to the military environment, where substantial compensable detriment can result to a member from a wide range of causes which cannot easily or conveniently be defined as administrative error. The difficulties associated with the utility of this scheme in the military environment have been recognised for some time and have been the subject of criticism in some of the submissions received by this review.

84. A recommendation to introduce a new avenue, specific to the military environment, by which compensation could be awarded was recommended by Street/Fisher. The Street/Fisher review found that:

The current CDDA administrative scheme is not well suited to correct wrongs associated with ADF service. A new discretionary compensatory delegation, controlled by the CDF, needs to be developed to meet the expectations and unique service considerations of the uniformed workforce.

85. To date this recommendation has not been implemented. This review agrees with the recommendation made by the Street/Fisher Report. The present situation whereby the Service Chiefs and the CDF are unable to award any form of ‘merit’ compensation to aggrieved members outside of the CDDA scheme, even though they may personally recognise the validity of the case and support the claim, detracts from the effectiveness of the complaint handling process and should be remedied. It has been suggested that this issue could be addressed through the application of Section 58B of the *Defence Act 1903* which provides the Minister with discretion to determine payments to members of the ADF. It is understood that such payments could apply to both serving and former members, and even deceased members. However, even if this is possible, the better option would be to establish a purpose designed compensation scheme for the ADF which clearly sets out the circumstances in which it would have application.

86. A further criticism of the CDDA system is that some delegates have been part of Defence Legal, other parts of which may also have advised a commander or manager with respect to the decision for which compensation has been claimed. This has raised perceptions of apprehended bias on the part of the CDDA decision maker; see also paras 11 and 12 of annex F.

**Recommendation 12. The Street/Fisher recommendation to establish a discretionary delegation to CDF to compensate administrative/management/financial errors in addition to the current CDDA scheme should be implemented.**

**Recommendation 13: To avoid any perception of apprehended bias in compensation decisions, the decision maker with respect to compensation—whether as part of CDDA or an ADF-specific scheme if established—should be organisationally separate from Defence Legal.**

## SUBMISSIONS TO THE REVIEW

185. The review was contacted by a number of individuals, the majority of them former ADF members. Some of those people sought a review of the individual circumstances of a historical complaint, which was outside the scope of this review. Where appropriate, these people were referred to the concurrent DLA Piper review. Some of the people who made submissions to this review also made submissions to the DLA Piper review.

### Summary of submissions

186. Fourteen written submissions were received and thirteen of those were considered as part of this review. The fourteenth submission fell outside the scope of the review. Some of the submissions were made directly to the review, some of them had been submitted to DLA Piper and were referred to this review because they fell outside of the scope of the DLA Piper task, and some of them were referrals from the Review Secretariat. It was outside the scope of this review to confirm the validity of claims made in the submissions.

187. A number of the individuals making submissions expressed concern that making a submission to this review might jeopardise the ongoing management of their own individual complaints. Each person was reassured and informed that his or her submission would be treated in confidence. An anonymous summary of the fourteen submissions received is at annex F.

### Common themes in the submissions

188. While this review did not address specific issues of each submission, their content was taken into account as far as possible. The submissions reveal a number of common themes:

**a. Lack of accountability for actions.** All of the submissions ultimately suggested a lack of accountability for actions on the part of complainants, and managers. Two of the submissions suggested that measures to discipline vexatious or malicious complainants are inadequate to hold such complainants to account. Eleven of the submissions reported some command or management failure for which the relevant commanders or managers were not or could not be held accountable.

**b. Abuse of power or authority.** Nine of the submissions reported an apparent abuse of authority either on the part of management but also, in two cases, on the part of complainants. Some of the submissions indicated that senior ADF officers had apparently deliberately ignored career management rules or guidelines, or had taken into account matters which ought not to have been taken into account, in making employment decisions. Two of the submissions mentioned abuse of power by complainants in making apparently vexatious fraud allegations and unacceptable behaviour complaints, for which there had been no effective redress.

**c. Failures properly to implement policy.** Five of the submissions directly referred to incidents in which a commander's or manager's ignorance of policy had apparently resulted in a failure to implement that policy when dealing with an incident.

d. **Management of defective administration claims.** Two of the submissions referred to confusion and long delays in the management of defective administration claims. The confusion, including the apparent raising of false expectations by Defence's scheme managers, caused a great deal of stress to the applicants. As Defence Legal advises Defence commanders and managers regarding administrative matters on the one hand—and a Defence Legal employee is the departmental delegate for the *Compensation for Detriment caused by Defective Administration* (CDDA) scheme on behalf of Defence on the other concerns were also express

***I REQUEST THE DART TO PLEASE CONSIDER THESE FINDINGS AND RECOMMENDATIONS AGAINST THE FOLLOWING SUMMARY OF MY CASE AS REPORTED INTERNALLY BY DEFENCE WITHIN THE DEFENCE REVIEW PROCESS. PLEASE NOTE THAT DEFENCE HQS NEVER ADVISED ME THAT THE DELEGATE ACTED OUTSIDE OF HIS AUTHORITY, INSTEAD THE DELEEGATE DISHONESTLY CLAIMED THAT THE OFFER WAS WITHOUT PREJUDICE. I CAN PROVIDE FUTHER EVIDENCE TO PROVE THAT SUCH WAS NOT THE CASE:***

“11. A former officer claimed he had not been shown procedural fairness when being considered for a promotional position in 2000, and that he was denied promotion for reasons which should not have been taken into consideration. The officer was not informed of those reasons at the time, and was therefore not given the opportunity to respond. Subsequently, on resigning from the ADF, the officer was denied permission for Defence industry employment, and this decision materially disadvantaged his family. The officer made a defective administration claim, which was poorly managed over several years by the delegate and involved the officer's being made what he thought was a satisfactory offer of settlement. It appears that the delegate may not have had authority to make that offer and the delegate subsequently asserted that any discussion of the offer had been on a 'without prejudice' basis.”

Extract of Report submitted by

AIRCDRE G F Bates AM (Ret'd)

29 Nov 2013

# Government response to the Defence Abuse Response Taskforce (DART)

## Chapter - Concluding remarks Submission 2 - Attachment 1

The review calls on the ADF, the Government and the Parliament to give proactive support to those in the ADF who have the courage to stand up for what is right when others in the ADF do, or have done wrong. (page 199 – 200)



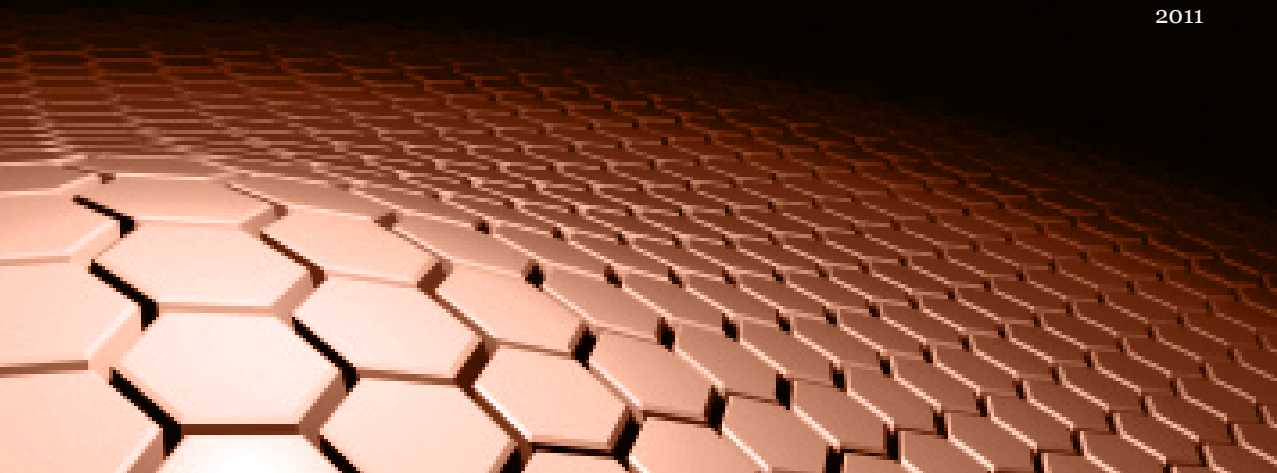


Australian Government  
Department of Defence

# Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction

A Report by the Inspector General Australian Defence Force

Reviews into aspects of Defence and  
Australian Defence Force Culture  
2011





**INSPECTOR GENERAL  
AUSTRALIAN DEFENCE FORCE**

**REVIEW OF THE MANAGEMENT OF  
INCIDENTS AND COMPLAINTS IN DEFENCE  
INCLUDING CIVIL AND MILITARY  
JURISDICTION**

INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE  
91 NORTHBOURNE AVENUE, CANBERRA, ACT 2600

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## Inspector General Australian Defence Force

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2011/1061185/1  
IGADF/OUT/2011/R674559

**General D.J. Hurley, AC, DSC**  
Chief of the Defence Force  
RUS-R1-51-5-CDF  
PO Box 7900  
CANBERRA BC ACT 2610

Dear General Hurley

**INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE REVIEW OF  
ARRANGEMENTS FOR THE MANAGEMENT OF COMPLAINTS AND  
INCIDENTS AND RELATED JURISDICTIONAL ISSUES IN THE ADF**

I am pleased to forward herewith a report of my review of current policy arrangements in Defence for the management of complaints, including complaints about unacceptable behaviour, incidents and related jurisdictional issues.

**Yours sincerely**

A handwritten signature in black ink, appearing to read 'Geoff Earley'.

**Geoff Earley AM**  
**Inspector General ADF**

Email: [geoff.earley@defence.gov.au](mailto:geoff.earley@defence.gov.au)

06 September 2011

**Enclosure:**  
Report of Review and attachments.

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## EXECUTIVE SUMMARY

Following the Australian Defence Force Academy (ADFA) Skype incident the Minister for Defence announced that the independent Inspector General Australian Defence Force (ADF) would conduct a review of the management of incidents and complaints in Defence with specific reference to the treatment of victims, transparency of processes and the jurisdictional interface between military and civil law which may lead to untimely decision-making processes.

The subject matter of the review therefore embraced a range of related but discrete topics, each with its own applicable law and policy. This made it challenging and ultimately impractical to deal globally with the matters under review. For this reason, discussion in the review report has been divided into categories:

- **Overview of Defence's current arrangements to manage complaints.** The fundamental principles underpinning Defence's arrangements compare favourably with the Defence Force Ombudsman's key components for a complaints handling system: *culture, principles, people, process and analysis*.
- **Quick Assessments.** These serve a useful purpose but proposals to address inconsistent and unclear policy should be expedited; recommendation 1 refers.
- **Redress of Grievances (ROG).** The ADF ROG system has been the subject of many internal and external reviews in recent years. The system is consistent with relevant Australian standards and compares favourably with grievance mechanisms of other countries' armed forces. Policy is necessarily complex but there is scope to simplify its presentation to better suit the needs of end-users. The strict requirement for a Commanding Officer to make his or her own inquiries should be relaxed, and the entitlement of warrant officers and officers to refer grievances to the Chief of the Defence Force (CDF) should be discontinued. Consideration should be given to discretionary external review of grievances in appropriate circumstances; recommendations 2–17 refer.
- **Unacceptable behaviour and unacceptable sexual behaviour.** ADF personnel, including those who have only recently joined, appear to be aware of their complaint avenues. There appears also to be a high level of confidence in management processes for unacceptable behaviour complaints. However, relevant policy is confusing and in urgent need of reform and consolidation; recommendations 18–24 refer.
- **Support to sexual offence complainants and respondents.** There are approximately 75 sexual offence complaints annually in the ADF. The quality of support provided to complainants and respondents in such matters currently relies upon the knowledge and experience of individual commanders or managers. The viability of an ADF-wide approach to responding to allegations of sexual offences should be explored. 'Restrictive' or informal reporting of sexual offences where there are no consequences for the alleged offender is inconsistent with the maintenance of Service discipline and should not be adopted; recommendations 25–26 refer.

- **Transparency of processes.** Impediments to procedural transparency include restrictions on disclosure of Defence inquiry information and privacy law restrictions on disclosure of personal information including the results of disciplinary proceedings. These impediments compromise timely management and also the maintenance of discipline in the ADF and should be removed; recommendations 27–28 refer.
- **Civil-military jurisdictional resolution.** Policy in this area is necessarily complex but has been the subject of *ad hoc* review. There should be one sponsor for jurisdictional policy and one policy document to which others may refer without duplication; recommendations 29–35 refer.
- **Administration of complaints.** The centralisation of complaint administration in Fairness and Resolution Branch and the introduction of the Complaint Management, Tracking and Reporting System (COMTRACK) have been useful initiatives; recommendation 36 refers.
- **Interface between ADF and APS complaints handling arrangements.** Increased integration of Defence workplaces renders mutually consistent ADF and Australian Public Service (APS) complaints handling arrangements more important. There would be benefit in a study to better provide for the reality of a mixed workplace that does not leave one employment category or another at a disadvantage in the management of complaints; recommendation 37 refers.
- **Defence responses to media interest in complaints.** Continual, negative reporting of complaints management without evidence of appropriate rejoinder or rebuttal can be damaging to morale of ADF personnel. While acknowledging that the publication of Defence responses is outside the Department's control, a more robust and swift response by Defence to correct misconceptions or inaccuracies was urged by some of the commanders and stakeholders consulted as part of the review; recommendation 38 refers.

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. However, they are not user-friendly and their implementation depends upon commanders' and managers' understanding and experience of those policies. The system generally could be enhanced by improving commanders' and managers' accessibility to relevant policy. This could be achieved by consolidating policy and information into fewer reference documents, by producing entry-level policy guidance tailored for different user categories, and by improving training available to complaints managers.

## SUMMARY OF RECOMMENDATIONS

1. Subject to receipt of Part 3 of the HMAS *Success* Commission of Inquiry Report, the Director-General ADF Legal Services' proposed amendments of Quick Assessment (QA) processes should be expedited.
2. Simple plain language 'fact' sheets on the redress of grievance process should be produced for use on unit bulletin boards, websites and other locations as appropriate.
3. Information on grievance processes should be included in annual unit induction training using the IGADF Military Justice Awareness Briefing Package, or something similar, as a model.
4. The presentation of complex policy guidance instructions should be simplified to better meet the differing needs of likely end-users.
5. The production of a user-friendly Complaints and Alternate Resolution Manual should be expedited to complement, or replace if appropriate, existing detailed guidance provided by Defence Instructions.
6. 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.
7. In the interests of longer term stabilisation of the Complaint Resolution case officer complement, consideration should be given to greater use of Defence APS personnel as Complaint Resolution case officers.
8. The entitlement of officers and warrant officers to access a further level of review of their grievances by the CDF should be discontinued.
9. The redress of grievance regulations and Defence Instruction (General) DI(G) PERS 34-1 should be amended to mandate that where it is clear that a Commanding Officer does not have the authority to resolve a grievance or where the circumstances of paragraph 17 of the Defence Instruction apply, the Commanding Officer must refer the grievance without further inquiry to the relevant Service chief.
10. The circumstances in which a commanding officer may refer a grievance to an authority who has power to resolve the grievance, where that authority is not the Service Chief, should be clarified.
11. The policy described in DI(G) PERS 34-1 concerning the suspension of administrative action pending the resolution of a grievance should be reviewed so that suspension may be considered only where exceptional circumstances exist.
12. The Street/Fisher recommendation to establish a discretionary delegation to CDF to compensate administrative/management/financial errors in addition to the current CDDA scheme should be implemented.
13. To avoid any perception of apprehended bias in compensation decisions, the decision maker with respect to compensation—whether as part of Compensation for Detriment caused by Defective Administration (CDDA) or an ADF-specific scheme if established—should be organisationally separate from Defence Legal.

14. To improve perceptions of impartiality of the complaints resolution process, consideration should be given to further examining the feasibility and benefit of including an independent, external 'assessor' in the preparation of briefs for Service Chiefs in selected cases based on the United Kingdom Single Service Board model.
15. Publicity and training packages of the kind described in recommendations 2 and 3 above should contain explicit warnings about preventing, discouraging, victimising or otherwise dissuading members from making a complaint or facilitating the processing of a complaint.
16. The need for performance measures in grievance management beyond the setting of realistic completion times should be reviewed in light of the Commonwealth Ombudsman's proposal to develop and publish a Defence grievance handling service charter.
17. The following recommendations made by the Defence Force Ombudsman in his submission to this review should be implemented:
  - a. Defence agree that a 180-day time limit for finalisation of ROGs referred to service chiefs is not optimal, and any process of reform should include a staged reduction in the time taken to resolve complaints.
  - b. Defence undertake a case management risk analysis of each ROG to match the resources allocated to the ROG to the risk posed to the organisation.
  - c. Defence review the content and style of briefs to the service chiefs.
  - d. Defence undertake an evaluation of the extent to which the peer review and quality assurance processes value could be further streamlined.
  - e. Defence publish a service charter for the handling of ROGs that includes performance measures for which defence will be held accountable in managing members' redresses.
  - f. Defence cease the practice of putting cases in an unallocated queue and allocate to case officers upon receipt.
18. Subject to adequate guidance being made available to commanders and managers on the limitations of Alternative Dispute Resolution (ADR) as a solution to work-related issues involving command relationships or disciplinary incidents, greater use of ADR across Defence should be encouraged.
19. The appointment of case officers to support complainants and respondents should be required in all cases, consistent with the intention of Chief of Army Direction 27/2009 and Chief of Air Force Directive 04/2006.
20. DI(G) PERS 35-3 and DI(G) PERS 35-4 should be reviewed to clarify the administrative action which may be taken when disciplinary action is pending.

21. The policy on the management of all unacceptable behaviour and sexual offences should be combined in a single policy reference. As an immediate measure a digest of existing policy, similar to Australian Fleet (AF) Memorandum 14/11, should be issued so that commanders and managers have access to a single reference for the management of unacceptable behaviour and unacceptable sexual behaviour.
22. Defence's administrative policies should be amended to provide for administrative suspension from duty, including the circumstances in which a Commander may suspend an ADF member and the conditions which may be imposed on the suspended member.
23. In the short term, consideration should be given to using the IGADF complaints handling course as a training basis for all Defence workplace supervisors.
24. In the longer term, competency-based complaints handling training should be developed as a promotion prerequisite.
25. Restricted reporting should not be adopted by the ADF. As a concept, it is inconsistent with the maintenance and enforcement of service discipline in that it potentially allows sexual assailants to continue to serve undetected.
26. The viability of a complainant-focused, ADF-wide regional approach to responding to allegations of sexual offences such as that in place at HMAS *Cerberus* should be explored.
27. Reform of the Defence (Inquiry) Regulations to restore the pre-2002 disclosure arrangements to give authority to Defence personnel to disclose documents in the course of their duties should be expedited.
28. Relevant Defence legislation should be amended to provide privacy law exemptions to enable the general outcomes of discipline and administrative proceedings, with names redacted, to be made available to Defence personnel to ensure transparency of military justice outcomes, which should in turn assist commanders to maintain discipline.
29. Any inconsistency between DI(G) ADMIN 45-2 and Provost Marshal—Navy Policy Directive 01/2010 be reviewed and clarified.
30. Policy should be amended to permanently remove the requirement for use of the form AC875-4.
31. The Director of Military Prosecutions consider expediting her intended change to policy to require consultation with a victim prior to any relevant prosecution decision.
32. Consolidation of the summary proceedings prosecution and disclosure policy in the *Discipline Law Manual* should be expedited.
33. Defence's policy on jurisdictional resolution should be consolidated in one policy document to which other, related policy documents may refer without duplication.
34. Currency of policy in this area is critical and maintaining current policy should be prioritised. Pending consolidation of jurisdiction policy, an urgent review should be undertaken to update and remove inconsistencies between existing policy documents.

35. Consideration should be given to appointing one sponsor area to accept responsibility for all jurisdictional policy documents.
36. Adequate arrangements should be put in place to ensure sufficient resources are available to maintain COMTRACK at optimum currency.
37. A review of the interface between ADF and APS complaints management processes in the Defence workplace should be expedited.
38. The way in which Defence responds to media criticism of incident reporting and management should be reviewed to provide, where appropriate, a more robust and swift rebuttal with enhanced visibility to ADF personnel.

**GLOSSARY OF DEFENCE INSTRUCTION TITLES**

<b>Abbreviated Title of Document</b>	<b>Full Title of Document</b>
DI(G) ADMIN 45-2	Defence Instruction (General) Administrative 45-2 <i>The reporting and management of notifiable incidents</i> of 26 March 2010
DI(G) ADMIN 67-2	Defence Instruction (General) Administrative 67-2 <i>Quick Assessment</i> of 07 August 2007
DI(G) PERS 34-1	Defence Instruction (General) Personnel 34-1 <i>Redress of Grievance—Tri-Service procedures</i> of 08 September 2010
DI(G) PERS 35-3	Defence Instruction (General) Personnel 35-3 <i>Management and reporting of unacceptable behaviour</i> of 28 June 2009
DI(G) PERS 35-4	Defence Instruction (General) Personnel 35-4 <i>Management and reporting of sexual offences</i> of 11 February 2004
DI(G) PERS 45-1	Defence Instruction (General) Personnel 45-1 <i>Jurisdiction under the Defence Force Discipline Act—Guidance for commanders</i> of 17 February 1999
DI(G) PERS 45-4	Defence Instruction (General) Personnel 45-4 <i>Australian Defence Force Prosecution Policy</i> of 29 August 2000



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# **REVIEW OF THE MANAGEMENT OF INCIDENTS AND COMPLAINTS IN DEFENCE INCLUDING CIVIL AND MILITARY JURISDICTION**

## **INTRODUCTION**

### **Background**

1. On 11 April 2011 the Minister for Defence announced a suite of reviews into aspects of the culture of the Australian Defence Force (ADF). The need for these reviews arose from an incident at the Australian Defence Force Academy (ADFA) involving two first year cadets that has since become commonly known as the *ADFA Skype incident*.
2. Underpinning the reviews, was a requirement that the ADF and Defence promote and enforce the highest standards of behaviour within a workplace environment where complaints can be aired and appropriately addressed impartially and without fear of recrimination.
3. On 06 May 2011 the Minister announced that the independent Inspector General ADF (IGADF) would conduct a review of the management of incidents and complaints in Defence with specific reference to the treatment of victims, transparency of processes and the jurisdictional interface between military and civil law, which may lead to untimely decision making processes. What follows is the report of that review.

### **Scope of the review**

4. Although formal terms of reference were not initially provided, it was generally understood that the review task was to broadly address two aspects—arrangements for the management of complaints and incidents, and the interface between military and civilian jurisdictions when dealing, in particular, with matters such as the *ADFA Skype incident*. Subsequent development of formal Terms of Reference for this review (annex A) included the requirement to identify the existence of any weaknesses, inconsistencies or ambiguities in Defence's policy and procedural arrangements for managing incidents and complaints under disciplinary, administrative or equity processes.
5. The range of activities and incidents that could potentially become the subject of reporting or complaint within the ADF and the wider Defence organisation is vast. In many cases quite specific arrangements exist to deal with the reporting and investigation of a wide variety of incidents and complaints arising from technical, operational or other special to type activities.
6. For instance, activities involving security issues, safety issues, air accidents, fraud, procurement and medical management matters, among others, each have separately identifiable arrangements for reporting their occurrence and for dealing with complaints about them. Such matters are beyond the scope of this review. In order to keep the task within manageable proportions it was necessary to ensure that a reasonable linkage existed between matters for review and the nature of the incidents that gave rise to them.

7. The range of incidents and complaints addressed in this report has therefore been limited to:

- a. the management of complaints under the Redress of Grievance (ROG) system;
- b. the management by commanders and supervisors of complaints of unacceptable behaviour and offences against the person; and
- c. the reporting and initial management of incidents.

8. In particular, the review has aimed to:

- a. identify what guidance, instructions, policies, practices and requirements are in place for managing such incidents and complaints under either civil or military legal, disciplinary, administrative or equity processes;
- b. identify any apparent weaknesses, inconsistencies or ambiguities that may exist in—or in the application of—extant guidance, instructions, policies, practices and requirements; and
- c. consult with relevant internal and external stakeholders, including surveying of relevant Defence personnel who have been involved in the management or reporting of unacceptable behaviour complaints or complaints of offences against the person.

9. As far as the management of complaints and incidents is concerned, this review is confined to the current policy governing incident and complaint management by commanders, supervisors and others in the chain of command. It does not therefore include detailed consideration of complaints avenues external to management or the chain of command.

### **Matters outside the scope of the review**

10. A key component of the current policy by which ‘complaints and incidents’ are managed includes the arrangements for inquiry or investigation into such matters. A detailed review of the system of administrative inquiries in Defence was completed by a Working Group in November 2010 and presented to the Chiefs of Service Committee, and subsequently to the HMAS *Success* Commission of Inquiry headed by the Honourable Roger Gyles AO QC for further consideration. Under long-standing arrangements separate action is also in train to conduct an independent review of the effectiveness of the ADF investigative capability under the *Defence Force Discipline Act 1982* (DFDA) following the program of reforms commenced in 2006.

11. This review does not aim to repeat the work of the 2010 Administrative Inquiry Working Group, nor duplicate the current review of the ADF investigative capability, other than so far as may be relevant to a commander or supervisor’s overall management of an incident or complaint.

## **Other matters affecting the subject of the review**

12. Concurrent with this review of Defence's arrangements for the management of incidents and complaints, the HMAS *Success* Commission of Inquiry (COI) has also been engaged in a review of arrangements for the management of complaints of unacceptable behaviour. It is understood that the report of those inquiries will be completed in late 2011. The President of that Commission of Inquiry, the Honourable Roger Gyles QC, was consulted as part of this review.

## **Outline of the report**

13. This report will cover:

- a. the method of the review;
- b. a description of current arrangements for the management of complaints and incidents, including:
  - (1) relevant policy and law,
  - (2) management responsibility for jurisdictional determination,
  - (3) analysis of surveys and discussions with Defence managers, and
  - (4) relevant international policy and experiences;
- c. treatment of victims and respondents, including:
  - (1) relevant policy and law, including management responsibilities,
  - (2) accessibility of complaints mechanisms,
  - (3) results and relevant analysis of surveys of complainants and respondents;
- d. transparency of processes, including:
  - (1) relevant disclosure and privacy law and its implementation in Defence, and
  - (2) attitudes of commanders and managers.
- e. resolution between civilian and military jurisdictions, including inconsistencies and ambiguities in relevant policy;
- f. the interface between APS and ADF processes for complaint handling;
- g. Defence's media responses; and
- h. recommendations for improvement.

## Review method

14. **Procedure.** The method of the review has been as follows:

- a. to review Defence's policy and procedures—with respect to the management of redresses of grievance and other complaints of unacceptable behaviour or allegations of offences against the person—to assess their relevance and consistency;
- b. to compare Defence's complaints and incident management policies and procedures with relevant national standards, namely the Human Rights Commission, Comcare and the Australian Standard AS ISO 10002—2006 *Guidelines for complaints handling in organizations*;
- c. to gather information about the experiences of Defence personnel who have been involved in an unacceptable behaviour complaint either as a manager, complainant or respondent;
- d. to gather information about recently-appointed or enlisted ADF members' knowledge and experience of complaint processes; and
- e. to identify any best practice arrangements in use by comparable defence forces overseas

15. **Consultation.** As part of the review, IGADF staff consulted with stakeholders internal and external to Defence. Annex B is a list of the topics which were discussed with external stakeholders and senior Defence commanders. Annex C is a list of the topics which were discussed with Commanding Officers. Those consulted were as follows:

- a. Mr Alan Asher, Defence Force Ombudsman, whose formal submission to the review is enclosure 1;
- b. the Honourable Roger Gyles, President HMAS *Success* COI;
- c. Major General the Honourable Richard Tracey RFD, Judge Advocate General of the ADF;
- d. the Office of the Chief of the Defence Force (CDF);
- e. Operational and strategic level commanders, including the Chiefs of Navy, Army and Air Force;
- f. Director General Fairness and Resolution Branch, Department of Defence, whose formal submission to the review is enclosure 2;
- g. Commander Fiona Sneath, RAN, Deputy Director of Military Justice, Defence Legal;
- h. Chief Petty Officer Joanne Monaghan, formerly the Sexual Offence Support Person Network Coordinator, HMAS *Cerberus*; and
- i. forty tactical-level commanders (unit Commanding Officers and their staffs).

## OVERVIEW OF CURRENT ARRANGEMENTS TO MANAGE COMPLAINTS

16. The submission of a 'complaint' or 'grievance' is the means by which formal action may be initiated. A complaint may be either about an individual's conduct as part of an incident, or about a decision which has been taken by persons in authority on behalf of an organisation.

17. Annex D is a list of the policy and legal instructions which provide guidance to Defence commanders and managers in the management of incidents and complaints. The following is a brief outline of the process which, according to current policy, should generally be followed when an incident or complaint occurs:

- a. The commander or manager's initial response in most cases should be to direct that a Quick Assessment (QA) be conducted. The purpose of the QA is to recommend an appropriate course of action.
- b. Based on information in the QA, the commander or manager may decide to direct that no further action is warranted, that the incident or complaint can be resolved informally, or that it be the subject of further inquiry or investigation.
  - (1) If the facts of the incident or complaint disclose a 'notifiable incident' then DI(G) ADMIN 45-2 mandates that the incident or complaint be reported to the Australian Defence Force Investigative Service (ADFIS). ADFIS will be responsible for either investigating the allegations as a DFDA offence or for liaising with civilian police as necessary. The range of matters that may constitute a 'notifiable incident' is broad and may include a disciplinary or criminal offence, a security incident, death or serious injury, or any incident that is deemed by a commander or manager to be serious, sensitive or urgent.
  - (2) If the facts of the incident or complaint disclose a minor disciplinary offence then this should be investigated at unit level.
  - (3) If the facts of the incident or complaint do not disclose any disciplinary or criminal offence, then the commander or manager may direct that the incident or complaint be the subject of an administrative inquiry. Defence's *Administrative Inquiries Manual* provides that any administrative inquiry should be suspended in certain circumstances pending completion of discipline investigations; see subparagraphs 4.9f and paragraph 6.4–6.5 of the Manual.
  - (4) The complainant and respondent should be supported and receive regular feedback throughout the investigative or inquiry process.

## Fundamental principles

18. The fundamental principles that underpin the current arrangements for the management of incidents and complaints in the ADF are customarily taken to be:

- a. **Right to complain.** All members have an established right, both historical and legislative, to complain about matters relating to their Service.
- b. **Obligation to act.** The Services have an obligation to deal with members' complaints in an effective, efficient and timely manner.
- c. **Resolution at the lowest possible level.** Complaints and disputes should be resolved informally where possible, and at the lowest possible level. This is consistent with arrangements for the APS<sup>1</sup>. The reasons for resolution at the lowest possible level include ensuring that decisions about incidents and complaints can be made as quickly as possible, and by decision-makers who are most likely to understand the issues which are at the heart of the complaint or incident.
- d. **Command and leadership.** A complainant's Commanding Officer is central to the management of the complaint, or of the incident giving rise to the complaint. The reasons for a Commanding Officer having a pivotal role in complaint and incident management include that commanders require a detailed understanding of the pressures on their personnel in order to lead them to cooperate as a fighting unit when necessary and to deliver operational outcomes.
- e. **Referral to higher authority.** Members who remain dissatisfied with the outcome of their complaint to their command chain have an entitlement to refer the complaint to their Service Chief for review. Officers and warrant officers have an additional entitlement to refer their complaint to the CDF for further review if dissatisfied by the outcome of consideration by their Service Chief. This further avenue of appeal is not available for other ranks.
- f. **Duty not to prevent complaints.** It is an offence for persons to dissuade, prevent or victimise complainants from making complaints.
- g. **Support to parties.** All parties to a complaint, including respondents, are entitled to support throughout the process of dealing with the complaint.

## Comment

19. In considering whether the fundamental principles that have traditionally underpinned the ADF's approach to complaint handling have continuing relevance to the current Service environment, the review has been informed by the guidance provided by AS ISO 1002-2006 *Guidelines for Complaint Handling* and the *Key Components of a Good Complaint Handling System* published by the Commonwealth Ombudsman.

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<sup>1</sup> IGADF discussion with Commonwealth Ombudsman of 27 June 2011

20. AS ISO 1002-2006 describes an internationally accepted framework for complaint handling. It provides that complaints policies and procedures should incorporate the following key principles: Commitment; Accessibility; Responsiveness; Objectivity; Confidentiality; Continual Improvement; and Accountability.

21. According to the Commonwealth Ombudsman, the key components of a good complaint handling system should be built on five elements:

- a. Culture—valuing complaints as of benefit to good administration and demonstrating a commitment to resolving problems.
- b. Principles—fairness, accessibility, responsiveness, efficiency.
- c. People—skilled, positive attitude, effectively supervised.
- d. Process—acknowledgment, assessment, planning, investigation, response, review and consideration of systemic issues.
- e. Analysis—can be used to improve service, highlight failings, reveal problems and trends; agencies should set both qualitative and quantitative measure to assess complaint handling.

22. In assessing the fundamental principles underpinning the ADF complaints management system against the guidance on complaint handling offered by the Australian Standard and the Commonwealth Ombudsman, the review has identified no significant inconsistencies between that guidance and the objectives and outcomes sought by the ADF system, notwithstanding its application within a hierarchical military environment.

23. The review concludes therefore that the fundamental principles that currently underpin the ADF complaints management system remain valid for use as a basis and reference point for any further development and improvement of the present system.



## QUICK ASSESSMENT OF COMPLAINTS OR INCIDENTS

24. Since 2000, Defence policy has mandated the conduct of QAs as an initial formal process in certain circumstances. Defence's principal policy document for the conduct of QAs is DI(G) ADMIN 67-2.
25. That instruction provides that the purpose of a QA is to quickly assess the known facts, and to identify what is not known about an occurrence, so that a decision can be made about the most appropriate course of action to be taken in response to it.
26. An additional purpose of a QA is to provide Defence commanders and managers an audit record of occurrences. A QA brief, and the commander/supervisor's endorsement, is to be in writing.
27. Quick Assessments are supposed to be brief and quick, and delivered to the initiating commander or manager within 24 hours of tasking. The policy intent is that the QA officer not take formal written statements and should not make findings about the event which is the subject of the QA, other than to establish the known facts and to recommend whether further inquiry or investigation is required.
28. Paragraph 8 of DI(G) ADMIN 67-2 mandates that a QA be conducted where the commander or manager is of the opinion 'that subsequent investigation or inquiry of the occurrence may be required'. In all other cases, the decision to conduct a QA is at the commander/supervisor's discretion.

### Perceived problems

29. The following are common perceived problems with the QA process:
- b. **Purpose is misunderstood.** This perceived problem has two aspects—the initiation of QAs in circumstances where they are unnecessary, and the conduct of QAs not in accordance with policy intent:
    - (1) **Completion of QAs when no requirement.** Often QAs are initiated and completed in circumstances where other reporting is prescribed. Examples of this include vehicle accident investigations (for which a separate report is mandated), low level injuries not requiring inquiry/investigation (which require completion of a separate form), and civilian offences not occurring on Service land or in a Service vehicle such as 'driving under influence of drugs or intoxicating liquor' (which are reported on Defence's Conduct Recording and Tracking System).
    - (2) **Lack of awareness of purpose of QA.** Although commanders who were consulted as part of the review advised that there is gradual improvement in the execution of QAs, many QAs are neither quick, nor are they a preliminary assessment of the facts as they are known at the time. Rather, many QAs take a long time to complete and contain unnecessary detail.
  - c. **Ambiguous policy guidance.** The policy guidance for commanders and supervisors for initiating a QA is ambiguous.

- (1) Paragraph 8 of DI(G) ADMIN 67-2 provides that a QA is a matter for a commander/supervisor's commonsense and judgment, and need only be directed following *significant* incidents, allegations or problems. Paragraph 2 of annex C of the same reference mandates a QA irrespective of the seriousness of an occurrence as follows:

When an occurrence is reported, irrespective of the seriousness of it, a commander/supervisor must initiate a Quick Assessment ...

Therefore, there appears to be conflicting policy guidance as to whether a QA is required or discretionary.

- (2) Annex F to Defence's policy on the management of unacceptable behaviour, DI(G) PERS 35-3, mandates a QA following a complaint of unacceptable behaviour, whereas paragraph 19 of DI(G) ADMIN 67-2 implies that in such circumstances a QA is discretionary.
- d. **Mandatory QAs unnecessary in some circumstances.** The requirement that a QA be conducted even where an incident is exclusively disciplinary in nature has the potential to waste resources. If an incident has no administrative features, and discloses either a possible Service offence or civilian offence, then the policy requirement for a QA appears to be superfluous.

### Proposals for reform

30. The Director General Australian Defence Force Legal Services is aware of the above problems and advised the review of his intention to amend DI(G) ADMIN 67-2 including as follows:

- a. to clarify the circumstances in which a QA is required,
- b. to clarify that a QA is not required where there are other specific instructions mandating other immediate actions that replace the requirement for separate QA,
- c. to provide more detailed guidance as to the substance and form of QAs.

31. The Director General intends to further consider the amendments listed above after receipt of part 3 of the HMAS *Success* Commission of Inquiry report.

**Recommendation 1: Subject to receipt of Part 3 of the HMAS *Success* Commission of Inquiry Report, the Director-General ADF Legal Services' proposed amendments of QA processes should be expedited.**

32. Unless there is no further action following a QA, the next step in the complaints handling process would normally be either an administrative inquiry or a disciplinary investigation. For the reasons given in paragraphs 10 and 11 of this report, this review has not dealt with either of those processes.

## REDRESS OF GRIEVANCES

33. In its consideration of the ROG system the review acknowledges the informative submission received from the Director General Fairness and Resolution Branch in the Department of Defence (enclosure 2).

34. It is the right of every member of the ADF to complain to his or her Commanding Officer about an issue affecting his or her service. Commonly, an application for Redress of a Grievance will be concerned with decisions or actions of a commander or supervisor that is perceived by the member to impact adversely upon his or her service. This historic right has its legislative origins in the *Articles of War 1717* (UK) and is now provided by part 15 of the *Defence Force Regulations 1952*. Those regulations, amplified by DI(G) PERS 34-1 *Redress of Grievance—Tri-Service Procedures*, limit issues which may be raised in a ROG and provide for a tiered response as follows:

- a. The Commanding Officer must inquire into the complaint, make a decision on it, take any other necessary action and notify the applicant of the decision.
- b. If the applicant is dissatisfied with the Commanding Officer's decision, the applicant may refer the complaint to the Chief of the applicant's Service.
- c. If the applicant is an officer or warrant officer and is dissatisfied with his or her Service Chief's decision, the applicant may refer the complaint to the CDF.

35. The Regulations and instructions covering the ROG system provide a number of limitations on what matters may form the subject of grievances under the system. Members may not, for example, make complaints about decisions or judgements of a civil court or service tribunal or about liabilities arising under the Financial Management and Accountability Act. Nor may they normally complain about matters that are more than six months old or matters to do with initiating action in anticipation of a decision yet to be made, performance assessments, termination notices or the merits of defence policies.

36. If a complainant remains dissatisfied with the outcome of a complaint to a Service Chief, further avenues of appeal are available but these must generally be pursued outside of the normal command chain channels. Depending on the subject matter of the complaint these further avenues might include the IGADF, the Defence Force Ombudsman, the Human Rights Commission or, possibly, even judicial review by the Administrative Appeals Tribunal or Federal Court.

37. The operation of the ROG system, rightly or wrongly, is often taken to be an indicator of the wider health and effectiveness of the military justice system. A significant backlog in the number of grievances awaiting resolution, for example, is interpreted by some commentators to be symptomatic of a more general dysfunctionality of the military justice system. While this sort of extrapolation is unlikely to be the case, the right to make a complaint and have it dealt with expeditiously is certainly a significant element of the military justice system. It is of fundamental importance that the complaints system not only works properly, but is seen to work properly.

### **Previous reviews of the Redress of Grievances system**

38. As a result, the ROG system has been the subject of a number of reviews and inquiries both internally and externally since 2000. These include:

- a. the 2004 joint CDF and Ombudsman review of the ADF ROG system;
- b. the 2005 Senate Foreign Affairs, Defence and Trade References Committee's (the References Committee) inquiry into the Effectiveness of Australia's Military Justice System;
- c. the Ombudsman's 2007 review of the ADF's Management of Complaints about Unacceptable Behaviour; and
- d. the 2009 Report of the Independent Review on the Health of the Reformed Military Justice System, by the Honourable Sir Lawrence Street, AC, KCMG, QC and Air Marshal Les Fisher, AO, FRAeS, MAP (Rtd).

39. While each review made a number of recommendations concerning complaint handling and the ROG process, only the 2007 Ombudsman review looked specifically at the management of complaints about unacceptable behaviour. A brief summary of these reports appears below.

#### **Joint review of the ADF's Redress of Grievance System 2004**

40. This very comprehensive joint ROG review was conducted by the Ombudsman and the Department of Defence specifically into the ROG system. Importantly, the review found little to criticise in terms of Defence's approach to compliance with basic best practice complaint handling principles. Rather, the focus of the review was more concerned with the practical implementation of complaint handling processes. In this respect the ROG review noted the growth in complaint handling mechanisms that had occurred since 1997 and the consequent increase in complexity in managing and administering complaints that had resulted. It observed that there was no over-arching policy that explains to potential complainants (or their advisers) which mechanisms might be best suited to resolving their grievance.

41. While most of the 72 recommendations made by this review appear to have been incorporated into the current guidance provided by the regulations and DI(G) Pers 34-1 *Redress of Grievances-Tri-Service Procedures* (re-issued in September 2010), it remains the case that complaint handling mechanisms still appear to be complex.

#### **The effectiveness of Australia's Military Justice System 2005**

42. The References Committee's inquiry into the effectiveness of Australia's military justice system considered the ADF's military justice system of which the ROG process is a part. At the time of the inquiry a substantial backlog of ROG cases awaiting resolution had developed. Of particular interest for the issue of complaint handling was the Committee's recommendation to establish, in relation to the ROG system, an ADF Administrative Review Board (ADFARB).

43. The ADFARB was intended to be an external review agency with statutory independence from the chain of command. Modelled on the Canadian Grievances Board, it was intended to replace some or all of the functions of the Complaints Resolution Agency and the avenues for further review and oversight provided by the Defence Force Ombudsman and, for military justice related issues, the Inspector General ADF.

44. The ADFARB proposal was not accepted by the then Government. While it agreed there was a need to improve the complaints management system it decided that the shortfalls in the existing system would best be addressed by streamlining the existing complaints management system and retaining independent internal and external review and oversight agencies. It was considered that the creation of an entirely new external agency of the type proposed for the ADFARB would not provide real benefits in terms of increasing perceived independence and could undermine the responsibility and accountability of commanders for the wellbeing of ADF personnel in their command. The then Government's response emphasised that the overarching principles guiding the ROG system should remain that complaints be resolved at the lowest effective level in the quickest time and that primary responsibility to resolve complaints remain with unit commanders.

#### **Commonwealth Ombudsman's review of ADF management of complaints about unacceptable behaviour 2007**

45. This review was specifically concerned with the management and reporting of complaints under DI(G) PERS 35-3—*Management Reporting of Unacceptable Behaviour*.

46. Although it is possible for complaints about unacceptable behaviour to be addressed within the ROG system, they are more usually dealt with as a separate process as required by the relevant Defence Instruction. The Ombudsman found that while Defence provided an effective complaint management mechanism that was readily accessible by members, further consideration could be given to improving a number of key areas including record keeping, training, reporting, data collection, the role of inquiry officers and equity advisers and quality assurance. All fifteen recommendations made relating to these areas were accepted by Defence.

#### **Report of the Independent Review on the Health of the Reformed Military Justice System 2009 (the Street/Fisher Review)**

47. In 2009 an independent review of the implementation and the consequential effects of the 2005 Committee's report on the effectiveness of Australia's military justice system was conducted by Sir Laurence Street and Air Marshal Les Fisher (Retd).

48. In relation to the ROG system, the Street/Fisher independent review saw no need for any radical changes to the basic structure. It did however recommend the implementation of a 90-day benchmark for the completion of ROGs referred to Service Chiefs and CDF. Although the need for a benchmark was accepted, Defence chose to set it at 180 days. While this may have been a pragmatic solution having regard to resources, extending the benchmark time limit for finalising complaints from an otherwise reasonable time limit of 90 days, does not at face value seem to have been a progressive initiative in light of the fundamental principle of the need to strive for more timely ways of finalising complaints.

49. In addition to the reviews mentioned above, the ADF complaints system generally and the ROG process in particular have received ongoing attention from the Senate References Committee in its series of progress reports into reforms to the ADF military justice system following the Committee's 2005 inquiry. Also, in 2010, the ROG system was again considered in a joint review by the Commonwealth Ombudsman and Defence. On this occasion the review focussed on delays in handling grievances that are elevated to the Service Chief level. While the joint review resulted in an exposure draft of the proposed report which included a number of recommendations, a final version was not proceeded with.

### **Comment**

50. As stated in the introduction, the present review of the ADF complaints handling policy is concerned with the policy guidance as it currently stands. The brief summary of previous reviews in the preceding paragraphs has been included to illustrate that the complaints system and ROG process has been under virtually continuous and detailed review for many years, the latest only being in 2010. The present policy guidance is largely the product of progressive implementation of successive previous reviews, most of the recommendations of which were accepted. There is little, therefore, that can be said, in terms of structural reform, that is new in this regard. What can be said is that there has been a consistent acknowledgment that, structurally, the ADF complaints system meets or exceeds the commonly accepted key principles that should underpin an effective complaints handling system. It follows from this that the reasons given for not replacing the present system with a wholly external complaints handling agency, such as that proposed in 2005 by the creation of an ADFARB, remain valid.

### **Best practice**

51. In considering the issue of best practice, this review has had regard to the extent to which current complaint handling policy in Defence complies with criteria set by four external agencies; Australian Standards, the Australian Human Rights Commission, the Commonwealth Ombudsman and Comcare. Annex E identifies where and how Defence policy complies with best practice criteria used by these external agencies under the headings of Fairness/Objectivity, Accessibility, Responsiveness/Timeliness, Commitment/Integration, Confidentiality and Review. A similar comparison, although from a slightly different perspective, was also included in enclosure 2.

### **Comment**

52. Both comparisons indicate that the implementation of changes in Defence complaint handling practices arising from recommendations made in previous reviews have been consistent with acknowledged best practice expectations in Australia.

### **Comparison with Armed Forces of other countries**

53. The review had available to it information on the policy approaches towards complaint handling taken by the defence forces of the United Kingdom, Canada and New Zealand, which have similar cultural and military traditions to the ADF.

## **Canada**

54. The Canadian Forces Grievance Process was simplified in 1998 to create two levels of review within the chain of command. The process provides for a member to submit a grievance relating to certain decisions, acts or omissions in the administration of the Canadian Forces which affect the personal rights or situation of Canadian members, provided there is no other redress process within the National Defence Act. As with the ADF redress process, there is a general six month timeframe within which a grievance should be submitted. In the first level of review the grievance is submitted to the member's Commanding Officer or a superior officer, as appropriate, and they are known as the 'Initial Authority'. If the member is unhappy with the decision of the Initial Authority, they have the right to have the matter reviewed by the Chief of the Canadian Defence Staff. The Chief of the Canadian Defence Staff has delegated the right to decide some grievances to the Director General Canadian Forces Grievance Authority, however some grievances must be decided personally by the Chief of the Canadian Defence Staff. All matters to be decided by the Chief of the Canadian Defence Staff are referred to the Canadian Forces Grievance Board to review and provide findings and recommendations to the Chief before a final decision is made. The Canadian Forces Grievance Board is an external and independent legal body with the power to summons witnesses, compel production of evidence and to determine and modify its own rules of procedure when investigating and reviewing grievances. It does not, however, have the authority to grant or deny ROG and may only provide the Chief of the Canadian Defence Staff with findings and recommendations and the Chief is not bound by these. The decision of the Chief of the Canadian Defence Staff is final and binding although it can be challenged by an application for judicial review in the Federal Court of Canada or reviewed by the Ombudsman.

## **United Kingdom**

55. In the United Kingdom, service personnel may lodge a redress of individual grievance. The redress process allows complaints to be resolved at three different levels or by a Service Complaint Panel. The first level of review is the 'Prescribed Officer', usually the Commanding Officer their immediate superior, as appropriate. The second level is review by a 'Superior Officer' who must satisfy certain rank requirements. The third level of review is the Defence Council, which will usually delegate its powers to a Service Complaint Panel or a Single Service Board.

56. A Service Complaint Panel normally consists of two serving officers of at least one star rank, usually of the same service as the complainant. An independent member is required to sit on Service Complaint Panel for complaints of discrimination, harassment, bullying, dishonest, improper or biased behaviour, failures in health care provided to a member by the United Kingdom Ministry of Defence, or the actions of the Service police. An independent member is not a member of the regular or reserve forces or employed in the Civil Service. The Single Service Board is comprised of at least two members who will decide on a complaint.

57. The United Kingdom system generally requires a complaint to be submitted within three months of the date of the matter being complained about. A member who is or was an Officer at the time of the matter being complained of, and who is dissatisfied with the decision of the Defence Council, may require a report on the complaint to be submitted to the Queen in order to receive her directions on the complaint. The Service Complaints Commissioner monitors the Service complaints system and also has the power to refer complaints of discrimination, harassment, bullying and dishonest, improper or biased behaviour made by serving or past members of the Services to the chain of command.

### **New Zealand**

58. New Zealand service personnel may raise a personal grievance with their chain of command if they believe they have been wronged in any manner. If Service personnel are unable to obtain redress through their respective Service, complaints can be forwarded to the CDF, who is the final authority for redress.

59. Complaints made to the CDF are referred to the Judge Advocate General (JAG), who investigates complaints and makes recommendations to the CDF. The CDF makes the final decision on a complaint, and that decision is conveyed in writing through the command chain to the complainant.

### **Comment**

60. Not surprisingly, the ADF system for the management of members' grievances is in principle similar to those used by comparable armed forces. All systems require grievances to be dealt with in the first instance by the Commanding Officer and provide for successive levels of review where complainants remain dissatisfied with outcomes. Each system provides avenues of external scrutiny or review where necessary, although the approach taken in relation to this aspect in each case differs. In the case of Canada and the United Kingdom, provision exists for external involvement in the assessment of grievances before decision by the highest level of internal review—the Chief of the Canadian Defence Staff and a Single Service Board in the United Kingdom. None of the systems provide authority for external review agencies to exercise executive power to alter decisions made by command.

61. Like the ADF, each of the defence forces of the United Kingdom, Canada and New Zealand has had occasion to wrestle with the problems of devising policy to implement complaints handling systems that are effective, fair and timely. What is apparent from the experiences of each is that the ADF is not alone in arriving at solutions that require relatively complex and extensive guidance. With one possible exception of the involvement of external agencies in Canada's and the United Kingdom's grievance processes, there do not appear to be any stand-out features of complaint handling systems in use overseas by comparable defence forces that are so markedly superior to the ADF system, as it has evolved, that would warrant adoption in this country whether from the point of view of cost effectiveness, efficiency or fairness.



62. The ADF system of ROG is compliant with best practice standards espoused by recognised independent Australian complaint handling agencies and compares favourably with systems in use by similar armed forces overseas. While this is largely attributable to the continual and detailed scrutiny to which the system has been subjected by previous reviews, there are a number of recurring themes identified by those reviews that still require remedial attention. These are:

- a. awareness of complaint channels;
- b. complexity of instructions;
- c. delay in resolution of complaints;
- d. inequity of entitlement of officers and warrant officers to further review by CDF;
- e. initial action by Commanding Officers on receipt of a grievance;
- f. suspension of administrative action pending resolution of a grievance;
- g. the Compensation for Defective Administration scheme;
- h. setting of performance standards for complaint handling;
- i. independence of complaint agencies; and
- j. fear of recrimination.

#### **Awareness of complaint channels**

63. This aspect incorporates what is referred to in best practice standards as ‘visibility and accessibility’, and simply means that adequate arrangements must exist to ensure that members are sufficiently informed of the options available to them to state a grievance and that the process for doing so is as simple as possible. The primary means of dissemination of information about the ADF ROG system is via DI(G) PERS 34-1 *Redress of Grievance—Tri-Service procedures*, a comprehensive publication of more than thirty pages. While none of the guidance contained in the instruction appears to be unnecessary, it is not ideal for use as an entry level reference point for potential complainants or managers. Intranet access to information on the grievance process is also available, although it too relies heavily on citing the DI(G). Further, intranet connectivity is not readily available to a significant proportion of ADF members, particularly in Army.

64. That there may be a significant level of ignorance across the ADF about options for making a complaint, and the ROG system generally, is supported by empirical evidence gathered from focus groups surveyed as part of the IGADF military justice audit program. For example, over the course of 25 unit audits conducted in the period July to December 2010, 64 percent of respondents reported that they were aware of the avenues of complaint open to them, although only 55 percent reported that they knew how to lodge a grievance.

65. While instruction on complaints procedures may be included in initial training and some other leadership courses, there appears to be a need for this type of awareness to be more regularly reinforced. This could be done by the production of simple plain language ‘fact’ sheets for use on noticeboards and the inclusion of similar information as part of unit annual

awareness or induction briefings as is currently the case for equity and diversity, security, and fraud issues among others. In 2008, a concise military justice awareness training package that included basic information on ROG procedure was prepared by the Office of IGADF and offered to the Services for use by units in annual awareness training. This, or a similar approach, could provide an appropriate vehicle for the regular dissemination of basic information on grievance procedure. As an example, an updated copy of the IGADF military justice awareness training package is enclosure 3.

**Recommendation 2: Simple plain language ‘fact’ sheets on the redress of grievance process should be produced for use on unit bulletin boards, websites and other locations as appropriate.**

**Recommendation 3: Information on grievance processes should be included in annual unit induction training using the IGADF Military Justice Awareness Briefing Package, or something similar, as a model.**

### **Complexity of instructions**

66. As observed by the Director General Fairness and Resolution in enclosure 2, it is a commonly held view in Defence and ADF circles that the framework in Defence for managing and investigating complaints, including complaints about personal conduct, is too complex. While this may well be the case, it is also true that complaint handling can be, and often is, an intrinsically complex process. This is particularly so in the case of the ADF where the employer relationship with its members is often characterised as ‘cradle to grave’. A consequence of this is that the range of matters that may potentially ground a complaint by an ADF member is very much larger—and can add more layers of complexity—than for most employees in other sectors.

67. At least part of the reason for the seeming complexity of policy guidance on ADF complaint handling appears to be because of a tendency to simply add to it as recommendations made by successive reviews are implemented. The policy guidance now contained in DI(G) PERS 34-1 is aimed not only at potential complainants but also at commanding officers and other officials who have parts to play in the grievance resolution process. The instruction requires that it be read in conjunction with at least three other Defence Instructions and publications which are relatively complex in their own right. Moreover, thirty six other policy documents are listed as being ‘related publications’.

68. It is clear that all of these instructions are intended to be for the guidance and benefit of multiple categories of end users, not all of whom would necessarily have a need to be across all of the information contained therein. At the same time, as previously remarked, there does not seem to be much about the policy guidance that is redundant, although it is likely that some content (for example, guidance on inquiries), may be duplicated in other policy instructions. It is acknowledged however that duplication in such cases is not necessarily a bad thing – consolidation of relevant guidance at the risk of duplication can be advantageous where it would otherwise mean having to cross reference.

69. The problem of complexity of guidance in this area of policy is not unique to the ADF. It may be the case that the complexity of the omnibus policy guidance contained in primary source instructions such as the ROG Defence Instruction must simply be accepted as unavoidable if such guidance is to properly reflect the policy intent.

70. This does not necessarily mean that nothing can be done to improve the situation. There would be advantage in approaching the problem of complexity from the point of view of presentation, that is, by giving further consideration as to how these complex issues might be better presented so as to cater more directly to the differing needs of the readership of such instructions. Some progress has been made in this regard. The re-issue of DI(G) PERS 34-1 in September 2010 has attempted, through the use of annexes aimed at particular categories of potential users, to simplify the presentation of the instruction. It is understood that Fairness and Resolution Branch has also commenced work to produce a Complaints and Alternate Resolution Manual which will aim to present the policy in a more user-friendly way. This type of approach should be encouraged for use in other related policy areas.

**Recommendation 4: The presentation of complex policy guidance instructions should be simplified to better meet the differing needs of likely end-users.**

**Recommendation 5: The production of a user-friendly Complaints and Alternate Resolution Manual should be expedited to complement, or replace if appropriate, existing detailed guidance provided by Defence Instructions.**

### **Delay in resolution of complaints**

71. The issue of undue delay in the resolution of complaints is the most frequently recurring criticism of the ADF grievance system. Statistics available from focus group surveys conducted as part of the IGADF unit military justice audit program in 2010 indicate that 66 percent of respondents do not believe that ROGs are resolved promptly. Commanding Officers are required to deal with grievances within 90 days. Complaints that are referred for consideration by a Service Chief are required to be dealt with within 180 days. Those that are eligible for further referral to the CDF are required to be dealt with within 90 days. Theoretically therefore, the delay in finalising a grievance, other than those referred to the CDF, will not become 'undue' until 270 days have elapsed, although the general rule is that all grievances should be resolved as soon as reasonably practicable, with priority being given to grievances about termination or discharge decisions.

72. Most commonly, problems of undue delay occur with grievances that are referred to Service Chiefs for resolution. At the end of 2010 the backlog of unresolved grievances at this level was 148. At the end of August 2011 there were 152 open Service Chief grievances, with 64 of these under review by Complaints Resolution case officers and the other 88 awaiting allocation of a case officer.

73. For many years the backlog in unresolved grievances at the Service Chief level has seemed an almost intractable problem and remains a visible indicator of the performance of the system. The backlog is not due to any lack of effort or application by Complaints Resolution staff. The main difficulty appears to be an inability to attract and retain sufficient suitably qualified staff as case officers, thus perpetuating a situation where grievances can remain unallocated to a case officer for lengthy periods. Case officer work within Defence is a relatively specialised area of occupation which, to date, has mostly been filled by permanent or Reserve ADF members. Not everyone who enters it is necessarily suited and many decide after a short time that it is not for them. While the case officer staffing situation stabilised in late 2010 and by late August 2011 had become fully complemented with 14 case officers, this improvement in personnel resources is still insufficient to reduce the backlog of cases and attend to the inflow of new grievances at the same time.

74. Reduction and elimination of the backlog must be regarded as a priority task as its continued presence remains a serious factor in undermining confidence in the whole complaints handling process. One approach taken in the past to reduce the growth of the backlog has been to restrict the matters about which grievances may be lodged. However, this can only be regarded as a solution of limited potential if the fundamental and historic rationale which underpins the military grievance system is not to be breached. While it may be convenient to argue that the addition of resources is not the answer, it is difficult to see how the situation can be retrieved without extraordinary, albeit temporary, arrangements being put in place. Provided that funding can be made available, the most practical option appears to be contracting out the task, perhaps to suitably qualified legal firms with Defence and complaints management experience. In the longer term, further consideration could also be given to rebalancing the case officer mix in Complaints Resolution with a greater proportion of Defence APS officers to assist with workforce stability.

**Recommendation 6: 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.**

**Recommendation 7: In the interests of longer term stabilisation of the Complaint Resolution case officer complement, consideration should be given to greater use of Defence APS personnel as Complaint Resolution case officers.**

#### **Inequity of entitlement of officers and warrant officers to further review by CDF**

75. Since its commencement, the present ADF ROG system has provided for an additional level of review by the CDF of grievances submitted by officers and warrant officers which, is not available to other ranks. While this may have been justified in times past by custom of the Service, it has become increasingly difficult to sustain an argument that officers and warrant officers should be entitled to access an additional avenue of review for complaints about their Service that others may not simply because of their rank. It is understood that relatively few cases seek review by the CDF and of these even fewer result in any change to the previous decision. This aspect of the grievance system now appears to be inequitable and could be discontinued without significant detriment.

**Recommendation 8: The entitlement of officers and warrant officers to access a further level of review of their grievances by the CDF should be discontinued.**

#### **Initial action by Commanding Officers on receipt of a grievance**

76. The Defence Force Regulations and DI(G) PERS 34-1 mandate that Commanding Officers must, after receipt of a grievance, complete a series of actions in accordance with paragraph 15 of annex C to that Instruction, including conducting a QA and inquiring into the grievance. Paragraph 17 of annex C to the Instruction mandates that the Commanding Officer must automatically refer the grievance to the Service Chief if;

- a. the grievance is about a decision, act or omission by the member's Commanding Officer;
- b. the Commanding Officer has already inquired into the issues raised in the grievance via a process other than the grievance process; and

- c. the grievance does not provide the Commanding Officer with new information that causes the Commanding Officer's original decision to be altered.

77. Paragraph 18 of annex C to the Instruction mandates that the Commanding Officer must complete all the requirements of paragraph 15, including the requirement to inquire into the grievance, even if the circumstances in which mandatory automatic referral to the Service Chief pertains. In cases where the circumstances of paragraph 17 for mandatory referral apply, or where it is clear from the QA that the Commanding Officer has no authority to resolve the grievance, the requirement for him or her to inquire into it not only appears to serve no useful purpose, but has the potential to add unnecessary delay to the grievance resolution process.

78. The grievance process could be improved by amendment of the Regulations and relevant Defence Instruction to provide for the Commanding Officer to automatically refer a grievance to the Service Chief, without first inquiring into it, where the circumstances of paragraph 17 of annex C to the Instruction apply or where it is clear that the Commanding Officer does not have the authority to resolve the grievance. Consideration should also be given to clarifying the circumstances in which a Commanding Officer may refer a grievance to an authority with the power to resolve it who is not the Service Chief.

**Recommendation 9: The redress of grievance regulations and Defence Instruction (General) Personnel 34-1 should be amended to mandate that where it is clear that a Commanding Officer does not have the authority to resolve a grievance or where the circumstances of paragraph 17 to annex C of the Defence Instruction apply, the Commanding Officer must refer the grievance without further inquiry to the relevant Service Chief.**

**Recommendation 10: The circumstances in which a Commanding Officer may refer a grievance to an authority who has power to resolve the grievance, where that authority is not the Service Chief, should be clarified.**

### **Suspension of administrative action pending resolution of grievance**

79. Under the present system, provision is made for adverse administrative action to be suspended pending resolution of a grievance that has been submitted in relation to the action proposed where that action may give rise to an irrevocable or pre-emptive action, or cause undue hardship to the member. Paragraph 41 of DI(G) PERS 34-1 mandates that the suspension of termination action must be considered in all cases. The policy goes on to provide that in certain circumstances, such as those involving considerations of safety, security, discipline or effective operation of the unit, the proposed administrative action may be taken despite the submission of a grievance, although such circumstances are to be exceptional.

80. The overall effect of this policy, which is not a requirement of the Regulations, appears to lean toward the suspension of administrative action as being the *de facto* or 'normal' course. While this is undoubtedly a considerable benefit to a complainant, a commonly heard criticism of this policy from the command point of view is that some complainants can take undue advantage of this situation by the submission of one or more grievances so that the proposed administrative action can become suspended for lengthy indefinite periods. Where this occurs the effect of suspension becomes more pronounced in direct proportion to the size of the backlog of complaints awaiting resolution.

81. While caution should be always exercised before an existing benefit is curtailed, there is little by way of administrative action taken that cannot be revoked if necessary to restore a complainant's position where a complaint is upheld. That said, there does appear to be a case for review of the present policy regarding suspension of administrative action so that suspension of administrative action becomes the exception rather than the 'rule', defacto or otherwise.

**Recommendation 11: The policy described in DI(G) PERS 34-1 concerning the suspension of administrative action pending the resolution of a grievance should be reviewed so that suspension may be considered only where exceptional circumstances exist.**

### **Compensation for Detriment caused by Defective Administration (CDDA) scheme**

82. Where, after due process, a grievance related to a decision or action has been found to be substantiated, a complainant may wish to seek financial compensation for the detriment suffered. This will usually take the form of an application for compensation under the Defective Administration Scheme. As a vehicle for providing relief in cases where some form of financial compensation would in all the circumstances be appropriate, the Defective Administration scheme is not ideal. Compensation may only be awarded where it can be shown that the detriment suffered was due to administrative error.

83. The focus on administrative error as a pre-requisite for access to this scheme is not well suited to the military environment, where substantial compensable detriment can result to a member from a wide range of causes which cannot easily or conveniently be defined as administrative error. The difficulties associated with the utility of this scheme in the military environment have been recognised for some time and have been the subject of criticism in some of the submissions received by this review.

84. A recommendation to introduce a new avenue, specific to the military environment, by which compensation could be awarded was recommended by Street/Fisher. The Street/Fisher review found that:

The current CDDA administrative scheme is not well suited to correct wrongs associated with ADF service. A new discretionary compensatory delegation, controlled by the CDF, needs to be developed to meet the expectations and unique service considerations of the uniformed workforce.

85. To date this recommendation has not been implemented. This review agrees with the recommendation made by the Street/Fisher Report. The present situation whereby the Service Chiefs and the CDF are unable to award any form of 'merit' compensation to aggrieved members outside of the CDDA scheme, even though they may personally recognise the validity of the case and support the claim, detracts from the effectiveness of the complaint handling process and should be remedied. It has been suggested that this issue could be addressed through the application of Section 58B of the *Defence Act 1903* which provides the Minister with discretion to determine payments to members of the ADF. It is understood that such payments could apply to both serving and former members, and even deceased members. However, even if this is possible, the better option would be to establish a purpose-designed compensation scheme for the ADF which clearly sets out the circumstances in which it would have application.

86. A further criticism of the CDDA system is that some delegates have been part of Defence Legal, other parts of which may also have advised a commander or manager with respect to the decision for which compensation has been claimed. This has raised perceptions of apprehended bias on the part of the CDDA decision maker; see also paras 11 and 12 of annex F.

**Recommendation 12. The Street/Fisher recommendation to establish a discretionary delegation to CDF to compensate administrative/management/financial errors in addition to the current CDDA scheme should be implemented.**

**Recommendation 13: To avoid any perception of apprehended bias in compensation decisions, the decision maker with respect to compensation—whether as part of CDDA or an ADF-specific scheme if established—should be organisationally separate from Defence Legal.**

### **Independence of complaint agencies**

87. From time to time the independence of the ADF's complaint agencies has been raised as an issue. As discussed earlier, the involvement of the Commanding Officer is a cornerstone of the ADF's complaint handling system, as it is in other comparable armed forces. The Commanding Officer, though not independent from the chain of command, is nevertheless required by his or her duties and responsibilities to act impartially in relation to dealing with complaints from persons within his or her command. Where this is not possible, as for example in cases in which the Commanding Officer has been previously involved, relevant law and policy require that the Commanding Officer forward the matter for consideration by higher authority.

88. Matters for the consideration of Service Chiefs are staffed by Complaints Resolution, which is directly responsible to the CDF and is otherwise independent of the chain of command. In the event that a complainant is dissatisfied with the outcome of review by a Service Chief, a complainant has the option of seeking further review by the Defence Force Ombudsman who is independent and entirely external to Defence or, if the matter involves military justice issues, by the independent IGADF, a statutory office appointed by the Minister for Defence specifically for the purpose of such review.

89. As mentioned earlier in this report, one point of difference in the approach taken by the United Kingdom and Canadian Armed Forces is that provision is made for the involvement of an external entity, be it a Grievance Board or an individual, in the grievance assessment process before submission for decision by what in the ADF would be the Service Chief level of review. While this review has seen no compelling evidence to support the adoption of such an approach for the ADF as an imperative, there may nevertheless be some merit in examining whether the concept could be adapted for the ADF system. While the Canadian Grievance Board model has already been rejected on cost and other grounds, an adaptation of the United Kingdom approach could be feasible. This might consist of including an external individual as an independent 'assessor' of the complaint resolution brief prepared for Service Chief decision and could help to reinforce the perception of impartiality of the process. As in the United Kingdom, involvement of an external, independent individual in the grievance process could be limited to certain cases involving harassment, bullying, or other unacceptable behaviour. The downside of this approach is that it would add to the cost and could further delay finalisation of a response.

**Recommendation 14. To improve perceptions of impartiality of the complaints resolution process, consideration should be given to further examining the feasibility and benefit of including an independent, external ‘assessor’ in the preparation of briefs for Service Chiefs in selected cases, based on the United Kingdom Single Service Board model.**

### **Fear of recrimination**

90. One of the reasons often cited as discouraging potential complainants from coming forward is said to be a fear of recrimination should they be discovered doing so. Both the Defence Force Regulations and DI(G) PERS 34-1 clearly make it an offence to prevent, dissuade, victimise, penalise or prejudice a member in any way for submitting a grievance or facilitating the processing of a grievance. The underlying principle is stated to be that members should be able to freely decide whether to submit a grievance without fear of repercussion.

91. The policy and law on this aspect is quite clear and there is nothing further required by way of legislative or policy amendment in these areas. As there is some evidence to support the view that some members may be discouraged from making a complaint for fear of repercussions, this is more likely to do with cultural factors or a lack of awareness of what the law is, both on the part of potential complainants and those who might have reason to discourage or victimise a complainant. Since it is not possible to legislate against wilful ignorance or stupidity, the most useful approach to remediation lies in education through better awareness and regular reinforcement of policy requirements. This could be done by including relevant guidance in annual and induction training conducted at unit level and in production of user friendly publicity material as suggested at recommendations 2 and 3 above.

**Recommendation 15: Publicity and training packages of the kind described in recommendations 1 and 2 above should contain explicit warnings about preventing, discouraging, victimising or otherwise dissuading members from making a complaint or facilitating the processing of a complaint.**

### **Performance measures**

92. The requirement for the promulgation of performance measures was recognised as far back as the 2004 Joint Ombudsman and CDF ROG Review's recommendation 19 that ‘Defence establish an integrated complaint measurement, analysis and reporting system’ and complementary recommendation 23 for ‘IGADF to provide Key Expected Result (KER) guidelines to all complaint handling agencies in Defence.’

93. This requirement was echoed in the 2009 Military Justice System Review Team (Street/Fisher Review) report's recommendation 33 to ‘Establish and promulgate Key Performance Indicators (KPI) against which the performance of each of the principal military justice system agencies can be assessed’. Although considerable work was undertaken between the two reviews and since, their satisfaction remains elusive.

94. Performance measures, to have value, must be developed and 'owned' by each agency involved. IGADF promulgated a set of KPIs based on the Commonwealth Ombudsman's *A good practice guide for effective complaint handling* to assist individual agencies, and provided funding for management consultancy services to facilitate their work. Regrettably, progress to reach agreement on a useful set of performance measures for complaint handling has remained slow against a continuing succession of reviews advocating further change. It



may be that the need for specific performance measures beyond those already in place to address completion timeframes may be unnecessary if the proposal to develop a grievance handling service charter is implemented as proposed at recommendation 17 below.

**Recommendation 16: The need for performance measures in grievance management beyond the setting of realistic completion times should be reviewed in light of the Commonwealth Ombudsman's proposal to develop and publish a Defence grievance handling service charter.**

### **Defence Force Ombudsman submission**

95. In his submission to the review, the Defence Force Ombudsman made recommendations which were based upon the findings arising from a joint Ombudsman/Defence study of the ROG system in 2010. While the 2010 study did not result in an agreed final report, this review supports those recommendations.

**Recommendation 17: The following recommendations made by the Defence Force Ombudsman in his submission to this review should be implemented:**

- a. Defence agree that a 180 day time limit for finalisation of ROGs referred to Service Chiefs is not optimal, and any process of reform should include a staged reduction in the time taken to resolve complaints.**
- b. Defence undertake a case management risk analysis of each ROG to match the resources allocated to the ROG to the risk posed to the organisation.**
- c. Defence review the content and style of briefs to the Service Chiefs.**
- d. Defence undertake an evaluation of the extent to which the peer review and quality assurance processes value could be further streamlined.**
- e. Defence publish a service charter for the handling of ROGS that includes performance measures for which Defence will be held accountable in managing members' redresses.**
- f. Defence cease the practice of putting cases in an unallocated queue and allocate to case officers upon receipt.**

## **UNACCEPTABLE BEHAVIOUR AND UNACCEPTABLE SEXUAL BEHAVIOUR**

96. Defence's policy on the management of unacceptable behaviour, including unacceptable sexual behaviour, is contained in two principal documents. These are DI(G) PERS 35-3, relating to unacceptable behaviour generally, and DI(G) PERS 35-4, relating to sexual offences.

### **Definitions**

97. Unacceptable behaviour is defined in the policy as behaviour which, in all the circumstances, would be offensive, belittling, abusing or threatening to another person or adverse to morale, discipline or workplace cohesion, or otherwise not in the interests of Defence. This includes any form of harassment and bullying.

98. Sexual offences are criminal offences in all Australian States and Territories, and under the DFDA.

### **Training**

99. Commanders are required to ensure that all members of the ADF receive mandatory annual training in how to deal with unacceptable behaviour. Each year, Defence's Fairness and Resolution Branch develops training packages designed for group presentation and online delivery. These training packages are updated annually to ensure variety and that the training is consistent with law and policy development. The training includes information on avenues of complaint. This training is delivered to all recently appointed and recently enlisted personnel at all of the Australian Defence Force's initial entry training establishments.

100. Data from IGADF military justice performance audits supports the view that the training is effective. Eighty-five per cent of those ADF personnel surveyed as part of the IGADF audit program reported that they knew where to go for advice or information on unacceptable behaviour. This compares with 90 per cent of recently appointed or recently enlisted personnel; see data in annex G.

### **Accessibility and awareness of the system**

101. Accessibility of a system includes not only knowledge of complaint avenues but also confidence that a complaint if made will be effectively managed. Defence policy provides a variety of information mechanisms including unit equity and diversity advisers and equity and whistleblower hotlines.

102. In IGADF audit surveys since July 2010, 94 per cent of survey respondents said that appropriate action would be taken if they reported an incident of unacceptable behaviour to their chain of command. This compares with 95 per cent of recently appointed or recently enlisted personnel. These figures would seem to indicate a high level of confidence in complaint management processes for unacceptable behaviour complaints.

### **Alternative dispute resolution**

103. Alternative Dispute Resolution (ADR) has become an established part of Defence complaint handling policy and is now recognised as a leading example of best practice for all Commonwealth and State government departments and agencies. The program is modelled on the Canadian Department of National Defence and Canadian Forces Conflict Management Program. In recent years it has taken on its own unique identity and character, incorporating Dispute Resolution and Equity programs into one, with both now being delivered by Fairness and Resolution practitioners in regional centres.

104. A particularly positive feature of ADR is that it can assist in resolving disputes quickly and informally where appropriate, but it is not suitable for every type of work-related dispute and care must be exercised in choosing to employ this avenue to resolve complaints. This is particularly the case in an overtly hierarchical organisation such as the ADF. ADR may not be a suitable choice, for example, to resolve work-related issues involving command relationships or disciplinary incidents.

**Recommendation 18: Subject to adequate guidance being made available to commanders and managers on the limitations of ADR as a solution to work-related issues involving command relationships or disciplinary incidents, greater use of ADR across Defence should be encouraged.**

### **Support for complainants and respondents**

105. Annex D to DI(G) PERS 35-3 mandates support for complainants, respondents and witnesses. This support is to be provided from the time of complaint and throughout the inquiry and resolution processes. A case officer may be appointed at the commander or manager's discretion to assist the complainant and the respondent.

106. This policy does not appear to be well-implemented in practice:

- a. **Complainants.** Only one-third of unacceptable behaviour complainants who were surveyed as part of the review reported that they had received all the support that was available to them. A further one-third of complainants reported that they were not provided support.
- b. **Respondents.** Approximately half of those respondents who had been accused of unacceptable behaviour in the same period reported that they did not receive sufficient support. The majority of complainants and respondents reported that they had not been assigned a case officer to assist and advise them.

**Recommendation 19: The appointment of case officers to support complainants and respondents should be required in all cases, consistent with the intention of Chief of Army Directive 27/2009 and Chief of Air Force Directive 04/2006.**

### **Policy inconsistencies—relationship between disciplinary and administrative action**

107. There is confusion between DI(G) PERS 35-3 and DI(G) PERS 35-4 regarding the relationship between administrative and disciplinary action. Paragraph 12 of annex E to DI(G) PERS 35-3 provides that administrative sanctions should not be taken until all disciplinary action is finalised. The express proviso to this is that circumstances may require administrative action including workplace reassignment and termination or suspension of

employment. This is inconsistent with paragraph 95 of DI(G) PERS 35-4 which provides that 'no formal administrative action should be taken ... while criminal or disciplinary proceedings are pending'.

**Recommendation 20: DI(G) PERS 35-3 and DI(G) PERS 35-4 should be reviewed to clarify the administrative action which may be taken when disciplinary action is pending.**

### **Policy inconsistencies—resolution of incidents at the lowest possible level**

108. Paragraph 43 of DI(G) PERS 35-3 provides that '[a]ll complaints of unacceptable behaviour should be resolved at the lowest possible level appropriate to the circumstances.' The phrase 'unacceptable behaviour' is not defined in the main body of that DI(G) but appears in an annex. In that annex, the definition of 'unacceptable behaviour' is:

behaviour that, having regard to all of the circumstances, would be offensive, belittling, abusive or threatening to another person or adverse to morale, discipline or workplace cohesion, or otherwise not in the interests of Defence.

109. This definition is broad enough to include sexual assault and other sexual offences. Although paragraph 11 of the DI(G) provides that the instruction does not apply to sexual or criminal offences and that these are the subject of DI(G) PERS 35-4, it may not be immediately apparent to a reader that sexual offences do not fall within the definition of unacceptable behaviour and should be managed differently. The Honourable Roger Gyles concluded in Part 1 of the HMAS *Success* Commission of Inquiry Report that some incidents which warranted a disciplinary response and investigation had been managed as an equity and diversity issue. As one of the persons who made submissions to the IGADF review noted, the confusion between policy guidance on sexual offences and unacceptable behaviour is detrimental in that commanders and managers may attempt to resolve disciplinary or criminal matters informally. Stovepiping policy on the management of sexual offences and unacceptable behaviour in two separate DI(G)s may result in an inappropriate approach being taken in response to a disciplinary or criminal incident.

110. Partly in response to one of the recommendations of part 1 of the HMAS *Success* Commission of Inquiry report, Fleet Command issued AF Memorandum 14/11 *Reporting, managing and investigating DFDA breaches, unacceptable behaviour, serious offences and serious misconduct* of 11 June 2011. That document summarises and digests relevant Defence policies in a single reference.

**Recommendation 21: The policy on the management of all unacceptable behaviour and sexual offences should be combined in a single policy reference. As an immediate measure a digest of existing policy, similar to AF Memorandum 14/11, should be issued so that ADF commanders and managers have access to a single reference for the management of unacceptable behaviour and unacceptable sexual behaviour.**

### **Policy inconsistencies—administrative suspension**

111. Sections 98 and 99 of the DFDA empower a Commanding Officer to suspend a member of the Defence Force who has been charged with or convicted of a civilian criminal offence or a Service offence, or who is under investigation on suspicion of having committed a Service offence. In this way, an ADF member may be suspended either with pay or without pay depending on the circumstances. Relevant policy requires that procedural fairness requirements are met prior to any suspension.

112. For unacceptable behaviour incidents which do not disclose a discipline offence, there is no specific law or Defence policy which empowers commanders to suspend an ADF member from duty. On one view such *administrative* suspension is feasible as part of the general command power to avert a threatened inefficiency; see Madgwick J's comments in *Bromet v Oddie* [2003] FCAFC 213. However, as was acknowledged by some of the senior commanders consulted as part of this review, there may be circumstances where a member's conduct does not disclose a Service offence but where it will otherwise be desirable to suspend that member from duty in order to ensure workplace efficiency or productivity. As in the case of disciplinary suspensions, procedural fairness obligations would need to be observed.

**Recommendation 22: Defence's administrative policies should be amended to provide for administrative suspension from duty, including the circumstances in which a Commander may suspend an ADF member and the conditions which may be imposed on the suspended member.**

### **Training**

113. While it appears that mandatory annual equity and diversity training is generally effective to inform ADF personnel of their complaint avenues, implementation of complaint management policies may not be as well understood. The IGADF has recently developed a vocational complaints handling course for supervisors which gives a practical overview of the complaints handling process and how to implement it.

114. Feedback from trials of this new course has been positive. One of the commanders interviewed as part of the review commented that a way should be found to encourage investment in complaints handling training in leadership courses. One means by which this might be achieved would be to develop competency-based courses on complaint handling as a promotion prerequisite. The intent is that these courses would be designed to prepare ADF personnel to manage complaints and disputes of the kind they would be likely to encounter at their next rank.

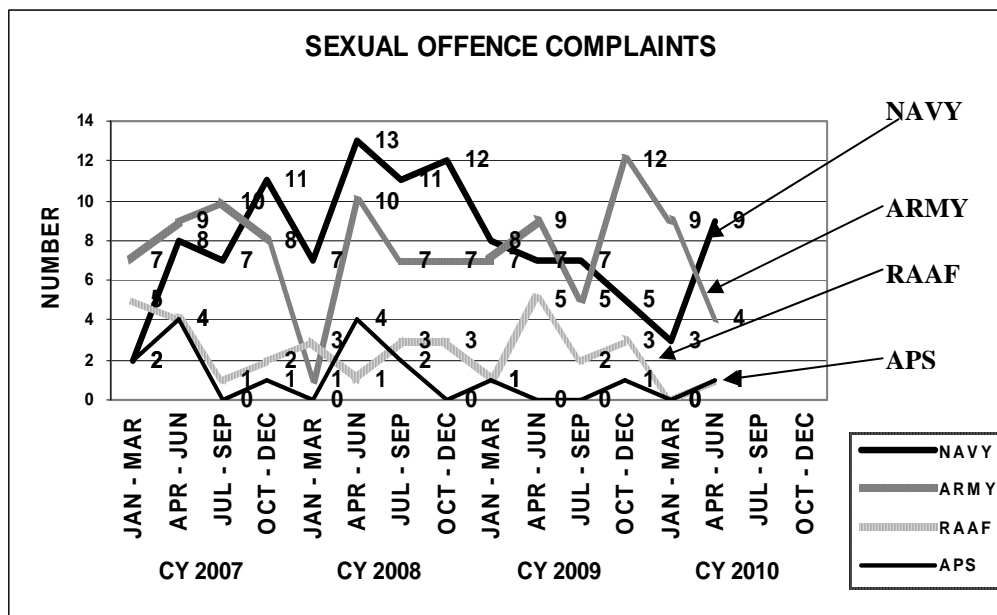
**Recommendation 23: In the short term, consideration should be given to using the IGADF complaints handling course as a training basis for all Defence workplace supervisors.**

**Recommendation 24: In the longer term, competency-based complaints handling training should be developed as a promotion prerequisite.**

## SUPPORT TO SEXUAL OFFENCE COMPLAINANTS AND RESPONDENTS

115. According to Service Police figures, in any given year there are approximately 75 sexual offence complaints by ADF personnel to ADF authorities. As noted above, current policy provides that commanders and managers are to provide appropriate support to complainants and respondents, including critical incident support. Such support depends upon the knowledge and experience of individual commanders and managers, and consistency of support to complainants across the ADF cannot therefore be guaranteed.

116. Figure 1 shows the incidence of sexual offence complaints for each of the three Services for calendar years 2007 to 2010.



**Figure 1**

117. The review had access to two recent papers, by Commander Sneath and Angela Ballard respectively, relevant to these issues.<sup>2</sup> Both papers advocate that there be a more strategic, ADF-wide approach to providing support to complainants, or victims, of sexual offences, and that this support involve far more engagement with civilian sexual assault support agencies.

118. As Commander Sneath notes in her paper, not only are there significant administrative and legal consequences of failing to manage people properly, but also the adverse effect on the ADF's reputation has a potentially significant cost in terms of recruitment, retention and operational performance.

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<sup>2</sup> A Ballard, *Sexual Assault Prevention and Intervention in a Military Environment*, 2009 Churchill Fellowship paper and Commander Fiona Sneath RAN, *How can a unified framework for responding to allegations of sexual offences be implemented throughout the Australian Defence Force?*, 2011

119. Angela Ballard's study included a review of the sexual assault prevention and response practices of Canada, the United Kingdom and the United States. She found that the armed forces of all of those countries have endorsed the community empowerment model of multi-agency support, advocacy and response. Agencies include Service police, local law enforcement, with dedicated Sexual Assault Response Coordinators.

### **'Restricted' reporting**

120. United States' policies include the concept of 'restricted reporting'. Restricted reporting allows the complainant to bypass the chain of command. Instead of reporting the assault to a superior, restricted reporting permits a complainant to call a Sexual Assault Response Coordinator on a hotline or tell a 'victim advocate', such as a chaplain or health care professional. Once a restricted report is made, advocacy and counselling is initiated for the victim, but an investigation is not triggered. The complainant's identity is never revealed. Such an approach is said to empower the complainant to make choices which may aid in the initial steps of recovery.

121. This review has some concerns with the concept of restricted reporting of this kind. One of the obvious problems is that the alleged sexual offender will, if only a restricted report is made, not be held accountable for the assault. In a Service environment, an undetected offender is clearly a liability for operational effectiveness.

122. Angela Ballard's research on this issue found that, in many cases, a victim who makes a restricted report will subsequently, after she or he feels comfortable with the support provided and a measure of confidence in the system has been restored, subsequently make an unrestricted report. A potential problem with such late reporting, however, is that critical probative medical evidence may be lost if not obtained in the hours following an assault.

**Recommendation 25: Restricted reporting should not be adopted by the ADF. As a concept, it is inconsistent with the maintenance and enforcement of Service discipline in that it potentially allows sexual assailants to continue to serve undetected.**

### **Sexual Offence Support Persons Network**

123. Both of the papers support a review of Defence's policies to determine the ADF-wide viability of a 'Sexual Offence Support Persons Network' of the sort which has been adopted at HMAS *Cerberus*. The key 'element' of that network is that it comprises a pool of personnel, readily identifiable as part of the command element, who are able to respond to complaints of sexual offences and to provide a complainant with the options available to them. While the concept may be feasible in larger bases it is unlikely to be viable in smaller ADF units. A regional approach may therefore be preferable.

124. The Sexual Offence Support Person effectively becomes the complainant's case officer who can draw on already-established relationships with civilian police and medical facilities to facilitate the complainant's access to crisis counselling, policing, medical and legal services as required. The network supports the ADF's existing policies in that the Sexual Offence Support Person manages the complaint on behalf of command, including ensuring that the complainant has access to civilian medical facilities so that advice can be provided and any available probative medical evidence can be obtained and secured. The Sexual Offence Support Person Network is therefore a multi-agency approach consistent with the approach to the management of sexual offences by the armed forces of other western countries.

125. One criticism that can be made of the Sexual Offence Support Person Network is that the Sexual Offence Support Person becomes in effect the complainant's case officer while at the same time manages the complaint on behalf of command. There may be an inherent conflict in allowing the roles of case officer and command manager to merge in this way.

**Recommendation 26: The viability of a complainant-focused, ADF-wide regional approach to responding to allegations of sexual offences such as that in place at HMAS *Cerberus* should be explored.**



## BENCHMARKS FOR UNACCEPTABLE BEHAVIOUR

### Domestic benchmarks

126. As part of the review, Defence's system to manage unacceptable behaviour complaints and incidents was assessed against the same benchmarks as for the redress of grievance system:

- a. Australian Standard (AS) ISO 10002-2006 *Customer satisfaction—Guidelines for complaints handling in organizations*;
- b. The Australian Human Rights Commission checklist for internal complaints procedures; and
- c. Comcare guidelines for incident notification procedures.

127. Generally, Defence's arrangements satisfy the requirements of all of the above benchmarks. Defence's arrangements are clearly documented and accessible to all employees, offer both formal and informal resolution options, guarantee confidentiality and objectivity, and are administered by personnel who receive some training.

128. The review identified the following areas which could be improved, if not necessarily in policy, at least in implementation:

- a. **Timeliness.** One of the principal criticisms for the handling of unacceptable behaviour complaints and incidents is the length of time which is taken. Sometimes this is necessary to ensure that there is a proper consideration of issues and potential outcomes, but on occasions the time taken to administer complaints and incidents appears to have been excessive. This is not always avoidable. The requirement to provide procedural fairness to respondents and other persons criticised in inquiry reports of unacceptable behaviour complaints can often add many weeks to the finalisation process.
- b. **Training.** Many of the problems in policy implementation occur because commanders and managers deal infrequently with complaints and incident handling processes. While it is understood that there is some familiarisation training on command courses, this can be overwhelming given the number of policy documents.

### International benchmarks

129. As a part of the review process, the ADF policies addressing the handling of unacceptable behaviour complaints and incidents were compared with those of overseas military systems. Canada, Germany, Israel, New Zealand, the United Kingdom, the United States and Sweden all provided the review with information on the policies which govern the handling of complaints and incidents within their individual military.

130. Within these differing systems, only Sweden chooses to rely principally on the civilian legal system. All other countries had various policy documents which governed the manner in which incidents and complaints were handled within the military.

131. From the information provided to the review, it appears that the ADF's system of complaints and incident handling for dealing with unacceptable behaviour is amongst the most comprehensive and detailed. The ADF's policies are comparable to those utilised by the United Kingdom, New Zealand and Canadian military.

132. The United Kingdom, Canada and New Zealand all have systems which comply with the principles established under their various human rights legislation. The review did not find any matters in the overseas policy documents which were not addressed in ADF policy or any alternate means of handling complaints or incidents which would be useful or appropriate for restructuring the ADF approach to these issues.

## **TRANSPARENCY OF PROCESSES**

### **Background**

133. Defence's processes are as transparent as the law allows. For example, the DFDA provides that courts martial and trials by Defence Force magistrate are to be open to the public. The *Defence (Inquiry) Regulations 1985* permit the Appointing Authority of a Court of Inquiry, Board of Inquiry or CDF Commission of Inquiry to order that the Court's, Board's or Commission's proceedings be open to the public and such orders invariably are made.

134. DFDA summary proceedings and Inquiry Officer inquiries pursuant to the Defence (Inquiry) Regulations are not open to the public.

135. The need for appropriate transparency in decision-making was acknowledged by all of the commanders consulted as part of the review. There was also almost universal agreement that existing limits on transparency hamper commanders and managers in the effective handling of incidents and complaints, particularly with respect to providing feedback to victims and complainants. Their inability to share inquiry information appropriately, to publicise the results of discipline and administrative processes within commands, and to inform complainants and victims of disciplinary or administrative outcomes was, in their view, preventing military justice from being seen to be done, and encouraging a view among some ADF members that the military justice system is ineffective.

136. Data from IGADF military justice performance audit focus group discussions supports this view. ADF members will often be aware of a transgression of some form having occurred in their unit and, being ignorant of any disciplinary or administrative measure which has addressed the transgression, will assume that the transgressor has not been held to account.

137. The existing limits on transparency arise principally from two sources: restrictions on the disclosure of inquiry information and restrictions on the appropriate disclosure and use of private information.

### **Inquiry information**

138. When an incident or complaint occurs which does not involve a disciplinary or criminal offence, the incident or complaint will usually be the subject of an administrative inquiry, and it will be on the basis of the inquiry conclusions and recommendations that a commander or manager will take action.

139. The Defence (Inquiry) Regulations regulate the conduct of all Defence administrative inquiries except for Routine Inquiries. Amendments to those regulations in 2002 inadvertently restricted the disclosure of documents and evidence from inquiries conducted pursuant to that reference. Since the 2002 amendments, only the Minister may authorise disclosure of documents or evidence both within and outside Defence. Prior to the legislative amendments it was possible for an ADF member or Commonwealth employee to disclose inquiry documents or evidence in the course of his or her duties. This allowed for the free sharing of information within Defence so long as it was duty-related.

## **Current arrangements**

140. Since December 2002 it has been an offence for an ADF member or Defence employee, unless he or she has Ministerial approval to do so, to disclose to another person documents or evidence from an administrative inquiry conducted pursuant to the Defence (Inquiry) Regulations; see subregulation 63(2). There is a statutory defence to this offence if the disclosure was made in the course of the ADF member's/Commonwealth employee's duties. However, there is inherent risk in relying on a statutory defence, and Defence Legal's approach has been to advise that, prior to any release even within Defence, Ministerial approval for disclosure be sought as a matter of routine.

## **Perceived problems**

141. The 2002 amendment of the Defence (Inquiry) Regulations has had the effect of dramatically increasing the amount of staff work, and delay, involved in the management of an incident or complaint. For example, a commander or manager must seek Ministerial approval prior to disclosing administrative inquiry evidence to a person about whom adverse findings have been made and against whom adverse administrative action is to be taken. Similarly, Ministerial approval is required before a commander or manager may inform a victim of inquiry conclusions.

## **Privacy**

142. Another potential difficulty in the management of incidents and complaints is the limitation on disclosure and use of personal information. Section 6 of the Privacy Act defines personal information as:

information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained from the information or opinion.

143. The *Privacy Act 1988* prohibits the disclosure or use of personal information other than in limited circumstances. This prohibition on disclosure extends to stakeholders who may be interested in the outcome of proceedings, including victims/complainants as well as other unit members.

144. One of the sentencing principles which DFDA summary authorities are required to take into account when determining punishment for a DFDA offence is the need to maintain discipline in the Defence Force, which includes 'general deterrence'. It is, however, not feasible for a summary authority to promulgate within his or her command or unit the outcome of a DFDA summary trial. Even if an offender's name and rank were to be suppressed in any report, the relatively small number of discipline matters would enable the offender to be identified and would therefore constitute a disclosure of personal information. All of the commanders consulted as part of the review agreed that it was inappropriate that it is therefore necessary to rely on unit gossip to broadcast the outcome of unit discipline proceedings.

145. The restriction on disclosing personal information extends also to informing victims or complainants of the outcome of proceedings. According to a strict interpretation of privacy law, it is not possible for a commander or manager to inform a victim or complainant of what action has been taken against an alleged offender, and what the outcome has been, because it would be an unauthorised disclosure of the offender's personal information. The most that can be explained to a victim or complainant is that 'action has been taken'. Providing such bland information to a victim or complainant can sometimes be counterproductive and exacerbate feelings of injury or uncertainty.

### **Comment**

146. The issue of transparency affects both disciplinary and administrative processes. The existing rules which require Ministerial approval to release inquiry information impose an unnecessary administrative burden which limits commanders' and managers' ability to deal quickly and efficiently with inquiry outcomes. In the same way, the limits on the disclosure and use of personal information imposed by the Privacy Act hinder commanders' abilities to disseminate appropriate information about disciplinary and administrative outcomes among their personnel to the detriment of encouraging confidence in the system and providing deterrence.

**Recommendation 27: Reform of the Defence (Inquiry) Regulations to restore the pre-2002 disclosure arrangements to give authority to Defence personnel to disclose documents in the course of their duties should be expedited.**

**Recommendation 28: Relevant Defence legislation should be amended to provide privacy law exemptions to enable the general outcomes of discipline and administrative proceedings with names redacted to be made available to Defence personnel to ensure transparency of military justice outcomes, which should in turn assist commanders to maintain discipline.**

## **CIVIL-MILITARY JURISDICTIONAL ISSUES**

### **Nature of Service jurisdiction**

147. The jurisdiction of Service tribunals for offences under the DFDA derives from the defence power in the Constitution of Australia. The High Court has ruled that the DFDA may not impair civilian jurisdiction but may empower Service tribunals to maintain or enforce discipline. Civilian criminal jurisdiction should be exercised when it can conveniently and appropriately be invoked. The jurisdiction of Service tribunals should not be invoked except for the purpose of maintaining and enforcing service discipline.<sup>3</sup>

### **The Defence Force Discipline Act**

148. The DFDA and its subordinate rules and regulations provide for the investigation, prosecution and trial of offences committed by ‘defence members’, defined in section 3 of the DFDA as permanent force ADF members and those Reservists on, or deemed to be on, duty. It establishes a regime of Service tribunals and provides for particular military offences such as ‘absence without leave’, ‘aiding the enemy’ and ‘desertion’. In addition, section 61 of the DFDA enables all Commonwealth offences, and almost all Australian Capital Territory (ACT) offences in their application to the Jervis Bay territory, to be tried as Territory offences by an appropriate Service tribunal.

149. The DFDA regulates the conduct of all defence members at all times and places, in peace and in war, in Australia and overseas. Subject to the requirement that any DFDA prosecution be for the purpose of maintaining or enforcing Service discipline, and the limitations in the succeeding paragraph, the DFDA does not expressly provide any jurisdictional limits on the nature of offences which can be prosecuted or on the location of offending.

150. In theory, therefore, a court martial may in appropriate circumstances try a defence member for any military or almost any civilian offence. In practice, the DFDA requires the Commonwealth Director of Public Prosecutions’ (Cwth DPP) consent before proceedings may be commenced in respect of certain offences which are alleged to have occurred in Australia. Those offences are listed in section 63 of the DFDA and are treason, murder, manslaughter, bigamy or any offence involving sexual assault. Since 1985 the Cwth DPP has on two occasions consented to the DFDA prosecution of sexual assault offences which were alleged to have occurred in Australia.

### **Jurisdictional resolution**

151. One of the issues which may confront a commander or supervisor when an incident occurs—or a complaint is made—is the issue of jurisdiction. This issue arises principally when the complaint or incident involves an allegation of a Service offence which has a civilian equivalent.

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<sup>3</sup> See *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at pp 569–570

### **Jurisdiction for investigation and trial**

152. There are two aspects to the issue of jurisdiction. The first is jurisdiction for investigation on suspicion of an offence; the second is jurisdiction for trying the offence. Relevant policy makes provision for both of these aspects.

### **Examples of offences with civilian equivalents**

153. There are a number of offences under the DFDA which have an equivalent in civilian criminal law. These offences include: assaults, including sexual offences; theft and other property offences; motor vehicle offences; falsification of documents; unauthorised disclosure of information; and drug offences.

### **Policy**

154. Aspects of Defence's policy for jurisdictional resolution are spread across the following policy documents:

- a. DI(G) PERS 45-4;
- b. DI(G) PERS 35-4;
- c. *Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions* of 22 May 2007 ('the *DMP/DsPP MoU*');
- d. the cancelled DEFGRAM 35/2009 *Management and reporting of sexual offences* of 30 January 2009 (the 'cancelled DEFGRAM 35/2009');
- e. DI(G) PERS 35-3;
- f. Director of Military Prosecutions Directive 02/2009 *Prosecution and disclosure policy* of 01 October 2009 ('*DMP prosecution policy*');
- g. Australian Defence Force Publication 06.1.1 *Discipline Law Manual* volume 3 (4<sup>th</sup> edition), chapter 2 of 07 October 2009; and
- h. DI(G) ADMIN 45-2.

### **General prosecution policy**

155. Defence's general policy on jurisdictional resolution is contained in DI(G) PERS 45-4. Paragraphs 5 to 10 of that policy require a military commander considering the exercise of DFDA jurisdiction to be satisfied that:

- a. proceeding with DFDA charges can reasonably be regarded as substantially serving the purpose of maintaining or enforcing Service discipline; and
- b. the exercise of Service jurisdiction is not otherwise inappropriate for reasons including the seriousness of the alleged offending, or the involvement of persons not susceptible to DFDA jurisdiction.

156. DI(G) PERS 45-4 provides specific policy guidance regarding Service offences which have a civilian equivalent when jurisdiction is unclear:

- a. The commander is to seek legal advice.
- b. If it is determined that the matter should be referred to the civilian criminal justice system, details of the alleged offence are to be advised to the relevant civilian police authority. If a Service investigation has already commenced, that investigation is to cease immediately. If civilian prosecution authorities subsequently decide not to take action, DFDA jurisdiction may be exercised.
- c. If it is determined not to refer the matter to a civilian police or prosecution authority and to deal with the matter in accordance with the DFDA, then the results of any subsequent DFDA prosecution are to be notified to the relevant civilian police authority.

### **Informing complainant or respondent**

157. Commanders have no obligation to notify affected personnel when a matter has been referred to civilian authorities; see para 18 of DI(G) PERS 45-4.

### **Notifiable incident policies**

158. Paragraph 6 and table 1 of DI(G) ADMIN 45-2 require that the Australian Defence Force Investigative Service (ADFIS) be notified of a 'notifiable incident' which includes alleged offences against civilian criminal law. ADFIS would then resolve jurisdiction with respect to any investigation with civilian police authorities. On some occasions, joint investigations occur with either a civilian police authority or ADFIS having the investigative lead while being supported by the other.

159. The Provost Marshal—Navy Policy Directive 01/2010 *Defence Policing and Security Management System* of 20 September 2010 appears to modify DI(G) ADMIN 45-2 by requiring that all referrals to ADFIS by Navy ships and establishments occur via the Directorate of Policing and Security—Navy.

**Recommendation 29: Any inconsistency between DI(G) ADMIN 45-2 and Provost Marshal—Navy Policy Directive 01/2010 be reviewed and clarified.**

### **Director of Military Prosecutions' prosecution policy**

160. The *DMP Prosecution Policy* expressly does not provide policy guidance or procedures for resolving jurisdictional conflicts between the civil, criminal and military discipline systems, and confirms the procedures in DI(G) PERS 45-4 and the *DMP/DsPP MoU*. According to that Memorandum of Understanding the DMP is obliged to consult with the relevant DPP regarding conduct that:

- a. the DMP considers may be a breach of the criminal law and the DMP is unsure whether the alleged conduct is sufficiently connected to service discipline to warrant the conduct being dealt with under the DFDA; or
- b. where the DMP is of the view that, while the alleged conduct is a breach of Service discipline, it may also constitute an offence which should be dealt with in the criminal justice system.



161. Since 2007 the DMP's annual reports have indicated that an average of six matters annually have been referred to civilian prosecution or police authorities.

### **Jurisdictional resolution for sexual offences occurring in Australia**

162. Although DI(G) PERS 45-4 provides some guidance about special arrangements for sexual offences occurring in Australia, that guidance is not clear. This lack of clarity has been exacerbated by *ad hoc* amendment. For example: paragraph 8 of DI(G) PERS 45-4 refers commanders to the out-of-date Defence Instruction (General) Personnel 35-3 *Harassment, Discrimination, Fraternisation and Unacceptable Sexual Behaviour in the Australian Defence Force* (the 'out-of-date DI(G) PERS 35-3'). The out-of-date *DI(G) PERS 35-3* was superseded by a new DI(G) PERS 35-3 *Management and reporting of unacceptable behaviour* and DI(G) PERS 35-4 *Management and reporting of sexual offences*. DI(G) PERS 35-4 was itself amended by the cancelled *DEFGRAM 35/2009*.

163. Paragraph 26 of DI(G) PERS 35-4 requires commanders and managers initially to determine jurisdiction when dealing with a sexual offence complaint. Where the alleged victim is not an ADF member, the complaint is to be referred immediately to the relevant civilian police authority.

164. Where the alleged victim of a sex offence occurring in Australia is an ADF member, DI(G) PERS 35-4 sets out a complex jurisdictional resolution formula which has the following key elements:

- a. If the allegation is of sexual assault, sexual assault in any degree, act of indecency in the first degree, act of indecency with young people, incest, abduction or involves child pornography the allegation should be referred to the civilian authorities in the first instance.
- b. If the allegation is of an act of indecency, or an act of indecency in the second or third degree, the ADF retains jurisdiction subject to legal advice.

### **Victims' wishes**

165. DI(G) PERS 35-4 provides apparently conflicting advice regarding the victim or complainant's wishes. Annex C to DI(G) PERS 35-4 is a form AC875-4 *Record of complainant's wish not to officially report a sexual offence to the police*. Paragraph 47 mandates that the relevant commander or manager must ensure that this form is completed where appropriate. This form appears to imply that the victim of an alleged sexual offence may formally indicate that she or he does not want to report the allegation. However, paragraph 48 provides that, notwithstanding that the complainant does not wish to proceed with a complaint or investigation, the commander or manager still has a responsibility to ensure that a sexual offence complaint is notified to the State/Territory police or relevant Defence Investigative agency.

166. This confusing policy has been criticised on the basis that some victims of sexual assault will not be able to make a definitive decision about their complaint soon after the assault, and may subsequently change their decision not to refer a complaint to the civilian authorities with the result that critical evidence relating to the assault has not been obtained and has since been destroyed. A decision by a sexual assault victim to not want the matter reported to civil police also raises duty of care issues for Defence if the victim later decides to pursue the complaint. The cancelled *DEFGRAM 35/2009* directed that form AC875-4 was no

longer to be used and mentioned that DI(G) PERS 35-4 was to be amended, but this DEFGRAM is no longer current and the amendment of DI(G) PERS 35-4 has not yet occurred.

**Recommendation 30: Policy should be amended to permanently remove the requirement for use of the form AC875-4.**

167. The DMP informed this review of her intention to pursue legislative reform to enable certain Service tribunals to consider victim impact statements when making punishment decisions. The DMP also advised this review that she is considering amending her prosecution policy to require consultation with a victim prior to any decision to commence, continue or discontinue a prosecution or any decision to accept a charge bargain offer.

**Recommendation 31: The Director of Military Prosecutions consider expediting her intended change to policy to require consultation with a victim prior to any relevant prosecution decision.**

### **Jurisdictional resolution for sexual offences occurring outside Australia**

168. The consent of the Commonwealth DPP is not required for the prosecution of any offence alleged to have occurred outside Australia. DI(G) PERS 35-4 provides that DFDA jurisdiction should apply except in circumstances where jurisdiction is assessed as belonging to the civilian authorities, in which case liaison with the Commonwealth DPP is to occur. DI(G) PERS 35-4 provides that liaison should occur where the alleged offence is committed:

- a. on an ADF aircraft,
- b. by an ADF member serving with a United Nations force, and
- c. against a person under the age of 16 years in a foreign country.

169. The *rationale* for liaison for such offences appears to be that Australian civilian authorities may be able to exercise extra-territorial jurisdiction in respect of offences listed in subparas 29a–c above. Those offences, however, are not an exhaustive list of offences for which civilian authorities may have jurisdiction. Since its commencement in May 2001, the Commonwealth *Criminal Code* has provided for the exercise of Australia's extra-territorial criminal jurisdiction in respect of an increasing number of sex offences, including war crimes; see sections 268.14–268.19 of the Criminal Code.

### **Double jeopardy**

170. Section 144 of the DFDA provides that a defence member is not liable to be tried for an offence under the DFDA if that defence member has already been convicted or acquitted of a substantially similar civilian or overseas offence. In appropriate circumstances, administrative action may be taken.

171. It is not clear whether or not a DFDA conviction would preclude a defence member from being tried in a civilian criminal court for a substantially similar civilian offence.

## Summary of law and policy

172. The effect of the law and policy with respect to jurisdictional resolution of alleged offences by defence members may be summarised as follows:

- a. Jurisdiction under the DFDA only exists where prosecution of an alleged offence would substantially serve the purpose of maintaining or enforcing Service discipline. If the prosecution of a defence member for an alleged offence would not serve this purpose, the allegation should be referred to civilian investigative or prosecution authorities. Such referral should be urgent in circumstances in which critical evidence, including physical evidence of a sexual assault, is at risk of destruction.
- b. In circumstances where there appears to be concurrent jurisdiction under the civilian criminal law and the DFDA, ADF investigative or prosecution authorities should consult civilian investigative or prosecution authorities to resolve jurisdiction.
- c. Where it is resolved that civilian authorities will exercise jurisdiction, all evidence already obtained should, where appropriate, be handed over to civilian investigative or prosecution authorities and further DFDA investigative action should cease. The rationale for this policy is to ensure the integrity of any investigation and to minimise the risk that that multiple and potentially conflicting witness statements will be obtained by civilian and Service investigators working concurrently.
- d. After the exercise of any civilian jurisdiction is complete, and subject to the rules of double jeopardy, investigation and prosecution under the DFDA may occur in respect of any related disciplinary matters. In practice, the disciplinary efficacy of DFDA action in such circumstances will usually have been compromised by delays in the civilian criminal justice system dealing with related civilian offences.

## Existing reform proposals—jurisdictional guidance for commanders and prosecution policy

173. The Director General Australian Defence Force Legal Services has foreshadowed that he intends to cancel DI(G) PERS 45-1 and DI(G) PERS 45-4 and include appropriate parts of these documents in the *Discipline Law Manual*.

- a. Appropriate parts of DI(G) PERS 45-1 are to be included in the ‘jurisdiction’ chapter.
- b. Appropriate parts of DI(G) PERS 45-4 are to be included in a new ‘summary prosecutions policy’ chapter.

These changes will avoid duplication and minimise the risk of inconsistencies between policy documents.

**Recommendation 32: Consolidation of the summary proceedings prosecution and disclosure policy in the *Discipline Law Manual* should be expedited.**

### **Existing reform proposals—sexual offences policy**

174. The Director General Fairness and Resolution has foreshadowed that an update of DI(G) PERS 35-4 has been drafted in preparation for stakeholder consultation.

### **Problems with policies and their implementation**

175. Notwithstanding that the policy and law applicable to jurisdictional resolution may be succinctly stated (see subparas 172.a–d above), the policy is dispersed across eight separate official documents, increasing the risk of mistakes in application of the policy.

176. The policies affecting jurisdictional resolution have been subject to *ad hoc* amendment. The cancelled DEFGRAM 35/2009 is one example of an important policy change which has not been permanently implemented. The DEFGRAM itself no longer appears in the list of current DEFGRAMS on the Defence Restricted Network. There is a risk, therefore, that a commander or manager reacting to a sexual offence allegation will not be aware that the policy relating to the management of sexual offence victims has changed. More generally, *ad hoc* policy amendment increases the risk of policy inconsistencies developing over time.

177. The Provost Marshal Australian Defence Force (PMADF) has identified that the ability of ADFIS to investigate Service offences has in the past been compromised by an inability to obtain evidence, including DNA evidence, under warrant. As part of Project FULCRUM, which aims to create a more professional Service investigative capability, PMADF has suggested that the DFDA be amended to permit ADFIS investigators to obtain evidence under warrant for the purpose of prosecution under the DFDA.

### **Comment**

178. While the substance of the ADF's jurisdictional resolution policy does not require amendment, the multitude of overlapping policy documents has the potential to cause confusion.

179. *Ad hoc* policy development also increases the risk that inconsistent policies will develop over time, and leads to an increased risk that policies will be confused and difficult for managers to implement.

180. Responsibility for the various policy documents in this area is spread across a variety of appointments: the Deputy Secretary People Strategies and Policy, the Director of Military Prosecutions, the Director-General Australian Defence Force Legal Services and the Inspector General Defence. While consultation inevitably occurs in policy amendment, it may be useful for one appointment to have responsibility for all jurisdictional resolution policy.

181. Sponsor officers for some of the Defence Instructions relating to jurisdictional resolution do not appear to have reviewed those documents within three years after promulgation as required by para 43 of Defence Instruction (General) Administrative 0-00-001 *The system of Defence Instructions* of 26 March 2007.

**Recommendation 33: Defence's policy on jurisdictional resolution should be consolidated in one policy document to which other, related policy documents may refer without duplication.**

**Recommendation 34: Currency of policy in this area is critical and maintaining current policy should be prioritised. Pending consolidation of jurisdiction policy, an urgent review should be undertaken to update and remove inconsistencies between existing policy documents.**

**Recommendation 35: Consideration should be given to appointing one sponsor area to accept responsibility for all jurisdictional policy documents.**

## ADMINISTRATION OF COMPLAINTS

182. Since 2006, the administration of complaints has been conducted on a tri-service basis by the establishment of Fairness and Resolution Branch. All unacceptable complaints must be reported.

183. Given the inherent complexity of the various elements of complaint handling from grievances to unacceptable behaviour and sexual offences, the consolidation of the administration of complaint handling in one central agency, which could also provide advice to line managers, is sensible and its continuing role is strongly supported.

184. An important requirement of complaints administration is the ability to monitor and record relevant data about the operation of the system. The development of the Complaint Management, Tracking and Reporting System (COMTRACK) has been a welcome improvement in this regard. However, it is important that sufficient personnel resources to operate the system, and cover for absences, be maintained. Assessment of the health and effectiveness of the complaints handling system is heavily dependent on the availability of current data from this system.

**Recommendation 36: Adequate arrangements be put in place to ensure sufficient resources are available to maintain COMTRACK at optimum currency.**

## SUBMISSIONS TO THE REVIEW

185. The review was contacted by a number of individuals, the majority of them former ADF members. Some of those people sought a review of the individual circumstances of a historical complaint, which was outside the scope of this review. Where appropriate, these people were referred to the concurrent DLA Piper review. Some of the people who made submissions to this review also made submissions to the DLA Piper review.

### Summary of submissions

186. Fourteen written submissions were received and thirteen of those were considered as part of this review. The fourteenth submission fell outside the scope of the review. Some of the submissions were made directly to the review, some of them had been submitted to DLA Piper and were referred to this review because they fell outside of the scope of the DLA Piper task, and some of them were referrals from the Review Secretariat. It was outside the scope of this review to confirm the validity of claims made in the submissions.

187. A number of the individuals making submissions expressed concern that making a submission to this review might jeopardise the ongoing management of their own individual complaints. Each person was reassured and informed that his or her submission would be treated in confidence. An anonymous summary of the fourteen submissions received is at annex F.

### Common themes in the submissions

188. While this review did not address specific issues of each submission, their content was taken into account as far as possible. The submissions reveal a number of common themes:

- a. **Lack of accountability for actions.** All of the submissions ultimately suggested a lack of accountability for actions on the part of complainants, and managers. Two of the submissions suggested that measures to discipline vexatious or malicious complainants are inadequate to hold such complainants to account. Eleven of the submissions reported some command or management failure for which the relevant commanders or managers were not or could not be held accountable.
- b. **Abuse of power or authority.** Nine of the submissions reported an apparent abuse of authority either on the part of management but also, in two cases, on the part of complainants. Some of the submissions indicated that senior ADF officers had apparently deliberately ignored career management rules or guidelines, or had taken into account matters which ought not to have been taken into account, in making employment decisions. Two of the submissions mentioned abuse of power by complainants in making apparently vexatious fraud allegations and unacceptable behaviour complaints, for which there had been no effective redress.
- c. **Failures properly to implement policy.** Five of the submissions directly referred to incidents in which a commander's or manager's ignorance of policy had apparently resulted in a failure to implement that policy when dealing with an incident.

- d. **Management of defective administration claims.** Two of the submissions referred to confusion and long delays in the management of defective administration claims. The confusion, including the apparent raising of false expectations by Defence's scheme managers, caused a great deal of stress to the applicants. As Defence Legal advises Defence commanders and managers regarding administrative matters on the one hand—and a Defence Legal employee is the departmental delegate for the *Compensation for Detriment caused by Defective Administration* (CDDA) scheme on behalf of Defence on the other—concerns were also expressed about apprehension of bias in the making of these compensation decisions.



## OTHER ISSUES

### **Interface between APS and ADF processes for complaint handling**

189. The Defence workplace has become increasingly integrated and it is now common for incidents of unacceptable behaviour to involve ADF personnel, APS personnel and also Defence contractors. While the QA system is common to the management of an incident involving both ADF and APS personnel, any action that follows differs depending upon whether ADF or APS processes for complaint handling are followed thereafter.

190. There would be benefit in a study to better provide for the reality of a mixed workplace that does not leave one employment category or another at a disadvantage in the management of complaints. It is understood that some work to deal with this issue has commenced in People and Strategies Division and this should be encouraged.

**Recommendation 37: A review of the interface between ADF and APS complaints management processes in the Defence workplace should be expedited.**

### **Media responses**

191. Many of those commanders and stakeholders who were consulted as part of the review advocated a more positive response to what was seen as often exaggerated or sensational media commentary about incidents and complaint handling involving ADF personnel. While acknowledging that the publication of Defence responses in particular cases is outside of the Department's control, a more robust and swift response by Defence to correct misconceptions or inaccuracies was urged on the basis that continual, negative reporting, without evidence of appropriate rejoinder or rebuttal, can be damaging to morale.

**Recommendation 38: The way in which Defence responds to media criticism of incident reporting and management should be reviewed to provide, where appropriate, a more robust and swift rebuttal with enhanced visibility to ADF personnel.**

## CONCLUSION

192. The terms of reference for this review cover a broad range of related but distinct subject matters, each of which has its own policy but which in parts overlap. Each of these matters has been the subject of a number of previous reviews and multiple recommendations, most of which have been accepted and implemented. While this in itself has tended to add successive layers of complexity to published policy guidance, there is little in the current guidance that this review found to be unnecessary or redundant. Structurally, the current policy guidance as it has evolved complies with best practice standards recommended by recognised external Australian authorities in complaint handling. Further, the ADF system shares the same basic objectives and compares favourably with complaints management systems used by overseas armed forces that have similar cultural and military traditions.

193. There does not appear to be any pressing need for radical revision to the present complaints handling structure. However, the policy guidance on the process is undoubtedly complex, and presents as an area with substantial potential for system improvement. While detailed instructions on implementation of the policy will always be required, the aim should be for the detailed instructions to not also have to serve as entry level points of information for complainants, managers or others with specific needs. In pursuing this aim however Einstein's often quoted maxim that "*things should be made as simple as possible but no simpler*" has some resonance.

194. More specifically, and aside from the need for greater simplicity in policy presentation, a number of other opportunities for improvement have been identified by this review. These arise principally in the context of recurring themes, both in the complaint handling process and jurisdictionally. Although identified by earlier reviews, these recurring themes still remain problematic by imposing inefficiencies or weakening confidence in the system.

195. Overall, this review has found that the fundamental underpinnings of the ADF's complaint handling system remain valid. Structurally, the ADF processes reflect best practices, and this review has found no compelling reason to support radical structural change. The most productive opportunities for improvement lie in better implementation of the present policy and the review's recommendations have wherever possible reflected this.

**Inspector General Australian Defence Force**

06 September 2011

## **LIST OF ANNEXES AND ENCLOSURES**

### **Annexes:**

- A. Terms of Reference for the Review
- B. List of Topics Discussed with External Stakeholders and Senior Commanders
- C. List of Topics Discussed with Commanding Officers
- D. List of Legal and Policy Documents Applicable to Management of Incidents or Complaints
- E. Compliance of Defence Policies with External Agencies' Complaints Criteria
- F. Anonymous Summary of Private Submissions
- G. Survey Results of Recently Appointed or Enlisted Personnel

### **Enclosures:**

- 1. Submission by the Defence Force Ombudsman to the Review
- 2. Submission by Director General Fairness and Resolution
- 3. IGADF Military Justice Awareness Training Package
- 4. IGADF Complaints Handling Course Materials

## REFERENCES

AS ISO 10002–2006 *Customer satisfaction—Guidelines for complaints handling in organizations* of 05 April 2006

Australian Defence Force Publication 06.1.1 *Discipline Law Manual* (4<sup>th</sup> edition 2009, Defence Publishing Service, Canberra

Australian Defence Force Publication 06.1.4 *Administrative Inquiries Manual* (2<sup>nd</sup> edition), 2006, Defence Publishing Service, Canberra

Australian Human Rights Commission fact sheet: *Developing and implementing internal complaints procedures*, [www.humanrights.gov.au/employers/](http://www.humanrights.gov.au/employers/)

A Ballard, *Sexual Assault Prevention and Intervention in a Military Environment*, 2009 Churchill Fellowship paper

Chief of Army Directive 27/2009 *Management of ADF members and Defence APS personnel within Army who are under investigation/inquiry or facing administrative/disciplinary action* of 07 July 2009

Chief of Air Force Directive 04/2006 *Management of ADF members under investigation* of 24 August 2006

Comcare complaint handling checklist, [www.comcare.gov.au](http://www.comcare.gov.au)

Commonwealth Ombudsman, *Management of complaints about unacceptable behaviour* of June 2007

*Defence Act 1903*

*Defence Force Discipline Act 1982*

*Defence Force Regulations 1952*

Defence Instruction (General) Administrative 45-2 *The reporting and management of notifiable incidents* of 26 March 2010

Defence Instruction (General) Administrative 67-2 *Quick assessment* of 07 August 2007

Defence Instruction (General) Personnel 34-1 *Redress of Grievance—Tri-Service procedures* of 08 September 2010

Defence Instruction (General) Personnel 35-3 *Management and reporting of unacceptable behaviour* of 28 June 2009

Defence Instruction (General) Personnel 35-4 *Management and reporting of sexual offences* of 11 February 2004

Defence Instruction (General) Personnel 45-1 *Jurisdiction under the Defence Force Discipline Act—Guidance for commanders* of 17 February 1999

Defence Instruction (General) Personnel 45-4 *Australian Defence Force Prosecution Policy* of 29 August 2000

DEFGRAM No 35/2009 *Management and reporting of sexual offences* of 30 January 2009

Department of Immigration and Citizenship, *Compliments and complaints policy* of 13 June 2007

Director of Military Administrative Law update 5/2008 *Claims for compensation for detriment caused by defective administration (CDDA) and Redress of Grievance* of 02 July 2008

Director of Military Prosecutions Directive 02/2009 *Prosecution and disclosure policy* of 01 October 2009

Director of Military Prosecutions annual reports 2007–2010

Director of Strategic Personnel Policy Research Report 01/2010 *Unacceptable behaviour survey – 2009 (ADF and APS)* of April 2010

HMAS *Success* Commission of Inquiry reports part 1 and part 2

Inspector General Australian Defence Force *Report for the period 01 January 2010 to 31 December 2010*

Professor John McMillan, *Twenty-five year of the Defence Force Ombudsman*, December 2008

*Memorandum of Understanding between the Australian Directors of Public Prosecutions and Director of Military Prosecutions* of 22 May 2007

*Millar v Bornholt* [2009] FCA 637

Commander Fiona Sneath RAN, *How can a unified framework for responding to allegations of sexual offences be implemented throughout the Australian Defence Force?*, 2011

*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518



**Australian Government**  
**Department of Defence**

**TERMS OF REFERENCE  
REVIEW OF THE MANAGEMENT OF INCIDENTS AND  
COMPLAINTS IN DEFENCE**

**Objectives**

1. To review extant policy in relation to the management of incidents and complaints with particular reference to the treatment of victims, transparency of processes and the jurisdictional interface between civil and military law in such circumstances. To achieve this, the Review will:
  - a. identify what guidance, instructions, policies, practice and/or requirements for managing incidents and complaints under either civil or military legal/disciplinary/administrative/equity processes;
  - b. identify any apparent weaknesses, inconsistencies or ambiguity that may exist in extant guidance, instructions, policies, practice and/or requirements; and,
  - c. provide recommendations regarding what, if anything should be done to clarify and improve extant policy and practice.

**Governance**

2. The review is not intended to focus on the merits of individual cases as such except where the management of individual cases may be relevant to current policy or practice. The arrangements in place for commanders and supervisors to manage incidents and complaints, along with Defence's procedural arrangements for the management of notifiable incidents, complaints of unacceptable behaviour and redresses or grievance, will be considered.
3. An indicative list of policies to be reviewed is:

<b>Document</b>	<b>Date</b>	<b>Sponsor</b>
<i>Defence Force Discipline Act 1982, especially section 61 and 63</i>	05 July 2010	Department of Defence
<i>DI(G) PERS 45-1 Jurisdiction under Defence Force Discipline Act—guidance for military commanders</i>	17 February 1999	DEPSEC Defence Support
<i>DI(G) PERS 35-3 Management and reporting of unacceptable behaviour</i>	28 June 2009	DEPSEC People Strategies and Policy Group
<i>DI(G) PERS 35-4 Management and reporting of sexual offences</i>	11 February 2004	

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Document	Date	Sponsor
DI(G) PERS 35-7 <i>Defence Equity Adviser Network</i>	09 May 2003	
DI(G) ADMIN 45-2 <i>The reporting and management of notifiable incidents</i>	26 March 2010	Office of the Secretary and Chief of the Defence Force
DI(G) ADMIN 45-4 <i>Defence investigative standards</i>	07 June 2009	Chief of the Defence Force
DI(G) ADMIN 67-2 <i>Quick assessment</i>	07 Aug 2007	Vice Chief of the Defence Force
ADFP 06.1.1 Volume 3 <i>Discipline Law Manual</i>	September 2009	Director General ADF Legal Services
ADFP 06.1.4 <i>Administrative Inquiries Manual</i>	June 2006	
Director of Military Prosecutions <i>Prosecution and disclosure policy</i>	01 October 2009	Director of Military Prosecutions
Memorandum of Understanding between Director of Military Prosecutions and Commonwealth, State and Territory Directors of Public Prosecutions	22 May 2007	

### Composition of Review Team

4. The review will be undertaken by the Inspector General of the Australian Defence Force in consultation with the Provost Marshal Australian Defence Force using subject matter experts from both agencies. The review will include, but not necessarily be limited to, consultation as appropriate with Mr Roger Gyles AO QC, President of the CDF Commission of Inquiry into HMAS *Success* matters, relevant ADF and Defence stakeholders, Federal and State Police authorities and Directors of Prosecutions.

### Reporting

5. It is expected the review can be completed in three months.

### Management of Recommendations

6. The review should produce the following outputs;

- a. a report on the effectiveness of extant policy governing the management of incidents and complaints in Defence with specific reference to the treatment of victims, transparency of processes and the jurisdictional interface between military and civil law;
- b. identification of any weaknesses, ambiguities or inconsistencies in present policy guidance and direction, including those that may lead to untimely decision making processes; and
- c. a schedule of recommendations designed to address any weaknesses, ambiguities or inconsistencies in policy guidance and direction identified by the review.

**ANNEX B TO  
IGADF REVIEW  
06 SEP 11**

**REVIEW OF MANAGEMENT OF INCIDENTS AND COMPLAINTS IN  
DEFENCE—ISSUES FOR IGADF DISCUSSIONS WITH COMMANDERS,  
MANAGERS AND STAKEHOLDERS**

**Effectiveness of the Quick Assessment process**

- **Requirement for a Quick Assessment.** Defence's policy for Quick Assessments, DI(G) ADMIN 67-2, mandates a Quick Assessment in circumstances where a subsequent inquiry or investigation may be required. Should Quick Assessments be mandatory, or should they be left to the commander/supervisor's discretion?
- **Adequacy of Quick Assessment guidance.** Last year, a working group, including representatives from each of the Services, reviewed the administrative inquiries system recommended that Quick Assessments be templated so as to guide Quick Assessment Officers and manage commanders' expectations. What are your thoughts on this general proposal?
- **Adequacy of Quick Assessments generally.** Perceptions at the tactical and operational levels are that the strategic level demand for information is distorting the Quick Assessment process from its intended purpose—of a speedy, initial assessment of the known facts to determine future investigative inquiry action—so that Quick Assessments are now more like an initial investigation or inquiry. Should the Quick Assessment policy be modified to reflect this change of purpose?

**Incident and complaint management policy framework**

- **Accessibility.** There are at least nine policy or legal documents which would apply to the management of different aspects of an incident like the ADFA Skype incident. Some of these policies qualify guidance in other policies. Are there too many publications? Would it assist if there was policy consolidation and/or an appropriately-staffed help line which managers at all levels could use to assist them in responding to incidents or complaints?

**Jurisdiction**

- **Suspension/redeployment of staff.** Are there sufficient avenues available to commanders and managers to suspend or re-deploy personnel who are suspected of having committed an offence or having been involved in other misconduct or unacceptable behaviour?
- **Administrative vs disciplinary responses.** The HMAS *Success* Commission of Inquiry report (part 1) concluded that the interplay between the equity and diversity system, the disciplinary system, and the chain of command were not well understood in Navy (see para 5.21 of the report). IGADF military justice performance audit data indicates that some units' first response to an incident will be to take administrative rather than disciplinary action. This is partly because disciplinary action, including the investigative process, is regarded as too complex and time-consuming. Another cause may be that Defence's policy is that incidents and complaints be resolved at the lowest possible level. Is there a tendency for commanders and managers to deal with incidents and complaints administratively rather than by disciplinary action? Is there tension between



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disciplinary, and equity and diversity, policies in responding to incidents and complaints?

### **Incidents and complaints**

- **Effectiveness of policy.** DI(G) ADMIN 45-2 establishes a regime which mandates reporting chains for various types of notifiable incidents. Is the notifiable incidents regime effective in assisting commanders to manage incidents and complaints?
- **Avenues of complaint.** Do you think there are too many (or too confusing) avenues of complaint now available to Defence personnel?
- **Central reporting of incidents and complaints.** Would it simplify complaints processes if, rather than the plethora of hotlines and avenues which currently exists (equity, whistleblowers, etc) there were one appropriately-staffed 'hotline' which Defence personnel could use to report complaints and incidents so that complaints and incidents could be referred to the appropriate area in Defence and centrally tracked?
- **Redresses of Grievance.** Under present regulations, in the majority of cases an application for redress of grievance automatically suspends the administrative decision giving rise to the redress. It may be that some redress of grievance applications are submitted for the purpose of either delaying implementation of an administrative decision or for vexatious reasons. Do you think that the regulations should be changed to provide that the administrative decision underlying a redress will be implemented notwithstanding that an application for redress of grievance has been submitted, with provision for reversal of the administrative decision in the event that the redress of grievance is decided in the applicant's favour?

### **Transparency**

- **Publication of discipline/administrative results.** Would it enhance confidence in the military justice system and facilitate general deterrence if results of discipline and administrative action could, at a commander's discretion, be published?
- **Advising complainants of outcomes.** Would it assist if results of discipline and administrative action could at least be advised to the complainant?
- **Effectiveness of equity and diversity training.** Is mandatory equity and diversity training effective? Could its effectiveness be increased by the introduction of competency-based training as part of promotion courses?
- **Equity of treatment.** Do you consider there is different treatment for officers and other ranks, in relation to the same types of incident?

### **Publicity**

Are commanders and managers equipped to deal with media interest in incidents?

**QUESTIONS FOR COMMANDERS RELEVANT TO REVIEW OF MANAGEMENT  
OF INCIDENTS AND COMPLAINTS IN DEFENCE**

**DISCIPLINE OR ADMINISTRATIVE APPROACH**

1. Is there a tendency to manage incidents as equity issues rather than under the DFDA? (NB HMAS SUCCESS COI report criticised Ship's command for dealing with matters which were clearly disciplinary as equity issues)
2. What tools are available to you as a commander to distinguish between an equity issue and a disciplinary issue?
3. How effective is the Quick Assessment process for a decision on whether an incident will be dealt with administratively (according to equity guidelines) or will be the subject of a DFDA investigation?
4. From the policies relating to the management of complaints do you think there are ambiguities, inconsistencies? Are there too many publications? Do they conflict with each other?

**JURISDICTION**

5. How do you decide whether an incident should be handled by the Service police or by the civilian police? Is it passed on immediately or do you first initiate a QA?
6. What process is used to inform the civil police of an incident?
7. What measures are in place to monitor the progress of incidents referred to the civilian police? How are matters managed?
8. What would you do if the civilian police decided not to investigate an incident that you considered to be a civil police matter? What alternate action would you take?
9. Should it be necessary to remove a member from the workplace are you satisfied with the avenues open to you, including suspension under the DFDA?

**COMPLAINANTS**

10. Do you think complainants feel comfortable making a complaint at the appropriate level? If not what is done to assist them with the complaint process?
11. Do you think complainants feel confident that the chain of command will deal with their complaint appropriately and in a timely manner?
12. How do you ensure that complaints of a serious nature are not stifled/dismissed/covered up at the lower chain of command?
13. Do you think there are too many (or too confusing) avenues of complaint now available to ADF members?
14. What support is provided to complainants after making a complaint?

## **STAFF-IN-CONFIDENCE**

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15. Are complainants treated differently by their peers or chain of command after making a complaint?
16. Is referral to a psychologist part of your SOPs in the management of complainants?
17. Are you aware of complainants going on extended leave after having made a complaint?

## **RESPONDENTS**

18. What support is provided to respondents after a complaint is made against them?
19. Are respondents treated differently by their peers or chain of command after a complaint is made against them?
20. Are respondents afforded procedural fairness?
21. Are you aware of respondents going on extended leave after a complaint is made against them?
22. Have you had any instances where respondents have alleged that complaints against them are made by vexatious complainants?

## **TRANSPARENCY**

23. How do you ensure that when investigating an incident or complaint that the process remains fair and transparent?

## **CONFIDENTIALITY/CONFIDENCE**

24. What measures are in place to maintain confidentiality about incidents?
25. Would it enhance confidence in the military justice system if results of discipline and administrative action could be published?
26. Would it assist confidence if results of discipline and administrative action could at least be advised to the complainant?

## **TRAINING**

27. What measures do you have in place to provide an environment which minimises incidents of bullying, harassment, and sexual offences?
28. How is the annual equity and diversity training provided? How do you ensure that all members of your unit undergo annual training?
29. Is mandatory equity and diversity training effective/ understood?

## **EQUITABLE TREATMENT**

30. Do you consider there is different treatment for officers and other ranks and genders, in relation to complaints for the same incident?

**STAFF-IN-CONFIDENCE**

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**MINORS**

31. If the complainant was a minor, what processes would be followed to inform/involve the parents, family?

**PUBLICITY**

32. Do you feel equipped to deal with any media interest in incidents? Would you be supported by higher HQ if an incident which attracted media interest occurred in your unit?

**REVIEW SURVEY**

**I have a clear understanding of what is meant by:**

- Workplace bullying

AGREE      DISAGREE

- Harassment

AGREE      DISAGREE

- Abuse of power

AGREE      DISAGREE

- Discrimination (gender, race, etc.)

AGREE      DISAGREE

- Bastardisation

AGREE      DISAGREE

- Sexual harassment

AGREE      DISAGREE

- Sexual offence

AGREE      DISAGREE

**STAFF-IN-CONFIDENCE**

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- Inappropriate workplace relationship, eg fraternisation

AGREE      DISAGREE

**It is every commanding officer's and manager's duty to provide a safe and inclusive workplace free of the types of behaviour listed above in an environment that is transparent, fair and open where complaints can be reported without fear of retribution.**

**Do you agree with this statement?**

YES      NO

**Do you believe this statement accurately describes your unit?**

YES      NO

**Do you regularly communicate this policy to your subordinates?**

YES      NO

**Do you believe your subordinates share and support this view?**

YES      NO

**Are personnel under your command briefed regularly on their rights and your expectations?**

YES      NO

**Are you aware/have you ever been made aware of circumstances where subordinates acted counter to this policy?**

YES      NO

**If yes, did you initiate appropriate remedial action?**

YES      NO

**Once a complaint is lodged,**

- **Is the complainant provided confidentiality?**

YES      NO

- **Is the respondent afforded procedural fairness?**

YES      NO

**STAFF-IN-CONFIDENCE**

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- **Are they both assigned a case officer to assist and advise them?**

YES NO

**Are complainants and respondents provided with adequate support?**

YES NO

**Complainants would not be ostracised or victimised.**

AGREE DISAGREE

**Respondents would not be ostracised pending investigation outcomes.**

AGREE DISAGREE

**You would take immediate action if it were to come to your attention that either the complainant or the respondent is being mistreated in any way.**

AGREE DISAGREE

**Respondents would not be automatically removed from their primary duties unless absolutely necessary.**

AGREE DISAGREE

**Every precaution would be taken to ensure that respondents do not become victims.**

AGREE DISAGREE

**Vexatious complaints are not tolerated and appropriate action would be taken against accusers.**

AGREE DISAGREE

**Do you/would you keep the complainant informed as your investigation progresses?**

YES NO

**Would you discuss your intended course of action with the complainant before putting it into effect?**

YES NO

**Would you be prepared to/did you alter your intended course of action based on the complainant's input?**

YES NO

**STAFF-IN-CONFIDENCE**

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**Would you seek the complainant's opinion/agreement prior to deciding on a course of action?**

YES NO

**Would you let the complainant's views influence your ultimate decision?**

YES NO

**There are too many instruments governing the management of complaints.**

YES NO

**Some of the instruments are ambiguous or contradictory.**

YES NO

**Direction and guidance for the handling of complaints that would apply universally to all Services and joint commands would be welcome.**

YES NO

**Training at all levels for the recognition, reporting and management of complaints is inadequate.**

YES NO

**Once an incident or complaint surfaces, the establishment of primary jurisdiction is difficult and the source of quick and reliable advice often elusive.**

YES NO

**Who to tell and by what means are perceived as the most urgent and difficult early issues.**

YES NO

**If an incident or complaint is a potential headline grabber media support of the unit involved is usually lacking, leading to frustration with facts and truth becoming early casualties.**

YES NO

**Ancillary questions of a general nature.**

- **You have been provided with the necessary training to deal with complaints.**

YES NO

- **You are aware of all complaint handling agencies within Defence.**

**STAFF-IN-CONFIDENCE**

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YES NO

- **The chain of command above you provides the required level of support.**

YES NO

- **Complaint handling agencies provide the required level of support.**

YES NO

- **You have an adequate working knowledge of all policies, practices and procedures dealing with complaints.**

YES NO

- **If a complaint is referred to higher headquarters for resolution, are you kept informed of progress?**

YES NO

- **Do you believe there are too many avenues of complaint available?**

YES NO

- **Do you believe complainants have unrealistic expectations of the time it takes to resolve complaints?**

YES NO

- **Do you believe complainants have unrealistic expectations of achievable outcomes to complaints?**

YES NO



**STAFF-IN-CONFIDENCE**

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INTENTIONALLY BLANK

**LIST OF LEGAL AND POLICY DOCUMENTS APPLICABLE TO  
MANAGEMENT OF INCIDENTS OR COMPLAINTS**

**Commonwealth Legislation:**

*Occupational Health and Safety Act 1991*

*Human Rights and Equal Opportunity Commission Act 1986*

*Sex Discrimination Act 1984*

*Disability Discrimination Act 1992*

*Racial Discrimination Act 1975*

*Age Discrimination Act 2004*

*Privacy Act 1988*

*Public Service Act 1999*

*Public Service Regulations 1999*

*Workplace Relations Act 1996*

*Legal Services Directions*

*Defence Legislation*

*Defence Force Discipline Act 1982*

*Defence Act 1903*

*Defence (Inquiry) Regulations 1985*

**Defence Instructions:**

DI(G) ADMIN 08-1 *Public comment and dissemination of official information by Defence personnel*

DI(G) ADMIN10-8 *Conduct Reporting and Tracking System*

DI(G) ADMIN15-1 *Misuse of Alcohol in the Defence Force*

DI(G) ADMIN 16-26 *Management of a Suicidal Episode in the Australian Defence Force*

DI(G) ADMIN 27-1 *Freedom of Information Act—Implementation in the Department of Defence*

DI(G) ADMIN 27-2 *Access to Defence and Defence-related archival records under the Archives Act 1983*

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DI(G) ADMIN 45-2 *The reporting and management of notifiable incidents*

DI(G) ADMIN 65-1 *Administrative Inquiry Tracking*

DI(G) ADMIN 67-2 *Quick assessment*

DI(G) OPS 13-1 *Incident scene initial action and preservation*

DI(G) PERS 19-1 *Defence Safety Manual*

DI(G) PERS 25-5 *Employment of immediate family members in the same chain of command and/or working environment*

DI(G) PERS 34-1 *Redress of Grievance—Tri-Service procedures*

DI(G) PERS 34-2 *Complaints of discrimination and harassment through the Australian Human Rights Commission*

DI(G) PERS 34-3 *Inquiries and investigations by the Commonwealth Ombudsman and the Defence Force Ombudsman*

DI(G) PERS 34-4 *Use and management of Alternative Dispute Resolution in Defence*

DI(G) PERS 35-2 *Application of the Sex Discrimination Act to the Australian Defence Force*

DI(G) PERS 35-3 *Management and reporting of unacceptable behaviour*

DI(G) PERS 35-4 *Management and reporting of sexual offences*

DI(G) PERS 35-6 *Formal warnings and censures in the Australian Defence Force*

DI(G) PERS 35-7 *Defence Equity Adviser Network*

Di(G) PERS 45-1 *Jurisdiction under the Defence Force Discipline Act—Guidance for Military Commanders*

DI(G) PERS 45-5 *Defence Whistleblower Scheme*

DI(G) PERS 55-4 *Reporting, recording and dealing with Civil Offences, Service and Civil Convictions and Diversionary Programs*

**Compliance of Defence Policies with External Complaints Procedures \***

<b>COMPLIANCE / CRITERIA</b>	<b>DEFENCE POLICIES</b>
<p><b>Fairness / Objectivity</b> Australian Standards Australian Human Rights Commission Commonwealth Ombudsman ComCare</p>	<p><b>DI(G) PERS 34-1 <i>Redress of Grievance</i></b>, para 15, 26, levels of review, timeframes, requirements for SORs annex B, para 22, annex C para 25-7, annex E</p> <p><b>DI(G) PERS 35-3 <i>Management and reporting of unacceptable behaviour</i></b>, para 14-15, 19, 29, 48</p> <p><b>DI(G) PERS 35-4 <i>Management and reporting of sexual offences</i></b>, para 16-17, 80, 103-106</p> <p><b>DI(G) PERS 35-7 <i>Defence Equity Adviser network</i></b>, para 19b</p> <p><b>DI(G) PERS 45-5 <i>Defence Whistleblower Scheme</i></b>, para 19, 26, 27</p> <p><b>DI(G) ADMIN 67-2 <i>Quick Assessment</i></b>, para 10</p> <p><b>ADFP 06.1.4 <i>Administrative Inquiries Manual</i></b>, see, for eg. Para 4.6, chapter 5, annex N</p>
<p><b>Accessibility</b> Australian Standards Australian Human Rights Commission Commonwealth Ombudsman ComCare</p>	<p>All DI(G) available on intranet</p> <p>DI(G) PERS 35-4 <i>Management and reporting of sexual offences</i> also on Fairness &amp; resolution's internet site</p>
<p><b>Responsiveness / Timeliness</b> Australian Standards Australian Human Rights Commission Commonwealth Ombudsman ComCare</p>	<p><b>DI(G) PERS 11-2 <i>Notification of Australian Defence Force and non-Australian Defence Force Casualties</i></b>, underpins DI(G), as stated in para 7 as part of 'casualty notification principles'</p> <p><b>DI(G) PERS 34-1 <i>Redress of Grievance</i></b>, para 16-20, 41-46, annex C</p> <p><b>DI(G) PERS 35-3 <i>Management and reporting of unacceptable behaviour</i></b>, para 28, annex D, F and H</p>

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COMPLIANCE / CRITERIA	DEFENCE POLICIES
	<p><b>DI(G) PERS 35-4 <i>Management and reporting of sexual offences</i></b>, para 9, 52, 70-71, annex B</p> <p><b>DI(G) PERS 35-7 <i>Defence Equity Adviser network</i></b>, para 19a</p> <p><b>DI(G) PERS 45-1 <i>Jurisdiction under Defence Force Discipline Act – Guidance for Military Commanders</i></b>, para 14</p> <p><b>DI(G) ADMIN 45-2 <i>The reporting and management of notifiable incidents</i></b>, para 15, 31</p> <p><b>DI(G) PERS 45-5 <i>Defence Whistleblower Scheme</i></b>, para 9-10</p> <p><b>DI(G) ADMIN 67-2 <i>Quick Assessment</i></b>, para 11</p> <p><b>ADFP 06.1.4 <i>Administrative Inquiries Manual</i></b>, discusses timeliness, e.g. tracking, scoping, planning and progress reports sections</p> <p><b>Defence Safety Manual, Volume 1, Part 1, Chapter 9 <i>Notification and reporting of OHS incidents</i></b>, completed within prescribed timeframes, annex A, para 11</p>
<p><b>Commitment / Integration</b> Australian Standard Commonwealth Ombudsman ComCare</p>	<p><b>DI(G) PERS 11-2 <i>Notification of Australian Defence Force and non-Australian Defence Force Casualties</i></b>, signed by CDF and Secretary</p> <p><b>DI(G) PERS 34-1 <i>Redress of Grievance</i></b>, signed by CDF and Secretary. Provides for complaints through COC with oversight by Cth ombudsman</p> <p><b>DI(G) PERS 35-3 <i>Management and reporting of unacceptable behaviour</i></b>, signed by CDF and secretary, places responsibility lies with all Defence personnel</p> <p><b>DI(G) PERS 35-4 <i>Management and reporting of sexual offences</i></b>, signed by CDF and secretary and requires commanders and managers to take complaints seriously and act</p>

COMPLIANCE / CRITERIA	DEFENCE POLICIES
	<p>immediately</p> <p><b>DI(G) PERS 35-7 <i>Defence Equity Adviser network</i></b>, signed by CDF and Secretary</p> <p><b>DI(G) PERS 45-1 <i>Jurisdiction under Defence Force Discipline Act – Guidance for Military Commanders</i></b>, signed by CDF and Secretary</p> <p><b>DI(G) ADMIN 45-2 <i>The reporting and management of notifiable incidents</i></b>, signed by CDF and Secretary</p> <p><b>DI(G) PERS 45-5 <i>Defence Whistleblower Scheme</i></b>, signed by CDF and Secretary</p> <p><b>DI(G) ADMIN 67-2 <i>Quick Assessment</i></b>, signed by CDF and Secretary</p> <p><b>ADFP 06.1.4 <i>Administrative Inquiries Manual</i></b>, signed by CDF</p> <p><b>Defence Safety Manual, Volume 1, Part 1, Chapter 9 <i>Notification and reporting of OHS incidents</i></b>, specifies responsibilities from CDF &amp; Secretary to supervisors</p>
<p><b>Confidentiality</b> Australian Standard Australian Human Rights Commission ComCare</p>	<p><b>DI(G) PERS 11-2 <i>Notification of Australian Defence Force and non-Australian Defence Force Casualties</i></b>, para 29-30</p> <p><b>DI(G) PERS 34-1 <i>Redress of Grievance</i></b>, annex C</p> <p><b>DI(G) PERS 35-3 <i>Management and reporting of unacceptable behaviour</i></b>, para 35-39</p> <p><b>DI(G) PERS 35-4 <i>Management and reporting of sexual offences</i></b>, para 56-67</p> <p><b>DI(G) PERS 35-7 <i>Defence Equity Adviser network</i></b>, para 46-50</p> <p><b>DI(G) PERS 45-1 <i>Jurisdiction under Defence Force Discipline Act – Guidance for Military Commanders</i></b>, para 10, 18</p>

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COMPLIANCE / CRITERIA	DEFENCE POLICIES
	<p><b>DI(G) PERS 45-5 <i>Defence Whistleblower Scheme</i></b>, para 10, 19, 21-24, 30, annex A, para 14 – 20, appendix 2 to annex A</p> <p><b>DI(G) ADMIN 67-2 <i>Quick Assessment</i></b>, para 27-29</p> <p><b>ADFP 06.1.4 <i>Administrative Inquiries Manual</i></b>, 1.62, 4.44, Chapter 9</p> <p><b>Defence Safety Manual, Volume 1, Part 1, Chapter 9 <i>Notification and reporting of OHS incidents</i></b>, annex A, para 13-14</p>
<p><b>Review</b> Australian Standards Australian Human Rights Commission Commonwealth Ombudsman ComCare</p>	<p>All policies have specified review dates</p>

**External agencies:**

*Australian Standards (Australian Standard for Complaints Handling AS ISO 10002-2006):*

- Commitment
- Visibility / Access
- Responsiveness
- Objectivity / Fairness
- Confidentiality
- Continual Improvement
- Accountability

*Australian Human Rights Commission (Good Practice, good business: eliminating discrimination & harassment from your workplace):*

- Documented / accessible
- Informal & formal options

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- Timeliness, confidentiality, objectivity
- Administered by trained personnel
- Guidance on investigation procedures & record keeping
- Prevention of victimisation / disadvantage for complainant
- Regular Review

*Commonwealth Ombudsman (Better practice guide to Complaint Handling) (adopted by Comcare, as stated in their annual report):*

- Accessibility
- Fairness
- Responsiveness
- Efficiency
- Integrated
- Review

**Defence policies reviewed:**

DI(G) PERS 11-2 *Notification of Australian Defence Force and non-Australian Defence Force Casualties*

DI(G) PERS 34-1 *Redress of Grievance – tri-service procedures*

DI(G) PERS 35-3 *Management and reporting of unacceptable behaviour*

DI(G) PERS 35-4 *Management and reporting of sexual offences*

DI(G) PERS 35-7 *Defence Equity Adviser network*

DI(G) PERS 45-1 *Jurisdiction under Defence Force Discipline Act – Guidance for Military Commanders*

DI(G) ADMIN 45-2 *The reporting and management of notifiable incidents*

DI(G) PERS 45-5 *Defence Whistleblower Scheme*

DI(G) ADMIN 67-2 *Quick Assessment*

ADFP 06.1.4 *Administrative Inquiries Manual*

Defence Safety Manual, Volume 1, Part 1, Chapter 9 *Notification and reporting of OHS incidents*



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**ANNEX F TO  
IGADF REVIEW  
06 SEP 11**

**ANONYMOUS SUMMARY OF PRIVATE SUBMISSIONS**

1. A former officer submitted that the root of almost all of Defence's problems is in institutionalised 'groupthink' which has permitted senior officers to use positions of power to further individual interests at the expense of organisational outcomes. He recommended that, to fix this problem, Defence needs to train its officers to put service before self.
2. A currently-serving Commanding Officer wrote of his concerns that the ADF's complaint systems are heavily weighted in favour of the complainant and that this can increase the difficulty of supporting a respondent during complaint management. The Commanding Officer also commented that vexatious or unreasonable complaints could be made in circumstances in which a respondent, although ultimately exonerated, would have little or no redress against the complainant.
3. An officer who was involved in a recent CDF Commission of Inquiry submitted that factors which detract from the effectiveness of existing unacceptable behaviour policies, the equity and diversity system, the chain of command and the disciplinary system are:
  - a. a herd mentality and culture of 'fitting in';
  - b. a culture of being part of the crowd;
  - c. excessive alcohol use by ADF personnel;
  - d. failures by middle and senior managers to enforce correct standards of behaviour;
  - e. a culture of silence and mutual protection, including reluctance to break rank;
  - f. fear of being shunned and excluded if a complaint or report of unacceptable behaviour is made;
  - g. misunderstanding of the concept of 'loyalty' to mean never to inform on anyone; and
  - h. a culture of contempt for whistleblowers.
4. A male officer claimed that in 2010 senior officers in career management had ignored career progression rules in order to promote a more junior female colleague. His complaint about this had resulted in what he claimed was a superficial and ineffective investigation by a junior officer about senior officers' actions.
5. Two public servants claimed that for a period of several months in 2009 they were the subject of violent and threatening professional, psychological and physical harassment, bullying and coercion by an officer. The conduct apparently occurred as a result of the public servants' having provided the officer unwelcome policy and procedural advice. They said that efforts by the bully's ADF one-star supervisor to deal with their complaints were ineffective as those efforts involved simply 'talking' to the bully rather than commencing any formal inquiry or other disciplinary action.
6. An officer claimed that her involvement in 2009 in an unspecified incident with a male peer had resulted in her receiving inequitable treatment, compared with the treatment her male colleague received, including her being removed from a deployment. She also claimed that

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she had experienced workplace bullying and harassment in the year following her submission of a Redress of Grievance based on the inequitable treatment, and that the claims of being bullied had not been properly addressed either by her Commanding Officer or by other more senior officers in her chain of command.

7. An officer claimed that in 2007 and 2008 he had been the subject of six vexatious complaints to the Defence Whistleblower Scheme, initiated by two subordinates in his chain of command. The complaints were investigated and eventually revealed to have been unsubstantiated. The Reserve officer asserted that the Defence Whistleblower Scheme supports vexatious complainants and does not provide any right of reply to respondents. The officer also submitted that he had not been supported while he was the subject of investigation, and that his subsequent efforts to seek redress had been forestalled because of an apparent organisation imperative to protect the integrity and anonymity of the Whistleblower scheme.

8. A Defence contractor in 2007 disagreed with the speed reading from a speed gun operated by a Service policeman on the ADF base at which the Defence contractor worked. The Defence contractor had 'phoned the base Service police Section Commander, a Senior Non-Commissioned Officer, who had told him, 'I don't have to worry about any courts of law; what I say goes.' The Defence contractor felt that he had no recourse to protest his innocence. He anticipated that there was little use in going to the base Commanding Officer because the base Commanding Officer would support his Service police Section Commander. The Defence contractor felt that the complaints system was inaccessible to him.

9. An officer claimed that in 2005 he had been the victim of retribution after he raised concerns about discriminatory practices being applied to trainees at a Defence training establishment. He claimed that senior officers had refused to accept his complaints and had also refused to give detailed reasons for that decision. He also claimed that, after intervention by more senior officers had resulted in his complaints being investigated, the complaints had been separated into two or more inquiries or investigations, which resulted in issues being stove-piped and not being properly investigated or considered in context.

10. A civilian software developer claimed that in 2005 a senior executive in the Defence Science and Technology Organisation misrepresented his software and his business, and breached a confidentiality agreement. This claim, relating as it did to commercial matters, was outside the scope of the IGADF review.

11. A former officer claimed he had not been shown procedural fairness when being considered for a promotional position in 2000, and that he was denied promotion for reasons which should not have been taken into consideration. The officer was not informed of those reasons at the time, and was therefore not given the opportunity to respond. Subsequently, on resigning from the ADF, the officer was denied permission for Defence industry employment, and this decision materially disadvantaged his family. The officer made a defective administration claim, which was poorly managed over several years by the delegate and involved the officer's being made what he thought was a satisfactory offer of settlement. It appears that the delegate may not have had authority to make that offer and the delegate subsequently asserted that any discussion of the offer had been on a 'without prejudice' basis.

12. A former officer claimed that in 2000 he had been denied procedural fairness on removal from an appointment. The former officer also said that his subsequent claim for a defective administration payment lasted over five years, was very stressful and ultimately unsatisfactory. The officer expressed concern that Defence Legal—which advises commanders on legal matters including adverse administrative action—is also the Division within Defence which ultimately makes decisions on defective administration payments.

13. A former senior non-commissioned officer claimed that, when in 1995 he became aware of an apparent travel fraud—with Defence-wide accountability ramifications—there was no complaint avenue to report his concerns. His subsequent attempts over the next 16 years to investigate the likely scale of fraud were not supported by his chain of command, by the Service police or in 2010 by the then-Minister for Defence, who the senior non-commissioned officer claimed had been misled by the Department. The senior non-commissioned officer's attempts to have the matter looked into by the Inspector-General Defence, by the Defence Force Ombudsman, and to obtain departmental documents on the issue of fraud using Freedom of Information processes had all met with failure.

14. An officer claimed that for six years he was victimised and his Defence Force career ruined as a result of his objecting in 1975 to a politically-motivated social function being held at the Officers Mess of which he was a member. After negative—and apparently statistically unjustifiable—reporting by senior officers for some years following the incident, the officer asserted that he had been charged with unprofessionalism and incompetence and forced from the Army.

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**ANNEX G TO  
IGADF REVIEW  
06 SEP 11**

**SURVEY RESULTS OF RECENTLY APPOINTED OR ENLISTED  
PERSONNEL**

UNIT	DATES	NUMBER OF PARTICIPANTS
RMC Officer Cadets	18 Aug 10	80
ADFA Officer Cadets	1–2 Sep 10	149
RANC CRESWELL midshipmen	24 Mar 11	39
RAN Recruit School CERBERUS	18–19 May 11	73
OTS OCDTs	19–20 May 11	46
1 RTU Wagga recruits	20 Jun 11	107
1 RTB Kapuka recruits	21 Jun 11	76

Survey Question	RMC	ADFA	RANC	RAN REC SCH	OTS	1 RTU	1 RTB
Understanding of the concept of procedural fairness	89%	89%	95%	86%	83%	93%	89%
Agreement that all ranks are treated equally	40%	49%	72%	71%	74%	80%	75%
Agreement that both genders are treated equally	60%	79%	82%	94%	89%	95%	79%
Percentage who witnessed or experienced bullying or harassment	30%	39%	36%	45%	9%	24%	25%
Percentage who do not believe they would have chain of command support if they approached a Help line or external avenue of complaint	19%	7%	0%	3%	2%	3%	3%
Percentage who do not believe that appropriate action would be taken if they reported an incident of unacceptable behaviour	9%	7%	0%	4%	4%	4%	7%
Percentage who do not believe that complaints made to the chain of command would be dealt with fairly and impartially	19%	20%	0%	8%	0%	2%	8%
Percentage who do not believe that the military justice system provides sufficient feedback to victims and complainants	9%	11%	3%	10%	2%	1%	4%
Percentage who do not believe personality conflicts are well managed	46%	29%	8%	12%	4%	9%	12%
Percentage who do not believe members with personal problems are well managed	54%	56%	82%	78%	2%	72%	78%
Percentage who do not believe that unit morale is good	51%	32%	0%	12%	2%	2%	16%
Percentage who do not have confidence in unit officers	11%	19%	0%	5%	0%	2%	7%
Percentage who do not have confidence in unit WOs/SNCOs	8%	7%	0%	8%	0%	0%	0%
Percentage who do not believe that the disciplinary process is fairly and consistently applied	64%	44%	13%	11%	4%	4%	11%
Percentage who believe they are pressured into pleading guilty	66%	36%	13%	14%	2%	4%	21%
Percentage who do not believe that those found guilty are actually guilty	16%	5%	0%	11%	2%	5%	9%
Percentage who do not believe that members subject to adverse administrative action are treated fairly	36%	15%	5%	5%	0%	1%	14%
Percentage who do not believe they are aware of available avenues of complaint	30%	34%	5%	16%	17%	7%	16%
Percentage who do not know where to get advice or information on unacceptable behaviour	19%	13%	0%	8%	11%	5%	9%
Percentage who do not know how to lodge a grievance	56%	48%	10%	23%	20%	9%	21%
Percentage who do not believe the alcohol testing program is effective	29%	44%	15%	23%	7%	13%	1%
Percentage who do not believe PSTP is effective	10%	12%	5%	19%	4%	2%	1%

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**ENCLOSURE 1 TO  
IGADF REVIEW  
06 SEP 11**

# **Submission by the Commonwealth and Defence Force Ombudsman**

## **MANAGEMENT OF DISCIPLINARY COMPLAINTS**

**Submission by the Commonwealth and Defence Force Ombudsman**

**August 2011**

### **INTRODUCTION AND SUMMARY**

The Defence Force Ombudsman (DFO) welcomes the *Review of the Management of Incidents and Complaints in Defence* and thanks the Inspector General of the Australian Defence Force (IGADF) for the opportunity to provide information in support of comments we provided to you on 27 June 2011.

As we outlined at that meeting, our main concerns with the management of complaints within Defence are:

- the delay in the processes for resolving Service Chief redress of grievance (as outlined in the draft report<sup>4</sup> we provided to you in late 2010)
- accessibility of information on managing incidents
- apparent inconsistency in how incidents or allegations are managed.

### **RESPONSE TO TERMS OF REFERENCE**

The Minister has asked that you conduct a review of the management of incidents and complaints in Defence with specific reference to the treatment of victims, transparency of processes and the jurisdictional interface between military and civil law, which may lead to untimely decision making processes.

I provide the following comments in relation to your broad terms of reference. These comments are informed by an analysis of complaints received and investigated in the past 12 months.

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<sup>4</sup> We have not proceeded with publishing this report but have asked the Chief of Defence to implement agreed recommendations. These recommendations are provided at *Attachment A*.



### ***Effectiveness of the Quick Assessment process***

Defence's policy for a mandatory Quick Assessment should be supported by a template to guide those officers completing Quick Assessments and to ensure consistency.

If it is decided that the purpose of the Quick Assessment should be to provide a speedy initial assessment of the known facts to determine future investigative action rather than an initial investigation or inquiry, then the Quick Assessment policy should clearly reflect this aim. This may also assist in managing expectations from senior levels.

### ***Incident and complaint management policy framework***

Complaints received by the DFO concerning the management of incidents and complaints in Defence indicate that there may be a need for greater support and training for managers.

For example, in cases of sexual assault complaints, it appears that there has been confusion concerning whether to follow guidelines outlined in the Defence Instruction on Unacceptable Behaviour, or the Instruction on Sexual Assault.

It is our understanding that Defence has procedural requirements for the notification and management of members who are under investigation for misconduct or criminal matters. However, there appears to be limitations to the management of matters under investigation outside of the Defence agency. For example, the notification and management of a service member who has allegations of sexual assault under investigation by State Police. The case study below provides one example of this.

This office received a complaint from Ms G regarding what she believed to be a lack of investigation, by Defence, of her sexual assault by a serving member of the ADF.

In her complaint Ms G stated that she was sexually assaulted by a member of the ADF. She reported the assault to the hospital and was treated by a forensic doctor. After undergoing counselling for a few months Ms G reported the matter to the NSW Police.

This matter was considered by a civilian court and the defence member was acquitted by a jury.

When the member was charged by for the alleged assault he advised his commanding officer. This was reported as required by DI (G) 55-4 but no further action was taken. This office considers that at this point, the commanding officer should have considered DI (G) PERS 35-4 *Management and Reporting of Sexual Offences*. Advice from Defence is that this DI (G) does not apply because the alleged assault was not a workplace incident. Whilst we accept this, there appears to be no clear guidance to commanders on how to manage these situations which results in inconsistent approaches that do not necessarily reflect the severity of the charges.

Complaints investigated also indicate that there has been a lack of clarity around application of relevant equity policies and contracted Defence staff.

### ***Jurisdiction***

Complaints received by the DFO indicate that some units' initial response to an incident is to take administrative rather than disciplinary action. This was also evident in the HMAS *Success* inquiry.

### ***Incidents and complaints***

Complaints received by the DFO indicate that it is not always clear what constitutes a notifiable incident. However, once an incident is categorised as notifiable, the reporting regime appears to be effective in assisting commanders to manage incidents and complaints.

Information gleaned from complaints to the DFO indicates that there is confusion as to which avenue to follow in reporting complaints and incidents. This includes complaints made directly to the DFO before Defence has had the opportunity to address the complaint. The DFO would strongly support one appropriately staffed 'hotline' which Defence personnel could use to report complaints and incidents.

A related issue is the current lack of a dedicated hotline for civilians to lodge complaints against behaviour or actions of Defence personnel. The DFO receives a small but regular number of complaints from members of the public about Defence. It is not clear how a member of the public can lodge a complaint, unless they happen to know which force and unit the complaint relates to. Complaints made to Defence's general enquiries line have resulted in conflicting advice given by staff.

In order to limit the amount of Redress of Grievance (ROG) applications that may be submitted for the purpose of delaying implementation of an administrative decision, the DFO supports changing the regulations to provide that the administrative decision underlying a redress will be implemented even though a ROG has been submitted, with provision for reversal of the decision if appropriate. This action may also assist in limiting the number of vexatious ROG applications.

### ***Transparency and perceptions of bias***

The DFO supports greater transparency around complainant processes, including publishing results of discipline and administrative action and advising the complainant about the results of action. This may assist in instilling confidence in those complainants who choose to remain anonymous.

It may also assist in reinforcing the message that members should feel free to use complaint systems, and in particular, the military justice system. Our analysis shows that rank and the chain of command can make members disinclined to complain. Further, some of those that have an IGADF inquiry ongoing have reported that their situation is oppressive and they have been pressured to withdraw their complaint to the IGADF by their supervising chain.

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Many of the complaints to the DFO relate to matters where a member has raised allegations of misconduct by a commanding officer and the complainant remains under the command of the alleged perpetrator. It is our opinion that Defence should consider clarifying the guidelines for situations where a decision maker has a perceived personal/ close relationship with the alleged perpetrator, for example a complaint where the decision maker is friends with the alleged perpetrator of misconduct.

***Publicity***

The recent Skype incident at ADFA would indicate that commanders and managers are ill-equipped to deal with media interest in incidents.

***Other – Complaints to the DFO about the IGADF***

The DFO has received a small number of complaints in the past 12 months with specific relevance to the IGADF. These include complaints where the primary concern is about the IGADF's investigation methodology, scope and perceived issues of delay. These complaints usually include perceptions of a lack of impartiality and a conflict of interest.

The DFO's investigations into these complaints have concluded that the complainant's perceptions are unfounded.

**ATTACHMENT A TO  
ENCLOSURE 1 TO  
IGADF REVIEW  
06 SEP 11**

**Agreed recommendations:**

**Recommendation 1**

Defence agree that a 180 day time limit for finalisation of ROGs referred to Service Chiefs is not optimal, and any process of reform should include a staged reduction in the time taken to resolve complaints.

**Recommendation 2**

Defence undertake a case management risk analysis of each ROG to match the resources allocated to the ROG to the risk posed to the organisation.

**Recommendation 3**

Defence review the content and style of briefs to the Service Chiefs.

**Recommendation 4**

Defence undertake an evaluation of the extent to which the peer review and quality assurance processes value could be further streamlined.

**Recommendation 5**

Defence publish a service charter for the handling of ROGs that includes performance measures for which Defence will be held accountable in managing members' redresses.

**Defence Force Ombudsman recommendation (not endorsed by Directorate of Complaint resolution):**

Defence cease the practice of putting cases in an unallocated queue and allocate to case officers upon receipt.

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**ENCLOSURE 2 TO  
IGADF REVIEW  
06 SEP 11**

**FAIRNESS AND RESOLUTION BRANCH REPORT ON REVIEW OF POLICIES  
GOVERNING ADF PERSONAL CONDUCT—APPROPRIATE AVENUES FOR  
REDRESS**

**EXECUTIVE SUMMARY**

1. This review of the avenues available to members of the Australian Defence Force (ADF) to make a complaint about personal conduct was undertaken to inform a broader review of policies governing ADF personal conduct. That broader review itself forms part of a comprehensive suite of reviews into culture in Defence, arising from the April 2011 Skype incident at the Australian Defence Force Academy.

2. The review has compared the current framework for making a complaint against three best practice frameworks and against systems of complaint in the armed forces of the United Kingdom and Canada, it has drawn on recent survey information of members of the ADF, and it has considered a selection of similar reviews that have been undertaken over the last decade.

3. The analysis from this review supports commentary made in other recent reviews that the complaints system in Defence is comprehensive and effective. It observes that the framework is complex. Despite the fact that individual pieces of Defence policy that support the framework are detailed and complete, navigating the entire system is problematic. There are numerous Defence Instructions and related policy documents that a member managing a complaint about behaviour may need to consult to effectively manage a complaint concerning personal conduct.

4. In comparing the complaint framework available to ADF members with best practice frameworks it is apparent that the Defence system compares favourably. All of the constituent elements of a mature, robust and fair complaints system are in place. Two weaknesses identified relate to the usability, visibility and access of the system, and to the accountability of complaint managers. With respect to the usability of the framework the earlier comments are germane and Defence should look to simplify the system. In considering accountability a number of recommendations are made, and a potential central assurance role for Fairness and Resolution Branch in conjunction with the Inspector General ADF should be reflected on.

5. Additionally, best practice is moving to place Alternative Dispute Resolution (ADR) at the forefront in dealing with adverse incidents and poor behaviour in the workplace, so that ADR is considered first to resolve matters early and at the lowest possible level. Defence has created Fairness and Resolution Centres in each State and Territory to facilitate access to ADR options and expertise. This approach is consistent with recent Commonwealth government initiatives to promote the early use of dispute resolution processes by courts, tribunals and the management of disputes in departments and agencies.

6. The extent to which members of the ADF understand the complaints framework and have the confidence to use it is another question and the survey analysis undertaken in this review points to a number of areas for improvement. To an extent improved understanding of the system will come as a consequence of making it simpler, but there is also a need to improve and professionalise the training regime and the support network of advisers.

7. Confidence and willingness to use the system is a more nebulous matter that goes to broader cultural issues in the ADF, just as it does in any organisation that draws a key strength from a very rigid chain of command structure for matters of behaviour and discipline. This review considers that work needs to be done in the ADF around willingness to use the system and to make a complaint. Central to this a move toward a greater emphasis on a learning culture will benefit. This broader cultural matter is not addressed in any detail in this review as it is expected to feature elsewhere in the ADF Cultural Reviews.

8. It is the opinion of this review that the framework available ADF members to raise issues about personal conduct, and to have confidence that appropriate action will be taken, is generally sound. Further consideration of the key areas identified in the review will lead to an overall improvement in the framework and enable it to remain contemporary.

9. Finally, it is emphasised that this review has largely been conducted in isolation of the other concurrent reviews into Defence culture. Therefore, its recommendations will need to be reconciled with those of the other reviews.

### **Recommendations:**

#### ***Recommendation 1***

Further encourage greater use of Alternative Dispute Resolution across Defence for the better management and resolution of conflict, disputes and complaints.

#### ***Recommendation 2***

Continue the work initiated by DEPSEC PSP to simplify the complaints and investigation system, but integrate this with the outcomes of the other reviews into Defence culture and include the total Defence workforce.

#### ***Recommendation 3***

Strengthen the assurance role of Fairness and Resolution Branch in the management of UB complaints.

#### ***Recommendation 4***

Improve support to commanders and managers for their management of UB through better training resources and a more professional network of advisers.

#### ***Recommendation 5***

Evaluate and if necessary enhance the role and function of Fairness and Resolution Branch with respect to the “zero barrier” office concept for personnel who wish to make a complaint concerning UB.

Report by Fairness and Resolution Branch Directors  
July 2011

## **PART 1 – INTRODUCTION**

### ***Context***

1.1 In the context of the broader Defence Review into the policies and instruments governing ADF personal conduct this review seeks to:

*identify whether a robust and fair framework exists to ensure appropriate avenues for redress, fairness, review that can be accessed by members without fear of recrimination.*

1.2 Interpretation of this task is that the framework constitutes policies, instruments and practice, and the question against which that framework is being reviewed is one of the ability of a member of the ADF to have appropriate action taken, without fear of recrimination, if they are subject to or witness inappropriate conduct.

1.3 The terms of reference at Attachment A refer to *redress, fairness* and *review*. Whilst redress (the setting right of what is wrong) needs to be an integral part of any framework of complaint, the term itself implies a decision is made and that the opportunity is needed for a member to have that decision reconsidered – redress. For members of the ADF this process is termed Redress of Grievance. Importantly, for this review it is first necessary to thoroughly consider the part of the framework that allows a member to take action in relation to inappropriate conduct. In Defence this process is known as the management and reporting of unacceptable behaviour. Therefore, this paper will primarily examine the Defence framework for the management of incidents of unacceptable behaviour and in doing so the *fairness* and *robustness* of that system will necessarily include the *review* mechanisms which encompass redress.

1.4 This paper will examine how a member of the ADF can make a complaint about the personal conduct of others that they either experience or witness, and how the framework allows for something to be done about it. It assumes that ADF members have an understanding of standards of personal conduct that are reasonably considered to be acceptable and unacceptable as a condition of their employment in Defence. In other words an ADF member can recognise personal conduct that falls outside of acceptable boundaries and wants to take appropriate action to do something about it. Does that framework for complaint about behaviour exist and is it robust and fair?

### ***Scope***

1.5 This review will consider the framework for managing unacceptable behaviour as it applies to members of the ADF. In doing so it will recognise links to other frameworks concerning potential criminal matters or potential breaches against the Defence Force Discipline Act (DFDA) but it will not examine those matters in any detail. Such matters are being considered by other reviews into the culture in the ADF.

### ***Methodology***

1.6 The methodology employed in this review is to critically examine the key characteristics of the various complaint mechanisms that are available to members of the ADF against best practice models of complaint management. It is also necessary to look beyond the models and the policy. Many reviews into the complaints system in the ADF that



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have been undertaken over the past decade. Therefore, this review has considered these key past reviews to examine, and possibly revisit, their finding and recommendations in the context of this fresh look.

1.7 Finally, it is necessary to consider attitudes and behaviours in the ADF that might impact on how the current complaint mechanisms are working and to judge if there are other factors at play, such as the military chain of command, that may impact on employment of a better practice model. A significant library of previous research and survey information has been called on in support of this attitudinal work.

## **PART 2 – BEST PRACTICE COMPARISON**

### **The Current ADF Framework**

#### ***Internal Policy and Complaints***

2.1 In 2006 Defence established the Fairness and Resolution Branch which centralized expertise in policy development in equity and diversity principles and personal conduct, prevention of workplace conflict and dispute resolution services and the management of complaints to provide more efficient and effective outcomes for Defence. The Director General of Fairness and Resolution Branch was tasked to lead this initiative in a Joint Directive from the Secretary and CDF. Recognition of the level of expertise now residing in FR Branch is reflected by the Commonwealth Attorney-General's appointment in March 2011 of one of the Directors, in a personal capacity, as a member of his National Alternative Dispute Resolution (ADR) Advisory Council (NADRAC).

2.2 The Australian Defence Force (ADF) system for dealing with complaints about poor personal conduct by its members is described in DI(G) PERS 35-3 *Management and Reporting of Unacceptable Behaviour (UB)*. Some forms of UB are also subject to the Notifiable Incidents policy contained in DI(G) ADMIN 45-2 *The reporting and management of notifiable incidents*. The use of Defence Instructions of this nature is widely accepted across the Defence organisation and the Instructions are easily accessible to ADF members.

2.3 The key features of the ADF system are as follows:

- All ADF members have an obligation to report any incident of UB.
- Commanders and managers are required to respond promptly to complaint of UB.
- Commanders and managers have the authority to resolve complaints and to make decisions.
- Alternative dispute resolution options are available at any stage in the complaint management process.
- All members are protected from victimisation or disadvantage as a result of making a UB complaint or of being subject of a complaint.
- All parties to a UB complaint are entitled to support throughout the process of dealing with the complaint. Support available includes access to the Equity Adviser network and other advice networks, - peer support, temporary transfer, or leave. ADF members are also entitled to legal assistance and medical and psychological treatment if appropriate.
- All UB complaints are recorded centrally for reporting and monitoring purposes.
- Communication with all parties to a UB complaint is required at all stages of the management of the complaint.
- Complaints are managed confidentially and privacy of all parties is protected.

#### ***Alternative Dispute Resolution***

2.4 The ADF also provides Alternative Dispute Resolution (ADR) options for complainants in tandem with the formal complaints process. At any time in the complaints process ADF members (including management, complainants and respondents) can access professional services in mediation, conflict coaching, group facilitation and assistance from practitioners with a process called interactive problem solving.

2.5 Alternative Dispute Resolution (ADR) processes are designed to assist commanders, managers and supervisors and Defence personnel affected by workplace conflict and disputes and is ideally accessed early to prevent issues escalating and with a view to resolving the matter before a complaint is made. ADR processes are designed to complement rather than supplant formal complaint processes, and are only used when assessed to be appropriate.

2.6 Participation in an ADR process is voluntary, and it is unique in that it focuses people in a joint problem solving activity on their interests and needs (not just positions and demands), with a view to them finding a fair and equitable outcome which will resolve the issues, concerns and complaint. The processes focuses on achieving substantive fairness for the parties, improving their well-being and reducing the detrimental impact of negative emotions and enabling restoration of productive working relationships. It has the added value for the parties, the wider workplace and the organisation in that it provides practical capacity and skills building in problems solving and constructive ways to resolve conflict, and in doing so them becoming more resilient in the future. ADR processes also provide a forum for participants which minimise fear of recrimination.

2.7 The Defence ADR program is today recognised as a leading example of best practice for all Commonwealth and State government departments and agencies. The external evaluation of the program by Quantitative and Qualitative Social Research reflects the high professional standard of the program and the very high satisfaction rates expressed by clients for the quality of the service it provides and the outcomes it achieves. Qualitative evaluation has been a key strategic component of the ADR program since its inception, and this is now complemented by robust quarterly quantitative reporting regime.

2.8 The program is modelled on the Canadian Department of National Defence and Canadian Forces (DND/CF) conflict management program. In recent years it has taken on its own unique identity and character, incorporating the dispute resolution and equity programs into one, with both now being delivered by Fairness and Resolution Practitioners in the regionally based Fairness and Resolution Centres. This is an advance on the DND/CF model.

2.9 In Australia in recent years there has been a new sense of direction emanating from government and the Attorney-General's Department providing guidance and direction to government departments and agencies encouraging greater use of ADR for the better management and resolution of conflict, disputes and complaints. This includes a requirement for agencies to have dispute management plans with strategies which will promote the need for parties to engage in early problem solving strategies, rather than merely stating complaints or initiating claims in courts and tribunals. Defence is well placed to comply with these new government initiatives, and the greater use of ADR.

**Recommendation 1.** Further encourage greater use of ADR across Defence for the better management and resolution of conflict, disputes and complaints.

#### *External/independent avenues for complaint*

2.10 Within the Defence system for managing complaints options exist for members to access external avenues for their complaint. Primarily these involve the Inspector General Australian Defence Force, the Defence Force Ombudsman or the Australian Human Rights Commission.

2.11 The Inspector General Australian Defence Force (IGADF) is independent of the chain of command and can investigate issues relating to behaviour. Any issue relating to Service can be raised with IGADF.

2.12 Members may complain to the Defence Force Ombudsman about issues relating to their service. This avenue is open to members at any time and does not require the member to raise a complaint internally before approaching the Defence Force Ombudsman. Normally however, the Defence Force Ombudsman will suggest that a complainant exhaust their internal complaint mechanisms before an Ombudsman's investigation is commenced.

2.13 Members have the right to make a complaint to the Australian Human Rights Commission about behaviour that may constitute unlawful discrimination, harassment or a breach of human rights.

### ***Whistleblower scheme and the Inspector-General***

2.14 All Defence employees, military and civilian may raise issues relating to misconduct, including harassment, with the Inspector General under the whistleblower scheme<sup>5</sup>. In practice the whistleblower scheme is more suited to fraud and ethics matters however it remains an avenue for complaint about behaviour.

### ***Resources for Complaint Handling***

2.15 In line with the basic principle that complaints are best managed at the lowest possible level and in the shortest possible time, the management of complaints of UB is the responsibility of individual commanders. Generally commanders in the ADF are not necessarily trained specifically in complaint handling but have had leadership and values training. They are also held accountable for people management through the Performance Management (PAR) processes for ADF personnel.

2.16 ADF Commanders have access to advice and assistance in dealing with complaints of UB from Fairness and Resolution branch, including access to ADR options.

2.17 The Defence ADR program delivers services through its regional network of 8 Fairness and Resolution Centres which are staffed by professionally qualified Fairness and Resolution Practitioners (FRPs). The FRPs deliver dispute resolution services, including interactive problem solving, conflict coaching, mediation, group facilitation and they also deliver equity training and provide advice to commanders, managers, supervisors and personnel in Defence. They are supported in these roles by part time panels of accredited conflict coaches and mediators and a national equity advisor network.

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<sup>5</sup> DI(G)PERS 45-5 *Defence Whistleblower Scheme*

2.18 Currently Defence has 55 mediators, all of whom are nationally accredited under the National Mediator Accreditation System (NMAS - which commenced operation in January 2008), and 25 conflict coaches who are assessed and accredited in the CINCERGY model by Defence. Most of the Fairness and Resolution Practitioners are also qualified group facilitators (through the Department of Justice Dispute Resolution Branch in Queensland). Defence is a Recognised Mediator Accreditation Body (RMAB) under the NMAS.

2.19 Legal advice and specialist human resources management advice is also available to Commanders.

### **Best practice**

2.20 There is a significant amount of literature available that attempts to describe best practice for dealing with complaints. Much of that literature relates to customer complaints or to interactions with government agencies, however the principles espoused are similarly applicable to employee complaints about inappropriate employee behaviours. This review has chosen three recognised frameworks of best practice in complaints handling against which to consider the system available to members of the ADF. Additionally the review has considered the complaints system in the armed forces of Canada and the United Kingdom.

### ***ISO 1002-2006***

2.21 ISO 1002-2006<sup>6</sup> provides an internationally accepted framework for complaints handling. The ISO standard describes guiding principles for complaint handling and says that complaints policies and procedures should cover the following key principles:

- Commitment; Visibility; Accessibility; Responsiveness; Objectivity; Confidentiality; Continual Improvement; Accountability; Charges.

### ***Commonwealth Ombudsman***

2.22 The key components of a good complaints handling system is built on five elements according to the Commonwealth Ombudsman<sup>7</sup>.

- Culture - valuing complaints as of benefit to good administration and demonstrating a commitment to resolving problems.
- Principles - fairness, accessibility, responsiveness, efficiency.
- People - skilled, positive attitude, effectively supervise.
- Process - acknowledgment, assessment, planning, investigation, response, review and consideration of systemic issues.
- Analysis - can be used to improve service, highlight failings, reveal problems and trends; agencies should set both qualitative and quantitative measure to assess complaint handling.

### ***New South Wales Ombudsman***

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<sup>6</sup> AS ISO 1002-2006 *Customer satisfaction – Guidelines for complaint handling in organizations*

<sup>7</sup> *Better Practice Guide to Complaint Handling*, Commonwealth Ombudsman, 2009

2.23 The NSW Ombudsman has issued guidelines for effective complaint handling<sup>8</sup> which incorporates a model approach. In that model the Ombudsman describes a three tiered system which addresses the expectations of the customer (complaint) and the needs of the agency. Tier one of the model system deals with frontline complaint handling and requires that staff either resolve the complaint at first contact or log the complaint for later analysis. Tier two of the model requires that the complaint be reviewed/resolved/investigated by more senior staff. Tier three of the model moves the complaint into alternative dispute resolution (ADR), external review or appeal/legal remedy.

2.24 The NSW Ombudsman's guidelines detail the essential features of such a complaint system. These features include a user-friendly approach to lodging complaints; a simple to understand process; a means of recording; commitment and clear line of authority; staff empowerment; remedies (appropriate and reasonable); performance standards, alternative remedies (ADR); policy and procedures.

### **Comparison with model systems**

2.25 In the table at Attachment B to this review the features of the three best practice models outlined above are summarised against the framework for complaints management that is applicable to the ADF. The analysis, presented in summary in the table, shows that the ADF complaints management system has all of the features expected in a best practice model but it may have weaknesses in respect to visibility / accessibility (complexity of the framework) and accountability (accountability of commanders and managers in managing complaints). Additionally, the ADF framework features a mature and robust alternative dispute resolution option.

2.26 In summary, the ADF framework for dealing with complaints of UB generally meets or exceeds best practice. The two identified weaknesses are discussed below.

### ***Visibility / Complexity***

2.27 The complaint system for the management of UB is described in a Defence Instruction which is the widely accepted means of dissemination of Defence policy. Nevertheless it is a complex instruction and it cross-references to a considerable body of other policy. Both visibility and accessibility of the total policy framework and the complaint process could be improved to achieve the best practice described by both Ombudsmen and the ISO Standard. This is a recognised issue.

2.28 Senior Human Resource practitioners in Defence have long held the view that the framework in Defence for managing and investigation complaints, including complaints about personal conduct, is too complex and in some circumstances impossible to fully comply with.

2.29 Observations about the complexity of the ADF complaints and grievance resolution process also featured in the May 2008 Examination of Mechanisms of Complaint and Grievance Resolution Across TTCP Nations undertaken by the Human Resources and

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<sup>8</sup> *Effective complaint handling guidelines* – 2<sup>nd</sup> edition, NSW Ombudsman, December 2010.

Performance sub-group of The Technical Cooperation Program. The report's conclusions point to the issue which is not exclusively an issue for the ADF:

The formal and informal complaint and grievance resolution processes, in addition to the other resources available internally and externally, such as an IG or Ombudsman, add to the complexity of understanding each nation's system as a whole. Some of the processes have the mandate to examine similar issues, but the outcome differs in what executive action may be taken. It can be difficult to determine how each mechanism links with the other and when and which mechanism should be used. This lack of information could lead to potential confusion on the part of the military members.

The future trend, specifically for the ADF and the CF, in order to help decipher the complexity of the complaint and grievance resolution process, is to work towards an integrated system that combines all the components of the informal and formal processes. How these organizations create a more integrated system will be interesting to observe and analyse.

2.30 This matter of complexity of the system was often discussed in Defence throughout 2010 and later that year Deputy Secretary People Strategies and Policy and Defence General Council agreed that the matter needed deliberate consideration. It was decided to workshop the issues with relevant practitioners from across Defence and with the assistance of external legal advice.

2.31 Moving forward was complicated by the ongoing HMAS *Success* Commission of Inquiry (COI) Part 2 that was to report on the Military Justice aspects, including the management of unacceptable behaviour for members of the ADF. For this reason it was decided that a workshop as proposed by DEPSEC PSP would go ahead but it would concentrate on the complaint and investigation framework relevant to the Australian Public Service (APS) employees of Defence and not specifically address the military component of the Defence integrated workforce. This decision acknowledged that key relevant policy and procedures apply equally to the APS and ADF workforce, and any future outcomes would need to be reconciled with future outcomes of the *Success* COI.

2.32 Relevant to this review is a paper prepared by Dr Carla Day to inform the DEPSEC PSP workshop. It articulates the problem from the Defence APS context, but as highlighted above the issues cross into the ADF context. The conclusion to Dr Day's paper notes:

Initial impressions are that Defence is not well served by its plethora of instructions and guidance, most of which have been developed as stand alone documents. This does not mean that the guidance as individual documents is lacking. Rather, it is the need to consult multiple pieces of information to gain a full understanding of the investigative process that is resulting in confusion and delays in decisions and action.

Early discussions with some practitioners also indicate that there are anomalies in the way decisions are made and responsibility is assigned, causing confusion about who should be responsible for specific actions. A lack of cross 'agency' collaboration and timely sharing of relevant information is also thought to delay the resolution of incidence reporting and complaints.

Deficits in skill and experience among supervisors and managers to thoroughly assess and manage complex workplace problems also reduce Defence's capacity to investigate incidents and complaints. There is some suggestion that taking the problem away from the supervisor or manager at an early stage in the investigative process is effectively deskilling our managers as they are not obtaining the experience necessary to learn how to manage difficult workplace situations. More consultation is needed to determine whether there is evidence to support this concern.

2.33 The DEPSEC PSP workshop went ahead in early May 2011. Its key outcome was to affirm the issues and to develop a shared understanding across Defence that there is a pressing need to simplify and improve the total framework in collaboration with the *Success* COI outcomes and other reviews into Defence culture.

**Recommendation 2.** Continue the work initiated by DEPSEC PSP to simplify the complaints and investigation system, but integrate this with the outcomes of the other reviews into Defence culture and include the total Defence workforce.

### *Accountability*

2.34 ADF policy is clear on zero tolerance for unacceptable behaviour and ADF members are held accountable for their behaviour. ADF members are subject to the military justice system with both administrative sanctions and Defence Force Discipline Act (DFDA) charges possible where UB is found. Additionally, performance assessment of individual members is a key tool in personnel management in the ADF. All members undergo an annual performance appraisal report (PAR) process which included assessment of their personal conduct, leadership and personnel management performance.

2.35 Despite the strength of Defence policy and the requirement for any complaint of UB will be dealt with appropriately there remain some concerns regarding accountability for the management of UB complaints.

2.36 Centralised reporting of UB complaints through Fairness and Resolution (FR) branch has provide more transparency about the management of UB incidents however the reporting system also shows that a high proportion of complaints remain open for too long. It may be that the matter has been dealt with and the issue is simply one of not finalising the required reports. Nevertheless the number of open UB complaints is of concern and it is recommended that further work be done to improve accountability in this regard. A greater role for FR branch in assurance of the UB complaints system could assist, particularly if that role included the authority to hold commanders and managers accountable for their timely management of UB.

2.37 In addition, information available from surveys indicates a disconnect between 'in principle' confidence and confidence based on actual experiences of ADF members in their chain of command.

2.38 Overall, findings from the 2009 Unacceptable Behaviour Survey, the 2008 Military Justice Survey, and the most recent Defence Attitude Survey show that the majority of respondents have confidence in their immediate supervisor and their chain of command when dealing with complaints about unacceptable behaviour.



2.39 In the 2009 Unacceptable Behaviour Survey, three-quarters of the respondents (75%) felt that their immediate supervisor was committed to preventing and stopping unacceptable behaviour, to at least a moderate extent. However, of those who indicated in that survey that they had made a complaint about unacceptable behaviour, 41% of the respondents reported “lack of support from supervisor” as a barrier to making the complaint.

**Recommendation 3.** Strengthen the assurance role of Fairness and Resolution Branch in the management of UB complaints.

## **Comparison with Other Defence Forces**

### ***Canada***

2.40 The Canadian Defence Forces has a two tier system for the management of member’s grievances. The first tier requires the member to submit their grievance to their Commanding Officer (CO). The CO acts as the decision maker on the grievance if the CO can grant the redress sought. If not, the CO forwards the grievance to the senior officer responsible for dealing with the matter. Should the grievance relate to a personal action of an officer who would otherwise be the decision maker, the grievance is forwarded directly to the next superior officer.

2.41 The second tier provides for members who are dissatisfied with the CO’s decision to request to have their grievance reviewed by the Final Authority, which is the Chief of the Defence Staff (CDS) or his/her delegate. Depending on the specific details of the grievance, the CDS may be obligated, or may, in his or her discretion, refer it to the Canadian Forces Grievance Board (CFGGB) The CFGGB is the Canadian Forces organisation responsible for the management and support of the military grievance system. If the grievance is referred for consideration, the Board conducts a review and provides its findings and recommendations to the CDS and to the member. Ultimately, the CDS makes the final decision on the grievance.

2.42 Canada also has an ADR program that provides ADR intervention services to Defence personnel including – and extending beyond – consultation, coaching, mediation, facilitation, and group processes. It also offers standard, integrated, and tailored conflict management training sessions. It is delivered through fourteen Dispute Resolution Centres (DRCs) and five aligned satellite facilities in military bases across Canada. The conflict management program’s aim is ‘ADR First’.

### ***United Kingdom***

2.43 The UK made significant changes in 2006 to its Service complaints system. The changes introduced the external position of Service Complaints Commissioner, joint standards for the three Services and a Services Complaints Panel. These changes resulted in a system which now has many similar components to the ADF system. The Australian system already had policy and legislation that applies to all three Services (joint standards). The UK Services Complaint Commissioner has many similar functions to the Australian Defence Force Ombudsman. The Service Complaints Panel reviews some complaints on behalf of the UK Defence Council while the IDADF undertakes a similar function at the request of the CDF or as a result of a direct approach by an aggrieved member.

2.44 The UK has a less mature ADR program when compared to Australia or Canada, however it does use mediation where possible and where agreed by parties to a dispute.

*Analysis*

2.45 The ADF system for the management of Service complaints is comparable to those in place in Canada and the UK. All three systems require grievances to be dealt with in the first instance by the Commanding Officer, and all three systems provide robust alternate options for a complainant.

2.46 While the Canadian system has a grievance board that considers some cases where a member is not satisfied with his or her CO's decision the final decision on a grievance remains with the CDS. The Canadian grievance board performs a similar function to CR in that grievances are referred for inquiry and recommendation however the decision is made by the CDS. In the ADF system all members have at least two tiers of grievance consideration as in the Canadian system. ADF members holding rank of Warrant Officer above have access to a further, third level of review.

2.47 Additionally, the options for a complainant to have their issue considered outside of the "chain of command" exist in comparable Armed Forces and the system for the ADF compares favourable. A summary of these external avenues is provided at Attachment C.

### **PART 3 – PREVIOUS REVIEWS**

3.1 Since 2000 a number of reviews relating to the management of complaints by ADF members and related review processes have been undertaken. This includes, in chronological order, the 2004 joint CDF and Ombudsman review of the ADF Redress of Grievance (ROG) system, the 2005 Senate Reference Committee for Foreign Affairs, Defence and Trade (the Committee) Review in to the Effectiveness Australia's Military Justice System, the Ombudsman's 2007 review of the ADF's Management of Complaints about Unacceptable Behaviour, and the 2009 Report of the Independent Review on the Health of the Reformed Military Justice System, by Sir Lawrence Street et al. Each review made a number of recommendations in relation to management reporting on that behaviour and/or subsequent review processes, including the ROG system; however it should be noted that only the 2007 Ombudsman review looked specifically at the management of complaints about unacceptable behaviour.

3.2 This review has looked at the recommendations of the above reviews relating to the management and reporting of unacceptable behaviour and administrative review processes of the above-mentioned reports in relation to whether those recommendations and their subsequent implementation are consistent with best practice and whether those recommendations need to be reconsidered. These reports are considered separately below.

3.3 It should however be noted that the in considering whether the recommendations of the reports, as implemented, are consistent with best practice principles only provides an overview of the complaint handling systems within Defence. Importantly, when considering the complaint handling systems as a whole, none of the reports state that the unacceptable behaviour complaints system or the ROG system are inconsistent with those principles.

#### ***Joint review of the ADF's Redress of Grievance system 2004 (ROG Review)***

3.4 The ROG review was conducted by the Ombudsman and the Department of Defence into the ROG system, established under Part 15 of the Defence Force Regulations 1952 (the Regulations). The ROG system is primarily provides a review mechanism of decisions, acts and omissions relating to past events. In the context of this review, the ROG system is used to review the decisions of commanding officers relating to complaints of unacceptable behaviour in accordance with DI(G) PERS 35-3. It is however possible for an ADF member to raise a complaint of unacceptable behaviour within a ROG. In these circumstances, the ROG system would inquire into the allegations of the unacceptable behaviour complaint within the ROG process, having regard to the requirements of DI(G) PERS 35-3.

3.5 The ROG review made 72 recommendations, mainly in relation to updating relevant Defence Instruction, DI(G) PERS 34-1—*Redress of Grievance – Tri-service procedures*, seeking amendment to Part 15 of the Regulations, and in relation to behind-the-scenes processing and reporting of ROGs. The latter does not affect the ROG or access to the ROG system, rather they relate to the implementation of the Regulations. Accordingly, those recommendations are, in the main, not considered in this report.

3.6 Of the recommendations considered, this review found that they are consistent with best practice principles as previously discussed. As such, it is the view of this review that these recommendations do not need reconsideration. However, it is noted that recommendation 24 of the review, to retain the ability to refer ROGs to the CDF, is

inequitable and discriminatory (albeit not unlawful) against members of the rank of petty officer or below, and their equivalents, who are unable to refer their complaints to the CDF and seek a third level of review within the ADF.

### ***The Effectiveness of Australia's Military Justice System 2005***

3.7 The Committee's inquiry into the effectiveness of Australia's military justice system considered the ADF's disciplinary system, as established by the *Defence Force Discipline Act 1982*, and administrative review processes, notably the ROG system. This review has not considered the discipline system, which has undergone substantial amendment since the Committee's report was released. In relation to the ROG system, the Committee recommended the creation of the ADF Administrative Review Board (ADFARB) based on the Canadian Forces Grievance Board. The ADFARB would be a review agency with statutory independence from the chain of command, in addition to the ROG system. The ADFARB would have a mandate to review all ROGs and to submit its findings and recommendations to the CDF on ROGs referred to it where the ROG had been at the unit level for more than 60 days. The ADFARB was to report annually to Parliament.

3.8 This recommendation was rejected by the then Government as being an inappropriate model for the ADF, in that it would undermine command and introduced duplication. In its place, the then Government recommended the streamlining of the then current ROG system in accordance with the joint review by Defence and the Ombudsman in 2004 (as discussed above).

3.9 The committee's recommendation does not suggest that the current ROG process is inconsistent with best practice principles; rather it provided an additional system, similar to the current role of the Defence Force Ombudsman. In light of this, and as additional reasons of the then Government for rejecting the recommendation remain valid, is not recommended that this approach be reconsidered.

### ***Australian Defence Force Management of Complaints about Unacceptable Behaviour 2007 (UB Review)***

3.10 The UB review was conducted by the Ombudsman and concerned the management and reporting of complaints under DI(G) PERS 35-3—*Management Reporting of Unacceptable Behaviour*. The Ombudsman made 15 recommendations, all of which were accepted by Defence. The majority of recommendations relate to back-ground processing of complaints and the of provision training, which do not affect the complaint process or access to it.

3.11 As all the recommendations of the UB review were accepted and implemented by Defence, this review is of the view that there is no need to reconsider the recommendation of the UB Review.

### ***Report of the Independent Review on the Health of the Reformed Military Justice System 2009 (the Independent Review)***

3.12 The Independent Review considered the implementation and the consequential effects of the Committee's report on the effectiveness of Australia's military justice system. Like the Committee's report, the main focus is on the ADF's discipline system and is not dealt with in this report for the same reasons discussed above.

3.13 In relation to the ROG system, the Independent Review recommended the implementation of a 90 day benchmark for the completion of ROGs referred to Service Chiefs and CDF. The need for a benchmark was accepted by Defence; however Defence chose to set it at 180 days. This is consistent with best practice principles, in that it promotes a system that will respond to complaints in a timely manner. This review does not recommend reconsidering this recommendation.

### ***Conclusion***

3.14 The majority of previous reviews of the Defence complaint management framework have concentrated on the formal grievance process. The UB review is the most recent examination of the management UB complaints across the Defence organisation. The recommendations that review have all been implemented as have all other recommendations relating to the formal grievance processes in the ADF with the exception of the Military Justice review recommendation for an additional external review body. The reasons for not introducing a further external review body remain valid. Changes made to the Defence complaints management framework since 2004 have been consistent with best practice.

## **PART 4 – ANALYSIS OF SURVEY RESULTS**

4.1 The previous sections deal with the analysis of the framework itself. The last element to consider is ADF members' willingness to use, and their confidence in, the framework.

4.2 The Directorate of Strategic Personnel Policy Planning (DSPPR) undertook an analysis of relevant surveys to assess the attitudes of ADF members around the complaint process. Information was drawn from the Defence Unacceptable Behaviour Surveys, the Military Justice Surveys and the Defence Attitude Surveys. This section is drawn from the DSPPR analysis. Some elements of that analysis are paraphrased.

4.3 The analysis provided the following observations:

- Knowledge and awareness of the complaint management framework process appears to come through experience rather than general training;
- Willingness to use the complaint management framework was higher than actual use of the framework;
- Confidence in the complaint management framework was moderate, with approximately two-thirds of the respondents indicating that they have confidence in elements of the framework;
- Confidence in the Military Justice System was moderate, with respondents reporting some concerns regarding timeliness and fairness;
- While the majority of respondents reported having confidence in their immediate supervisor and chain of command when dealing with unacceptable behaviour complaints, those who had actually experienced unacceptable behaviour indicated that lack of support from supervisors was a barrier to making a complaint; and
- Concerns over recrimination were a common barrier to submitting a complaint, with over a third of the respondents reporting fears of retribution by the person(s) displaying the unacceptable behaviour, fears of negative impacts on their careers, and fears of being labelled as a troublemaker.

### ***Gender and rank variations***

4.4 While there were some consistent gender differences regarding confidence in the framework and chain of command (with females generally reporting lower levels of confidence), differences among rank groups were more pronounced. When comparing by rank, junior personnel (in particular, junior other ranks (ORs) generally reported having the least confidence in elements of the complaint management framework. Given that higher percentages of both junior ORs and junior Officers reported having concerns, it is likely that confidence in the framework is something that improves with time in Service, rather than being purely an issue of rank.

### ***Overall Observations***

4.5 Where respondents indicated lower levels of confidence in the framework, the main reasons appear to include lack of support from their supervisor and chain of command, difficulties understanding the relevant policies/publications, and fear of recrimination for making a complaint. These results appear to confirm that while the system is actually robust

(confidence in the system until used) its useability could be improved and visibility of management commitment needs to be enhanced.

4.6 The usability of the complaints system has been discussed earlier in this report. It is apparent, as supported by the survey analysis above, that commanders and managers not only need the support of clear and simple policy framework but they also need good training resources and a support network of advisors. This currently exists through mandatory training and the Defence Equity network, however, it is widely recognised that this framework requires reinvigoration and professionalization.

**Recommendation 4.** Improve support to commanders and managers for their management of UB through better training resources and a more professional network of advisors.

***Why do people fail to report or act on unacceptable behaviour?***

4.7 In considering the survey analysis above it is apparent that failing to act on unacceptable behaviour is an issue for the ADF that may require further consideration. This question alone could be the subject of a major study and that goes beyond the scope of this review. However, the review undertook a limited literature search for insights to this matter as discussed in the following paragraphs.

4.8 Comprehensive gender, diversity and unacceptable behaviour policies are common in organisations however consideration of the reasons people do not complaint is rare. Research into the reasons for non-complaint in relation to consumer issues (defective products, poor service) is more readily available. Although there has been little study of the issue there are a variety of reasons covered in the literature about why people don't complain ranging from the still existing power imbalance between the genders in the workplace to lack of knowledge of the complaint system and to fear of negative repercussions. .

4.9 The Consultative Group on International Agricultural Research (CGIAR) gender diversity policy is similar to many other such policies however it does include an attempt to recognise the additional layer of complexity bought to managing unacceptable behaviour because people don't complain. The following is an extract from the CGIAR gender and diversity policy:

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**CGIAR Gender and Diversity - Recognizing the contradiction: when victims don't complain**

Dealing with harassment is sensitive enough when the inappropriate behaviour leads to either an informal resolution or to a formal complaint. However, there is another magnitude of complexity when the victims of harassment:

- do not want anyone to know about it, or
- hesitate to file an official complaint.

This is not an exceptional situation; indeed, it may be relatively common particularly in relation to sexual harassment. Essentially victims do not complain because they:

- blame themselves for the situation;
- are ashamed that the incident/s occurred;
- are unaware that they have the “right” to be treated with dignity when working for the CGIAR;
- fear that the risks of retribution may outweigh the benefits of filing an official complaint.

This can include fear of retribution from the offender, particularly if the offender is a more senior employee or supervisor, or from the offender’s friends, associates, family or community. The fear of retribution is especially common if the Center’s Code of Conduct and its avenues of assistance have not been made clear to all staff beforehand.

**Why victims don’t complain:**

“If I ignore it, it will stop.”

“I am the only one to whom it is happening.”

“No one will believe me.”

“My complaint won’t be taken seriously.”

“Management will side with the perpetrator.”

“Complaining will be too stressful.”

“I may be in some way to blame.”

“I will be labeled as a trouble-maker.”

“The harassment may get worse.”

“I don’t know how to complain, or nor to whom.”

“No action will be taken if I complain.”

“I may lose my job.”

Understanding this contradiction is essential to effective prevention or stopping of harassment, particularly sexual harassment. If a staff member becomes aware of a situation in which harassment exists and is going unreported, she/he should report the matter to the HR Manager in confidence. The HR Manager is then responsible for further investigation with appropriate sensitivity to the circumstances.

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4.10 Other, more anecdotal literature also talks about an unwillingness to complain because of a desire to remain unobtrusive, fear that the issue is ambiguous or too trivial to justify complaint<sup>9</sup>, they worry that complaint may be seen as an overreaction or make things worse.<sup>10</sup>

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<sup>9</sup> William F Buckley, Jr ‘Why Don’t We Complain?’ *50 Essays*, 2004

<sup>10</sup> [www.advicenow.org.uk/advicenow-guides/work/dealing-with-discrimination-at-work](http://www.advicenow.org.uk/advicenow-guides/work/dealing-with-discrimination-at-work)



4.11 Additionally, an article published in 2009 by the Journal of the International Ombudsman Association discusses this subject and some concepts within may warrant further consideration in the Defence context. The concluding paragraphs of the article, *A Few Ideas for Employers*, provide a number of suggestions that Defence may wish to pursue. In particular, this review highlights that the article recommends that all large organisations should have a “zero barrier” office like that of an organisational ombudsman.

4.12 The concept of such an office is that it is a confidential, neutral and independent, and has no formal managerial power, and it is a place where people can go to discuss their concerns and evidence off the record. They can review the policy, rules and options for dealing with the matter – at no risk.

4.13 It could be argued that Defence has such an office in Fairness and Resolution Branch and its associated regionally based Fairness and Resolution Centres, and the support network of Equity Advisers. This review contends that this structure operates to some extent as a “zero barrier” office but its role is less well defined and understood in this context. Additionally, aspects of the structure, particularly the Equity Network, is not structured, formal or professional and thereby may not be used to full effect or its full potential.

**Recommendation 5.** Evaluate and if necessary enhance the role and function of Fairness and Resolution Branch with respect to the “zero barrier” office concept for personnel who wish to make a complaint concerning UB.

**ATTACHMENT A TO  
ENCLOSURE 2 TO  
IGADF REVIEW  
06 SEP 11**

**TERMS OF REFERENCE  
PERSONAL CONDUCT REVIEW**

The terms of reference are as follows:

1. Defence will undertake a Review of the policies and instruments governing ADF personal conduct with the following objectives:
  - a. Identify whether a robust and fair framework exists to ensure appropriate avenues for redress, fairness, review that can be accessed by members without fear of recrimination.
  - b. Determine whether the ADF has an effective discipline system that produces an appropriate culture that balances the requirements of military capability while producing the climate and environment which respects its members and promotes the rights and responsibilities of each individual.
  - c. Determine whether the current Defence Force Discipline Act and supporting policy framework produces the necessary balance of obligations and protections to ensure effective military culture that meets the expectations of the Australian nation.
  - d. Review all policy and legislation that governs ADF conduct and identify opportunities to strengthen and clarify the obligations of ADF members to behave appropriately at all times.
  - e. Identify whether clear guidance is provided to all ADF members that articulates their responsibilities to behave at all times as representatives of the ADF, while on duty and off duty; and in Australia and overseas.
  - f. Recommend areas of weakness and strength and identify options to improve performance and clarity in legislation and policy.
  - g. Recommend methods to improve ADF members' understanding of their role as representatives of the ADF and the obligations that accompany that role.

2A-2

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Fairness and Resolution Branch – Department of Defence

**ATTACHMENT B TO  
ENCLOSURE 2 TO  
IGADF REVIEW  
06 SEP 11**

**Comparison – Best Practice Complaints Handling and the Defence Complaints Handling System**

<b>ISO Standard</b>	<b>Commonwealth Ombudsman</b>	<b>NSW Ombudsman</b>	<b>Defence system – for complaints of unacceptable behaviour (personal conduct)</b>
<p><b>Commitment</b></p> <p>An organisation should be committed to effective and efficient complaint handling and this commitment should be shown by and promoted by top management.</p>	<p>Culture – An agency must value complaints and be committed to resolving problems.</p>	<p>Complaints system should have organisational commitment and give complaint handlers the authority to resolve.</p>	<p>Highest level commitment is clear in the UB instruction and all UB policy statements. The UB instruction includes a statement that Defence is committed to ensuring that incidents of UB are dealt with. The instruction also states that complaints will be taken seriously and acted on appropriately.</p>
<p><b>Visibility and Access</b></p> <p>Information about how to complain should be well publicised.</p> <p>A complaint handling system should be easily accessible to all complainants – should include readily accessible information about the process, flexibility in how to make a complaint.</p>	<p>Principle: Accessibility</p> <p>Agencies should tell people about the complaints system.</p>	<p>Complaints system should be user friendly, simple.</p>	<p>The complaint system for UB is available in a Defence Instruction which is the widely accepted means of dissemination of Defence policy. Nevertheless it is a complex instruction and both visibility and accessibility of the policy and the complaint process could be improved to achieve the best practice described by both Ombudsmen and the ISO Standard.</p>

2B-2

ISO Standard	Commonwealth Ombudsman	NSW Ombudsman	Defence system – for complaints of unacceptable behaviour (personal conduct)
<p><b>Responsiveness</b></p> <p>Receipt of complaint should be acknowledged immediately and complaint should be addressed promptly in accordance with their urgency.</p> <p>Complainants should be treated courteously and kept informed of the progress of their complaint throughout the process.</p>	<p>Principle: Responsiveness</p> <p>Process: Prompt acknowledgement Assigned a priority Investigation (where needed) should be factual.</p> <p>Responses to complainants should be clear and informative</p> <p>Complainant are entitled to know how a complaint will be managed and the outcome of the investigation.</p>	<p>Complaints should be dealt with quickly (system should include timeframes).</p> <p>A response to a complaint must be comprehensive and deal with the issues raised.</p>	<p>The Defence UB complaint process requires responsiveness and prompt action on all complaints.</p> <p>Both complainants and respondents can expect to be supported through the complaint management process.</p> <p>Complainants and respondents will be advised of the outcome of the complaint (and as appropriate throughout the process).</p>
<p><b>Objectivity (Fairness)</b></p> <p>Complaints should be addressed in an equitable, objective and unbiased manner.</p>	<p>Principle: Fairness – impartial, open minded and without prejudice. Full and objective evaluation of the facts or evidence.</p> <p>Complaint material published should guarantee that a complainant will not be victimised or suffer negative consequences because they have made a complaint.</p>	<p>Respond to complaints equitably, objectively and in an unbiased manner.</p> <p>The system should be clear that complainants will not be disadvantaged because they have complained.</p>	

2B-3

<b>ISO Standard</b>	<b>Commonwealth Ombudsman</b>	<b>NSW Ombudsman</b>	<b>Defence system – for complaints of unacceptable behaviour (personal conduct)</b>
<p><b>Confidentiality</b></p> <p>Personal information should be used only in addressing the complaint and should be protected from disclosure.</p>	<p>Complainants have the right to expect that their privacy will be respected and their complaint will be investigated in private.</p> <p>It is generally good practice to accept anonymous complaints.</p>		<p>The Privacy Act applies. The UB instruction states that both complainants and respondents will have their personal information protected.</p>
<p><b>Continual Improvement</b></p> <p>Continual improvement of the complaints handling process should be a permanent objective of the organisation.</p>	<p>Principle : Efficiency, Planning</p> <p>A complaint handling system must be responsive to the needs of complainants – requires proper training of staff, adequate resources for the complaint unit and constant reviews and improvement of the system.</p>	<p>Complaints must be welcomed in order to prevent them – there should be a focus on resolving complaints and the subsequent prevention of complaints through a problem solving approach.</p>	<p>Records of UB complaints are kept but more analysis could be done to use complaints to drive improved behaviour.</p>
<p><b>Accountability</b></p> <p>Organisations should ensure that accountability for complaints management and reporting on actions and decisions in relation to complaints is clearly established.</p>	<p>Analysis: use reporting/performance measure to highlight problems or trends requiring action.</p>	<p>Means of recording complaints Performance standards</p> <p>The complaint system should include avenues for review (internal and external)</p>	<p>Defence personnel are held responsible for the management of UB complaints and can be held personally responsible for not acting in accordance with the UB complaints policy.</p>

2B-4

ISO Standard	Commonwealth Ombudsman	NSW Ombudsman	Defence system – for complaints of unacceptable behaviour (personal conduct)
			<p>The UB instruction requires that all complaints be recorded.</p> <p>The Defence system has clear avenues for complaints to be taken to further internal review (Redress of Grievance ) or to an external reviewing agency Defence Force Ombudsman).</p>

*Note:*

- 1 *The best practice complaint systems used in the table emphasise the need for staff who handle complaints to be skilled in their role and trained in complaint management. The models are based in full time complaint management organisations and do not deal with the role of managers (Commanders) in the handling of employee complaints and personal conduct matters.*
- 2 *The NSW Ombudsman refers to the use of Alternative Dispute Resolution (ADR) as a valuable part of a complaint process. Defence has a strong ADR process that is included in the UB complaints process.*

**ATTACHMENT C TO  
ENCLOSURE 2 TO  
IGADF REVIEW  
06 SEP 11**

**Comparison of External Complaint Agencies – Canada, UK, Australia**

	<b>DND CF Ombudsman</b>	<b>Canadian Forces Grievance Board</b>	<b>Service Complaints Commissioner (UK)</b>	<b>IGADF</b>	<b>DFO (AUST)</b>
<b>How are complaints / reviews received?</b>	By direct contact from member. Website, phone, email, fax.	Accessed when member seeks second line redress review (to Chief of Defence Staff).	By direct contact from member. Website, phone, email, fax.	By direct contact from member or on request by Services or agencies. Also on own initiative, any matter associated with Military Justice System.	By direct contact from member. Website, phone, email, fax.
<b>Role in harassment / behaviour complaints</b>	Can intervene in grievance matters if he/she considers there are compelling reasons to do so.	Second line review of grievance.	Prescribed behaviour (u/b) complaints that are referred to Services, places a duty on Services to inform SCC of action it takes and keep informed on progress and on any decision.	May inquire into matters received directly from individuals for whom the normal chain of command have failed or otherwise inappropriate. However there needs to be a nexus to the 'military justice system'.	May accept a complaint from an ADF member under special circumstances, if the member has not pursued a redress.



2C-2

	<b>DNDCF Ombudsman</b>	<b>Canadian Forces Grievance Board</b>	<b>Service Complaints Commissioner (UK)</b>	<b>IGADF</b>	<b>DFO (AUST)</b>
<b>Role in redresses or existing complaint processes</b>	Normally personnel must pursue existing service complaint. Mechanisms.	Second line review of grievance, ie beyond unit level to the Chief. Defence Staff.	May not investigate any complaint, but can refer such a complaint. to the relevant chain of command. Provides a performance review of the complaint system.	Provides advice on the conduct of inquires or investigations. Provide performance review of the military justice system.	Normally members must use the redress process.  Can accept a complaint if the redress has exceeded time limits or otherwise special circumstances exist.
<b>Powers</b>	Makes recommendations to the functional /command area with appropriate authority to rectify.	Makes recommendations and findings on grievances to CDS. CDS must provide reasons if not accepted.	No investigative powers. As above, for referred prescribed behaviour complaints Services must keep SSC informed.	Has broad investigative powers including own initiative. Makes recommendations to the appropriate functional/command area. May report the adequacy of responses to recommendations to the CDF.	Can investigate administrative processes relating to Service employment. Recommendations to SEC/CDF.
<b>Independence of chain of command</b>	Reports directly to the Minister, and accountable to the Minister.	The Board is an administrative tribunal with non-CF members.	Performs an audit and performance assessment function of complaint system, and analysis of data sources for trends etc.	Reports to CDF, independent of Service chain of command.  IGADF Regulations pending.	<b>Reports to Parliament</b>

2C-3

	<b>DNDCF Ombudsman</b>	<b>Canadian Forces Grievance Board</b>	<b>Service Complaints Commissioner (UK)</b>	<b>IGADF</b>	<b>DFO (AUST)</b>
<b>Legislative basis / Authority</b>	Internal ombudsman. No legislative basis. Created by Ministerial Directive.  Reports to the Minister.	Created under the National Defence Act.  Independent administrative tribunal reporting to Parliament through the Minister of National Defence.	Office created by Armed Forces Act 2006.  Annual Report to Parliament and Ministers.	IGADF is a statutory appointment under the Defence Act.  Reports to the CDF.  IGADF Regulations pending.  Legislative amendments drafted to change this to report to Minister and then to Parliament.	<b>Ombudsman Act 1976</b>
Future direction	Seeks legislative backing and to become an external ombudsman – more independence.	Focus on improvements to reduce delay.	Seeks to become an Armed Forces Ombudsman office.	Legislative amendments drafted to provide annual report to the Minister and Parliament.	No identified future strategic plans that would impact Defence.

2C-4

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**ENCLOSURE 3 TO  
IGADF REVIEW  
06 SEP 11**

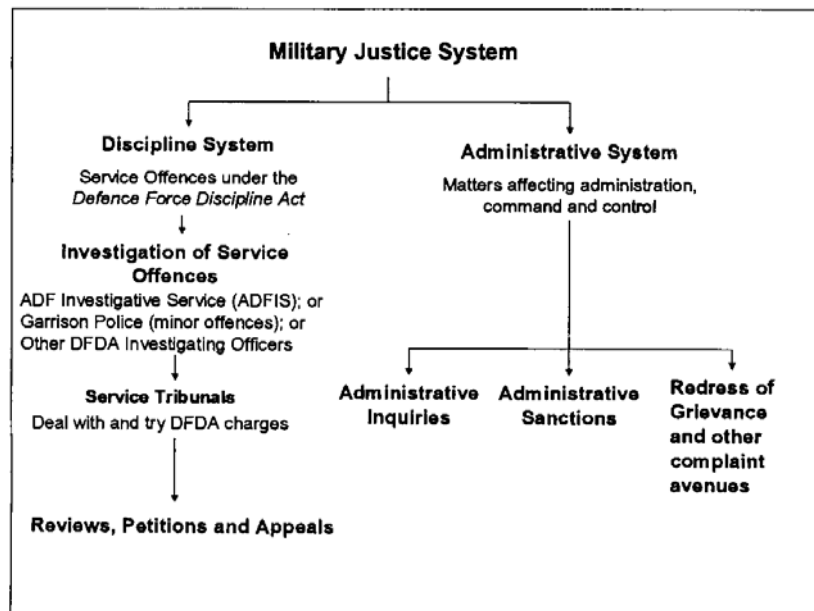
**Inspector General ADF  
Annual Military Justice  
Awareness Training**

## **Scope**

- What is the Military Justice System?
- Why is it important?
- The Discipline System
- What is an Administrative Inquiry?
- What is an Administrative Sanction?
- How to get assistance if you have a problem to do with the military justice system

The purpose of this presentation is to provide a brief overview of the military justice system, explain its purpose, and to let you know how to deal with problems you might experience with the military justice system. This presentation will take approximately 20 minutes, and will cover the following topics:

- What is the Military Justice System?
- Why is it important?
- The Discipline System
- What is an Administrative Inquiry?
- What is an Administrative Sanction?
- How to get assistance if you have a problem to do with the military justice system



The Military Justice system is split into two separate areas - the Discipline system and the Administrative System. The Discipline system includes disciplinary investigations and proceedings under the Defence Force Discipline Act (DFDA) against ADF members for service offences. The Administrative system includes administrative inquiries, administrative sanctions against ADF members for misconduct or poor performance (such as a Formal Warning or Censure) and the right for ADF members to complain, for example, through the Redress of Grievance system.

The ADF's military justice system strives to balance the maintenance of discipline and satisfactory performance by ADF members with the need to ensure fairness to the individual. The ADF military justice system also includes mechanisms which enable the ADF to recognise failures in the system itself and for ADF members to initiate a complaint to do with the application of the military justice system to them, for example, through the redress of grievance system.

## **Why is Military Justice important?**

- The military justice system exists:
  - to support the peacetime and operational activities of the ADF, serving to maintain discipline and reinforce the chain of command; and
  - to protect your rights and ensure that you are dealt with fairly.

The ADF has a military justice system to support Commanders and to ensure effective command at all times. The military justice system is vital to the successful conduct of operations and to facilitate ADF activities during peacetime, including the maintenance of operational preparedness.

Commanders, Managers and Leaders use the military justice system on a daily basis. It is an integral part of their ability to lead the people for whom they are responsible.

The DFDA and Administrative sanctions are management tools for Commanders, Managers and Leaders to punish or correct behaviour that constitutes a service offence or otherwise falls below expected standards, and that could undermine effective command and control in the ADF. Obedience to lawful direction is an intrinsic requirement expected from the most junior to the most senior members of the ADF. Military justice is the responsibility of all members not just commanders and supervisors.

The ADF is committed to a military justice system that is fair and just for all members, while achieving the objective of enhancing effective command, in peacetime and during operations.

It is important that all ADF members are aware of the Military Justice system and its purpose, as well as the avenues available to all ADF members to complain if the military justice system is not applied fairly to them.

## **The Discipline System**

- In 1982 the Federal Government introduced the Defence Force Discipline Act 1982 (DFDA) as a part of Commonwealth law. This law became effective in 1985, and all ADF members are subject to it. The purpose of the DFDA is to maintain and enforce military discipline.
- The control and exercise of discipline, through the military justice system, is an essential element of the chain of command.
- The Defence Force Discipline Act (DFDA) is a tool that is used to maintain and enforce military discipline.

As mentioned previously there are two areas of Military Justice, the Discipline System and the Administrative System. The discipline system provides a framework within which service offences are investigated and if warranted, prosecuted, regardless of whether offences are committed during peacetime or operational activities, or within Australia or overseas. The *Defence Force Discipline Act 1982* (DFDA) underpins the discipline system, providing for the investigation of service offences, punishments, the creation of Service tribunals, trial procedures before those Service tribunals, and rights of review and appeal. The DFDA applies to all permanent force ADF members and Reservists when in uniform or deemed to be on duty.

You can be charged with an offence which is specifically relevant to your military service, e.g. AWOL, failure to comply with a lawful order, or with offences which have a criminal law equivalent, such as assault, or with criminal offences imported into the DFDA, such as travel card fraud. The incorporation of civilian criminal offences into the DFDA enables the application of Australian laws to ADF members when members are deployed overseas in circumstances where an adequate criminal law framework is absent, or the application of host country law is otherwise undesirable.

All ADF members have access to free legal advice from ADF legal officers in relation to the discipline system. This is a unique service provided to ADF members.



## **Your legal protections**

- The DFDA provides an ADF member with legal protections similar to those in the civil criminal law system.
- For example
  - You have the right against self-incrimination
  - Access to legal advice
  - Presumption of innocence
  - Right to seek a review of a conviction or punishment and/or automatic review of the conviction or punishment

The DFDA provides a suspect or accused person similar rights to those found in the civilian criminal law system. For example, in relation to investigations, if you are a suspect, you have the right not to incriminate yourself, that is, you don't have to give a statement to the service police or investigating officer.

If charged, you need to be given sufficient time to decide how to plead, and to prepare your defence or mitigation of sentence. For complicated matters, you may need to seek advice from an ADF legal officer. You cannot be made to plead guilty. If you are threatened or ordered to plea guilty, you should report it up your chain of command or to a legal officer.

Under the current system, all convictions and punishments are reviewed by a legal officer and a higher ranking officer to make sure the conviction and punishment are lawful. This allows the ADF to identify any miscarriages of justice that may have occurred at a DFDA hearing and to rectify it, e.g. by quashing the conviction (that is, by cancelling the conviction), ordering a new trial, or changing a punishment.

## **The Administrative System**

- To support ADF operations.
- To maintain the expected standard of professional judgement, command, leadership and behaviour required of each individual.
- Includes the ability to inquire into the facts of any matter.
- **It is not a substitute for punishment for an offence under the discipline system.**

As mentioned previously there are two areas of military justice, the discipline system and the administrative system. The administrative system exists to provide support to the ADF and its operations. In relation to military justice, the three main components of the administrative system are administrative inquiries, administrative sanctions and the Redress of Grievance/other complaint options.

## **Administrative Inquiries**

- A quick assessment is mandatory
- They are never used for DFDA investigations.
- Procedural fairness is afforded to a respondent to an allegation i.e. you have the right to give 'your side of the story'.

The administrative inquiry process is part of the Administrative System and is not part of the Discipline System. Administrative inquiries are conducted to establish the facts surrounding incidents that may affect the ADF. They are initiated by Command for the purpose of determining what happened and why, so that appropriate action may be taken to prevent the recurrence of similar incidents, or policy and/or systemic improvements may be made.

There are different types of administrative inquiries, such as a Routine Inquiry, an inquiry under Part VI of the Defence (Inquiry) Regulations, or a Board of Inquiry. Which one is used depends upon the seriousness or complexity of the incident.

Prior to initiating an administrative inquiry, a quick assessment must be conducted. The conduct of a Quick Assessment is mandatory following the notification of an incident or complaint. A QA allows a commander to first determine the nature and gravity of the occurrence, identify the nature and extent of information required and decide what type of administrative inquiry, if any, is necessary. Further guidance regarding the conduct of a Quick Assessment is contained in DI(G) ADMIN 67-2.

Administrative inquiries do not make findings in relation to service offences or criminal offences. However, if it appears that an offence may have been committed, that part of the inquiry will be stopped and the matter referred to the Service Police or civilian police for investigation. Generally, evidence you give as part of an Administrative Inquiry can not be used to bring DFDA action against you. If unsure, speak to a legal officer. Members are afforded procedural fairness during an inquiry, that is, everyone has a right to respond to allegations made against them and to give 'their side of the story'. If you are a witness in an administrative inquiry which has been appointed pursuant to the *Defence (Inquiry) Regulations 1985*, you do not have the option to refuse to answer questions put to you by the Inquiry Officer.

### **Administrative Sanctions**

- Formal warnings and censures are two forms of administrative sanction used within the ADF to deal with individuals whose conduct, performance or standards are unsatisfactory.
- Some other forms of administrative sanction include, change of employment category, removal of security clearance, denying or delaying promotion or revocation of provisional promotion, removal from an appointment or locality, reduction in rank and termination of service (discharge)
- You must be afforded procedural fairness - usually through an opportunity to respond to a Notice to Show Cause.

An administrative sanction is imposed in response to a member's behaviour or performance, in circumstances where the conduct falls below the standards required by the ADF, but does not constitute criminal conduct or warrant the initiation of disciplinary proceedings under the DFDA. Often, the findings of an Administrative Inquiry will be used as a basis for the initiation of an administrative sanction against a member.

Note that an administrative sanction can still be imposed on the member out of the same set of facts that led to disciplinary and/or criminal proceedings. Similarly, the fact that a member is given a punishment or receives no punishment at all is no bar to imposing an administrative sanction. Disciplinary and administrative proceedings are different. A punishment is a penalty that is imposed on a member for a breach of a disciplinary or criminal offence, whereas the imposition of a formal warning or censure is a means of sanctioning a member for their unsatisfactory conduct, performance or standards.

An Administrative Sanction may follow from a DFDA matter, a civilian criminal charge, or an administrative inquiry where the facts demonstrate that conduct has occurred which is unacceptable for a member of the ADF.

A Notice to Show Cause will be issued to a member prior to imposing an administrative sanction. The Notice to Show Cause will outline the facts and circumstances which are relied upon or taken into account in the decision to impose the administrative sanction, attach all evidence, and provide an opportunity for the member to reply. Once the member has responded, the response must be reviewed and a decision made regarding whether or not to proceed with the administrative sanction.

### **Application for Redress of Grievance (ROG)**

- You must try to resolve complaints at the lowest level through normal command channels.
- A ROG is available as a last resort **formal** mechanism to complain. It is submitted through your chain of command to your CO.
- If you are dissatisfied with the CO's decision, you may refer the complaint to your Service Chief (through Complaints Resolution).

There are a number of internal mechanisms available to review administrative system processes. In the first instance, the ADF members must seek resolution of complaints at the lowest possible level through normal command channels (a minute in Writing to your CO/OC.)

The ROG process provides a formal mechanism whereby complaints may be investigated and reviewed, and where necessary, wrong or unfair decisions or actions may be corrected.

A complaint through the ROG system may only be made by a member of the ADF, and must be submitted to the member's CO/OC. A Quick Assessment is required to be completed by Command upon submission of a ROG. The CO/OC must then investigate and or take action to address the ROG and then make a decision on the ROG where possible, to resolve the matter. Where a member is dissatisfied with the result of the CO's Decision, he or she may request that the complaint be referred to the relevant Service Chief, at which time the complaint is forwarded to the Complaint Resolution Directorate. The Complaint Resolution Directorate allocates a case officer to review the complaint on the Service Chief's behalf. The reference for Redress of Grievance - Tri-Service Procedures is DI(G) PERS 34-1 and this explains more about the Redress of Grievance process.

## Other Complaint Avenues

Use your chain of command and the ROG system **first** for all military justice complaints.

If you are not satisfied with the way your chain of command has dealt with your complaint, you can complain directly to:

**Inspector General ADF** – 1800 688 042 or email  
[ig.adf@defence.gov.au](mailto:ig.adf@defence.gov.au)

**Defence Force Ombudsman** - 1300 362 072 or Email  
[ombudsman@ombudsman.gov.au](mailto:ombudsman@ombudsman.gov.au)

**Defence Whistleblower Scheme hotline** - 1800 673 502 (Military justice issues will be referred to IGADF)

For further information see the military justice webpage on the DRN –  
<http://intranet.defence.gov.au/militaryjustice>

Normally, ADF members should use their chain of command to resolve any workplace complaints including military justice complaints. An application for redress of grievance can be made if an ADF member is not satisfied with the decision of his or her commander.

However, there are other complaint avenues available if you are not satisfied with the way your chain of command has dealt with a military justice issue. You need to remember that just because a decision is made that you do not like, does not mean that there has been a failing of the military justice system.

**The Inspector General ADF (IGADF)** – the IGADF reports directly to CDF and can inquire into complaints by ADF members about the military justice system.

**The Defence Force Ombudsman (DFO)** can receive and inquire into complaints from ADF members relating to military justice issues, however the DFO will only inquire into complaints after all internal Defence avenues have been exhausted.

**The Defence Whistleblower Scheme** is an alternative and independent way for any person to report alleged misconduct or unethical behaviour. Military justice complaints will be referred to the IGADF. There is a 24 hour hotline: 1800 673 502.

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**ENCLOSURE 4 TO  
IGADF REVIEW  
06 SEP 11**

**INSPECTOR GENERAL ADF COMPLAINT HANDLING COURSE MATERIALS**

1. Good complaint handling is fundamental to maintaining an effective and efficient workplace. The ADF encourages the handling of complaints at the lowest appropriate level, expecting personnel to respond to complaints promptly, seriously and sensitively. Some complaints, such as allegations of sexual offences, criminal offences or other notifiable incidents, must be dealt with in accordance with the appropriate defence policy, including DI(G) PERS 35-4 – *Management and Reporting of Sexual Offences*, DI(G) ADMIN 45-2 – *The reporting and management of notifiable incidents* and DI(G) PERS 35-3 – *Management and Reporting of Unacceptable Behaviour*.

2. This booklet is designed to provide commanders and managers with the tools to deal with workplace complaints promptly, seriously and sensitively. It will outline a systematic and consistent approach for managing complainants and their complaints. While it is not always possible to resolve a complaint to the satisfaction of a complainant, the complainant should at least be satisfied their complaint was fairly heard and was dealt with in accordance with the policies, practices and procedures laid down to deal with that type of complaint.

3. The course is divided into the following modules:

- Complaint handling principles
- Complaint handling processes
- Investigating a complaint
- Unreasonable conduct and how to manage it
- Malicious or vexatious complaints



## COMPLAINT HANDLING PRINCIPLES

4. **Introduction.** A complaint is a written or verbal expression of discontent or concern. The complaint may be expressly stated or implied. Members of the public, Defence and APS members can make complaints about any number of different things.

5. A commander or manager should understand that dealing with complaints is a core part of their role and they are expected to treat complaints seriously and deal with them promptly, professionally and sensitively.

6. Some complaints, such as those alleging criminal offences, notifiable incidents or unacceptable behaviour should be dealt with in accordance with the following Defence policies:

- DI(G) PERS 35-4 – *Management and Reporting of Sexual Offences*;
- DI(G) ADMIN 45-2 – *The reporting and management of notifiable incidents*; and
- DI(G) PERS 35-3 – *Management and Reporting of Unacceptable Behaviour*.

7. The principles outlined in this booklet can be adopted to assist commanders and managers deal more efficiently and effectively with complainants and their complaints.

8. Where possible Defence encourages complaints to be dealt with at the lowest appropriate level. If a commander or manager receives a complaint they should take action on the complaint. If handled well, a complainant should be satisfied they received a fair hearing and that their complaint was dealt with in accordance with the appropriate policies, practices and procedures laid down to deal with that type of complaint. Consequently, even if the complainant is not entirely happy with the outcome, they may nevertheless be satisfied that Defence has dealt with them professionally and handled their complaint seriously.

9. The complaint handling principles a commander or supervisor should consider when handling a complaint are:

- a. Fairness;
- b. Accessibility;
- c. Responsiveness; and
- d. Efficiency.

10. These principles are dealt with below.

- a. **Fairness.** A complainant has the right to expect to be treated fairly after making a complaint and not be made to feel like their complaint is simply a nuisance, a burden or a trivial matter. For most people, making a complaint is stressful and the way in which their complaint is handled will directly impact on their satisfaction with the process and outcome.

It is important that the complainant is confident their complaint will be treated impartially, with confidentiality and transparency. Each complaint must be dealt with on its merits, with an open mind and without prejudice. Even if a complaint

is made by a person who has complained on a number of previous occasions (ie a persistent complainant or querulant)<sup>11</sup>, the complaint still needs to be dealt with on its merits and not dismissed summarily. The complainant does not have to prove they are in the right, although they should provide as much information as they have available to assist in dealing with the complaint.

If a complaint is about another person, the person against whom the complaint has been made also has a right to expect procedural fairness throughout the complaint handling process. They have the right to:

- know the allegations made against them; and
- be given the opportunity to put their case.

During the management of a complaint both the complainant and any respondent should be provided with:

- reasonable access to support services in accordance with CA Directive 27/2009, CAF Directive 04/2006 and through the Navy divisional officer system;
- procedural fairness in the handling of the complaint;
- protection from victimisation or disadvantage during the process;
- protection of their personal information in accordance with the *Privacy Act 1988*; and
- information on the progress of the complaint, including details of the resolution and any review process.

It is important to ensure that complaints are handled by someone who was not involved in the events leading to the complaint, otherwise there may be a perception that the person is biased or has a conflict of interest in dealing with the complaint.

- b. **Accessibility.** All complainants should be aware of the complaint handling system within Defence and how to access it. This should be addressed in annual training, brochures or posters in the workplace and any other means of publicising the complaints process.

If a complaint is made, the commander or manager must ensure the complainant is aware of the processes involved in dealing with the complaint. The commander or manager should never assume the complainant will know how the complaint will be handled, how long the process may take and what they can expect as a possible outcome.

When resolving a complaint, be aware of the services available to provide assistance to complainants and respondents and provide this information to both complainants and respondents, including if applicable:

- Defence Equity Advisor Network;

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<sup>11</sup> These terms are discussed *infra*

- Defence Equity Advice lines;
- Army Fair Go Hotline;
- Defence Legal, medical, psychological and pastoral support;
- Defence Community Organisation;
- Complaints Resolution Agency;
- Fairness and Resolution Centres;
- Employee Assistance Program for Defence APS employees.

It is easy to overlook the requirement to ensure that both complainants and respondents are provided with support, because complaints can often be stressful for all personnel concerned.

- c. **Responsiveness.** A complaint should be acknowledged when it is received, dealt with according to urgency and the complainant should be kept informed during the process. When dealing with a complainant, it is important to understand any requirements they may have for support and assistance. Ensure a complainant has access to support throughout the process. This support may include: a support person or case officer, padre, legal officer, social worker or any other person, organisation or agency described above.

Any substantiated allegations should be addressed and appropriate remedial action taken to prevent a recurrence. It is also important to let the complainant know the outcome of their complaint and what has been done or is being done to prevent a recurrence.

- d. **Efficiency.** A complaint should be handled in a way that is proportionate and appropriate to the matter being complained about. It should be dealt with without unnecessary delay and the complainant should be kept informed of progress being made to deal with the complaint. A complainant will generally expect to have their complaint dealt with as soon as possible. This is not always practicable, however keeping the complainant informed of progress or expected timeframes will reassure them that their complaint is being taken seriously, being addressed, and has not been forgotten or ignored.

## COMPLAINT HANDLING PROCESS

11. All complaints need to be handled professionally, applying the complaints handling principles as soon as the complaint is received. This will minimise the chances of delay, misunderstandings and future problems. The following steps will assist you to deal with complainants and their complaints.

12. **Know the complaints handling process.** Know the scope of what you can and can't do when dealing with a complaint. If this is unclear, contact someone who can assist such as the Complaints Resolution Agency or IGADF. Avoid a rigid, one size fits all approach to complainants and their complaints.

13. **Understand your aim:** When handling a complaint a commander or supervisor should aim for:

- establishing the facts relating to the complaint;
- timely resolution of the issue;
- accurate communication with all involved;
- resolving the complaint at the lowest level appropriate;
- simplicity in dealing with the complaint and its resolution;
- ensuring access to documentation and information;
- fairness and reasonableness in addressing the complaint, including making sure everyone involved is given procedural fairness by allowing them to respond to any allegations or potential findings which may be adverse to them; and
- ensuring the complainant is satisfied the appropriate processes have been followed and their complaint addressed even if they do not agree with the outcome.

14. **Understand what the complainant wants.** A complainant wants to:

- feel secure in making a complaint;
- feel their complaint has been listened to and understood;
- be heard without being judged;
- be treated professionally, fairly and politely;
- be provided an explanation of the complaint handling process;
- have the issue resolved as best as possible; and
- if the complaint is upheld, an assurance that remedial action will occur to avoid a recurrence.

15. **Be professional.** Handling complaints is part of your job. Listen to the complainant's problem and allow them to explain their concerns to you. A complainant won't be satisfied you can resolve their concerns if they don't feel you have listened to them and handled their complaint professionally. For the complainant you represent an opportunity to resolve their complaint and so if it's appropriate for you to deal with the complaint deal with it, don't avoid the complaint or simply pass the matter to someone else without good reason.

16. **Be prepared to refer the complaint, if appropriate.** If the complaint is about a matter with which you have been directly involved, if you are not the decision maker for the complaint or the complainant requests it, you should refer the complaint to another complaint handling agency to deal with the complaint. This is not simply avoiding the complaint but a

means to ensure the complaint is dealt with efficiently and effectively and in some cases will remove any suggestion of bias in the resolution of the complaint. However, before referring the complaint make sure you explain to the complainant the reason for the referral and the process involved. Be sure when referring the complaint to provide the complainant with the name and contact details of the person who the complaint will be referred.

17. **Manage complainant expectations.** A complainant may not know or understand what can be done about their complaint. When a complaint is first made, the commander or supervisor must ensure the complainant understands the process by which their complaint will be handled and that their expectations of the complaint handling process are realistic. Making a complaint can be difficult and stressful for an individual and ensuring they have an understanding of what will occur and how long it may take will help reassure them about the process.

18. If a complainant does not understand the way in which a complaint will be handled they may have unrealistic expectations of what the outcome can be and when these do not occur they can become disillusioned and dissatisfied with the process. This can usually be managed through a discussion with the complainant about:

- the process for dealing with the complaint;
- expectations of the complainant during the process;
- possible timeframes;
- possible outcomes; and
- the ongoing communication the complainant can expect while the complaint is being addressed.

19. The complainant must be clear that while the complainant ‘owns’ a complaint, Defence ‘owns’ the policies, practices and procedures which govern how a complaint is to be handled. The Defence policy and procedures will determine:

- who will be responsible for dealing with the complaint;
- the priority and resources which will be allocated to the complaint;
- the method for dealing with the complaint; and
- the final assessment and outcome of the matter.

20. **Communication.** Good communication can prevent many problems. Good communication needs to occur throughout the complaint handling process. When the complaint is received it is important to ensure you:

- establish the nature and extent of the complaint;
- ask the complainant what resolution they are seeking.

21. All complaints should be acknowledged as quickly as possible. This will let the complainant know the complaint has been received and is being actioned. It is also a good opportunity to ensure the complaint is fully understood. If the complaint was made verbally, the commander or manager who received it should document the complaint immediately. Further helpful suggestions when talking to complainants is at **annex D**.

22. Use open-ended questions to encourage the complainant to give you all the relevant information, such as:

- Tell me more about how you see this ...
- How did this occur ...
- Help me to understand ...
- What do you mean by ...
- I'm sorry, I'm having trouble understanding ...

23. In dealing with the specific aspects of the complaint, the commander or supervisor should:

- ask necessary questions in a polite and even-handed manner, to seek the most detailed response;
- paraphrase the complainant's issue/s to confirm mutual understanding;
- agree on a solution, where possible; and
- take action on the agreed solution.

24. **Track complaints.** Ensure you track the complaint from receipt to the conclusion of the matter by recording the action taken at every stage of the complaint handling process, including whether the complainant was satisfied with the outcome. Make sure the complaint has been addressed and resolved.

25. **Withdrawal of a complaint.** A person is entitled to withdraw a complaint at any time. A request should be made in writing and kept on file. In certain situations, it will be appropriate that a complaint continue to be investigated, despite the wishes of the complainant. This will generally apply if a complaint relates to a serious matter or raises issues which it would be inappropriate to ignore.

26. **Training.** It's important to ensure that are involved in handling complaints are aware of complaint handling procedures and any changes to those procedures.

## INQUIRING INTO A COMPLAINT

27. This section must always be considered in conjunction with any applicable Defence policy, practices, procedures or guidelines. It is intended to provide a general overview of the process of inquiry only.

28. **Assess and Plan.** Once a complaint is received it is important to assess:

- the type of complaint;
- the seriousness of the complaint;
- the need for immediate action;
- the complexity of the matter complained about;
- the parties involved;
- whether there is an indication of a systemic problem;
- the time between the event and the complaint;
- possible outcomes for resolution; and
- the need for support resources for the complainant, respondent or others involved.

29. It is also possible to start planning how to deal with the complaint by assessing:

- whether you have the power to address and resolve the complaint;
- whether it is appropriate for you to handle the complaint;
- other options for resolution such as Alternative Dispute Resolution; and
- the wishes of the complainant and or any respondent.

30. **Talk to the complainant.** This may have already occurred if the complainant made the complaint to you verbally. It is, however, vital to establish:

- that you understand the complaint; and
- that the complainant understands the complaint handling process, including what will be done, the time it may take and the possible outcomes. This allows you to manage the complainant's expectations and helps prevent problems in the future.

31. **Conduct the inquiry**<sup>12</sup>. In order to conduct any inquiry you and the inquiry officer will need to:

- Scope the inquiry;
- Prepare terms of reference;
- Plan the inquiry;
- Monitor the inquiry;
- Gather information;
- Analyse the information;
- Afford procedural fairness to those persons who may potentially be affected by the outcome of the inquiry;

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<sup>12</sup> Further information on the conduct of administrative inquiries can be obtained from ADFP 06.1.4 – Administrative Inquiries Manual and CDF Directive 04/2010 – Interim Arrangements – Quick Assessments and Administrative Inquiries.

- Write the inquiry report;
- Conduct post inquiry administration, including the preparation of a decision and implementation plan and notifying the complainant of the outcome and what will be done to rectify or ameliorate any deficiencies identified.
- ensure the complainant is updated about progress at each stage of the inquiry;

32. **Make a decision.** The decision on the complaint must be clear, unambiguous and based on available evidence. It is important to:

- provide clear reasons and a clear decision, addressing all issues the complainant raised in the complaint and outlining their options if unhappy with the outcome;
- communicate the outcome to the complainant, respondent and other members involved, as appropriate.

33. **Documentation.** The actions taken to deal with the complaint, the decision and the outcome must all be documented. Any action which needs to be taken as a result of the complaint should also be documented and its implementation recorded. All documentation should be handled confidentially and have the appropriate security labelling.

34. **Remedies.** There may be a range of remedies which are appropriate, including:

- providing an explanation to the complainant;
- apologising to the complainant for what has occurred;
- mediation between parties;
- change of decision or action;
- correction of documentation;
- correction of systemic issues; and
- referral to another area of Defence or agency for resolution.



## **UNREASONABLE CONDUCT AND HOW TO MANAGE IT**

35. Some complainants can be distressed, angry or upset and sometimes for good reason. They may be distressed because of the circumstances that led to the complaint, because the correct process to deal with the complaint is not being adopted, because of unreasonable delays in dealing with their complaint or because of associated problems such as their health, family or financial circumstances. Occasionally, a complainant's behaviour may become unacceptable or inappropriate. It may involve:

- Unreasonable persistence,
- Making unreasonable demands,
- Being unreasonably uncooperative,
- Using unreasonable arguments, or
- Demonstrating unreasonable behaviour.

36. These behaviours and how to deal with them are further discussed below. It is important when faced with this behaviour, to consider:

- your tone of voice;
- body language;
- the importance of not making empty promises, but being realistic about the time things take, possible delays and possible outcomes;
- not giving premature opinions, even when pressed;
- not focusing solely on the behaviour of the angry or upset complainant, but focusing on the handling of their complaint;
- remaining calm and clear about the complaint handling process; and
- being prepared to refer the complaint, if appropriate, to someone with more time, knowledge or authority.

37. Despite these helpful suggestions there might be a time when the behaviour of the complainant is so unreasonable that it amounts to unacceptable or inappropriate behaviour that is neither appropriate nor acceptable to tolerate in the workplace. If this is the case you should inform the complainant in an unemotional way that you regard their behaviour as being unacceptable or inappropriate. You should advise the complainant that you will be advising your commander, manager or supervisor about the complainant's behaviour and you should politely end the conversation.

38. In some circumstances it might be desirable to set up a communication protocol to deal with an unreasonable complainant. Particularly one who contacts numerous individuals, organisations or agencies in an attempt to obtain information which can be used to discredit or manipulate the complaint handling agency to obtain the outcome they desire. In these circumstances a communication protocol should be established. One example of a communication protocol is to advise the complainant that they are only to contact one named individual about their complaint. Other individuals, organisations or agencies should be advised that they are not to discuss any aspect of the complaint with the complainant and are to refer the complainant to the named individual.

39. **Unreasonable Persistence.** This can include:

- refusing to accept a final decision on the complaint;
- insisting that one particular solution is the correct one, despite the availability of valid contrary or alternative courses of action;
- persisting in interpreting policy or legislation in a way that is not generally accepted or in accordance with expert views;
- reframing a complaint in an attempt to have it looked into again;
- persisting with a complaint even after it has been addressed by other people or agencies;
- making an issue out of anything;
- demanding a review but not providing a case for review.

40. Strategies for dealing with unreasonable persistence generally involve explaining that nothing further can be done by:

- telling the complainant clearly and precisely that the outcomes they desire are outside the scope of the complaints handling process and are not going to occur;
- having an answer to the '*where do I go now*' question, either a referral within Defence or outside Defence, as appropriate;
- making it clear that the decision at that level is final and not subject to change.

41. **Unreasonable demands.** This includes:

- expecting unreasonable outcomes or excessive inquiries into their complaints;
- insisting on unattainable outcomes;
- insisting on a 'moral' outcome, e.g. justice for the community where it is really a personal interest at stake;
- demanding an apology or compensation where there is no reasonable basis to support that outcome;
- wanting revenge or retribution;
- wanting what is inappropriate or impossible e.g. sensitive documentation, information subject to the *Privacy Act 1988*;
- giving instructions or making demands about the complaint handling process;
- making unreasonable resource demands, out of proportion with the seriousness of the complaint;
- wanting regular and lengthy phone or in-person contact where this is inappropriate;
- changing the desired outcome;
- shopping for a sympathetic ear; and
- posting complaints on the internet.

42. Strategies for dealing with unreasonable demands involve setting limits for the complainant by:

- letting the complainant know in advance how the agency intends to deal with the complaint;

- clarifying the limitations of what Defence or the commander, manager or supervisor can and cannot do.

43. **Unreasonably uncooperative.** This can include:

- refusing to provide information which would assist in resolving their complaint;
- presenting a large quantity of information which isn't organised where the complainant is capable of doing so;
- refusing to present all the information at the outset;
- refusing to define the issues of the complaint;
- focusing on principles rather than actual issues;
- changing the complaint and raising new issues while the complaint is being dealt with;
- being unhelpful, e.g. withholding information, misquoting other people, being dishonest.

44. Strategies for dealing with an unreasonable lack of cooperation aim to set conditions for the complainant by:

- requiring complainants to outline/define the issues;
- requiring the complainant to provide the commander, manager, supervisor or Defence with all the information they have reasonably available;
- managing expectations from the beginning of the complaint handling process.

45. **Unreasonable arguments.** This behaviour includes:

- holding irrational beliefs;
- believing a conspiracy theory that is unsupported by evidence;
- arguing theories that are bizarre;
- insisting on the importance of an issue that is clearly trivial.

46. Strategies for dealing with unreasonable arguments. This generally involves declining to deal with complaints which are unreasonable or groundless. Care should be taken in assessing a claim as groundless as a complaint would generally have to be inquired into for this to become clear.

47. **Unreasonable behaviour.** This can include:

- displaying confronting behaviour such as rudeness or aggression;
- sending rude or threatening correspondence;
- making threats of self harm;
- displaying manipulative behaviour – overly ingratiating, tears or veiled threats.

48. Strategies for dealing with unreasonable behaviour generally set limits for complainants, such as:

- Advising the complainant that all persons involved in the process of dealing with the complaint are to be treated with respect and that unacceptable or inappropriate behaviour will not be tolerated.

- Managing any unacceptable behaviour, in accordance with DI(G) 35-3 – Management and reporting of unacceptable behaviour.
- Requesting complainants do not use rude language in their documents or interactions with those involved with their complaint.
- Ending telephone calls if the complainant becomes abusive.

49. Commanders, managers and supervisors need to recognise that dealing with complaints, including unreasonable complaints, is a part of their work and should not be avoided. Further helpful suggestions to deal with unreasonable complainants is at **annex C**.

## **MALICIOUS OR VEXATIOUS COMPLAINTS**

### **What is a malicious or vexatious complaint?**

50. A complaint is considered to be vexatious if it is an abuse of the complaint process, if there are no reasonable grounds for the complaint or the purpose of the complaint is to harass, annoy, delay or cause detriment. A complaint is considered to be a malicious complaint if its purpose is to cause harm.

51. A malicious or vexatious complaint is different from a complaint which is made in good faith, but cannot be substantiated or is based on incorrect information or only part of the relevant information. While it can take a substantial amount of time to deal with such complaints, it is important that complainants are not discouraged from making complaints which may have a legitimate basis.

### **How should a malicious or vexatious complaint be handled?**

52. Great care should be taken in determining a complaint to be malicious or vexatious. People have the right to complain about matters of concern to them and this right should not be inappropriately taken away. You should also ensure that no material aspect of the complaint has been overlooked, which may have some merit. It may be appropriate to obtain expert advice from, for example, Fairness and Resolution or Defence Legal, before deciding a complaint is malicious or vexatious. The complainant should also be given the opportunity to explain why their complaint should not be found to be malicious or vexatious before a final decision is made.

53. If, however, it is clear that the complaint is malicious or vexatious, it is generally appropriate to limit or cease contact with the complainant. This should be communicated to the complainant, in writing, recording that the complaint has been assessed as malicious or vexatious and listing the reasons for this decision.

54. The complainant should also be advised of other avenues to pursue their complaint (see Complaint Handling Agencies listed below). A copy of this correspondence must be kept on file as the complainant may then choose to escalate their complaint. An example letter dealing with a malicious or vexatious complaint is included at **annex E**.

### **Annexes:**

- A. Bibliography
- B. Complaint Handling Agencies
- C. Key Elements for Managing Unreasonable Complainant Conduct
- D. Tips for Talking with Complainants
- E. Example Letter to Malicious or Vexatious Complainant

**ANNEX A TO  
ENCLOSURE 4 TO  
IGADF REVIEW  
06 SEP 11**

**Bibliography**

**Defence Resources:**

ADFP 06.1.4 *Administrative Inquiries Manual*

CDF Directive 04/2010 *Interim Arrangements – Quick Assessments and Administrative Inquiries*

Defence Plain English Guide to Managing and Reporting Unacceptable Behaviour, 2004

Defence Workplace Relations Manual

DI(G) PERS 35-3 *Management and Reporting of Unacceptable Behaviour*

DI(G) PERS 34-1 *Redress of Grievance – Tri-Service Procedures*

**Other Publications:**

AS 4269-1995 Australian Standard *Complaints Handling*

Australian Law Reform Commission, Report 111 *Making Inquiries Report: a new statutory framework*, 2009

Commonwealth Ombudsman, *Better Practice Guide to Complaint Handling*, 1<sup>st</sup> edition, 2009

NSW Ombudsman, *Managing Unreasonable Complainant Conduct Practice Manual*, 1<sup>st</sup> edition, 2009

Ombudsman Western Australia, *Conducting Administrative Investigations*,

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## **COMPLAINT HANDLING AGENCIES**

### **Complaints handling agencies internal to Defence**

1. **Audit and Fraud Control Division.** The Division investigates allegations of fraud, serious misconduct and lack of probity, and also manages the Defence Whistleblowers Scheme and the Defence Policing and Security Management System.

- **Inspector General Defence.** The Inspector General Defence investigates complaints of alleged fraud, serious misconduct, commercial impropriety, corrupt practices and conflict of interest.
- **Defence Whistleblower Scheme.** This scheme provides an independent way for any person to report fraudulent or unethical conduct involving a member of the ADF, a public servant employed by Defence, or a supplier of goods and services to Defence. Refer DI(G) PERS 45-5 *Defence Whistleblower Scheme*. Contact details are:

24 Hour hotline: 1800 673 502

Fax: (02) 6266 4588

Email: [IG.Investigations@defence.gov.au](mailto:IG.Investigations@defence.gov.au)

Postal address: Director, Investigations and Recover

CP3-2-015

Campbell Park ACT 2600

2. **Australian Defence Force Investigative Service (ADFIS).** ADFIS investigate matters relating to discipline within the military justice system.

3. **Fairness and Resolution.** Fairness and Resolution provide advice and support to managers and complainants to resolve complaints at the lowest possible level. They also provide Alternate Dispute Resolution processes such as mediation as well as managing the formal complaint system, accessed when informal or administrative processes fail.

4. **Inspector General Australian Defence Force.** The Office of the IGADF conducts inquiries into alleged failures of the military justice system.

### **Complaints Handling Agencies outside Defence**

5. **Commonwealth Ombudsman.** [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

The Commonwealth Ombudsman considers and investigates complaints about the administrative actions of government departments and agencies, as well as complaints relating to the ADF, Australian Federal Police, Freedom of Information, Department of Immigration and Citizenship, the Postal Industry and the Australian Taxation Office.

- **Defence Force Ombudsman.** [www.ombudsman.gov.au](http://www.ombudsman.gov.au)



The Commonwealth Ombudsman undertakes the function of the Defence Force Ombudsman (DFO). The DFO can investigate complaints relating to administrative action and Defence Force employment matters. It does not investigate actions relating to disciplinary proceedings or honours or awards. The DFO will only investigate complaints from serving members after they have exhausted all internal complaints handling mechanisms or in exceptional circumstances. The DFO also investigates complaints from ex-service members and their families.

6. **Administrative Appeals Tribunal (AAT).** [www.aat.gov.au](http://www.aat.gov.au)

The AAT provides an independent review of a range of administrative decisions by Australian government and some non-government bodies.

7. **Australian Commission for Law Enforcement Integrity.** [www.aclei.gov.au](http://www.aclei.gov.au)

The Commission is responsible for investigating serious and systemic corruption issues in the Australian Crime Commission and the Australian Federal Police.

8. **Australian Human Rights Commission.** [www.humanrights.gov.au](http://www.humanrights.gov.au)

The Commission investigates claims of discrimination, harassment, bullying and breaches of human rights under federal laws.

9. **Inspector General of Intelligence and Security (IGIS).** [www.igis.gov.au](http://www.igis.gov.au)

IGIS conducts inquiries into complaints relating to the activities of Australian Intelligence Agencies.

10. **Office of the Australian Information Commissioner (OAIC).** [www.oaic.gov.au](http://www.oaic.gov.au)

The OAIC reviews decisions made by agencies and Ministers under the *Freedom of Information Act 1982*, as well as privacy and information policy issues.

- **Privacy Commissioner.** [www.privacy.gov.au](http://www.privacy.gov.au)

The office of the Privacy Commissioner has been integrated into the OAIC. The OAIC deals with complaints from people who believe their private information, including health information, has been mishandled by government agencies or private organisations.

11. **Social Security Appeals Tribunal.** [www.ssat.gov.au](http://www.ssat.gov.au)

The Tribunal provides an external review of complaints relating to Centrelink decisions about social security, family assistance, education and training payments. It also reviews most decisions made by the Child Support Agency.

12. **Various State and Territory Ombudsmen.**

The Ombudsmen investigate complaints into the actions or decisions of State or Territory governments.

ACT [www.ombudsman.act.gov.au](http://www.ombudsman.act.gov.au)

NSW [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

NT [www.ombo-hcsc.nt.gov.au](http://www.ombo-hcsc.nt.gov.au)

QLD [www.ombudsman.qld.gov.au](http://www.ombudsman.qld.gov.au)

SA [www.ombudsman.sa.gov.au](http://www.ombudsman.sa.gov.au)

TAS [www.ombudsman.tas.gov.au](http://www.ombudsman.tas.gov.au)

VIC [www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au)

WA [www.ombudsman.wa.gov.au](http://www.ombudsman.wa.gov.au)

13. **Veterans Review Board.** [www.vrb.gov.au](http://www.vrb.gov.au)

The Veteran's Review Board reviews decisions made by the Repatriation Commission under the Veterans' Entitlements Act 1986 (Cth) and determinations under the Military Rehabilitation and Compensation Act 2004 (Cth).

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**ANNEX C TO  
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**KEY ELEMENTS FOR MANAGING UNREASONABLE COMPLAINANT  
CONDUCT**

**Aim**

1. Ensure complainants are treated with fairness and impartiality.
2. Understand the resources and process available for handling the complaint.
3. Ensure all staff have an understanding of the complaint handling processes.

**Managing a Complaint**

4. Be professional in all dealings with the complainant, the complaint and anyone else involved with the complaint.
5. Manage the complainant's expectations of the complaint handling process and possible outcomes from the process.
6. Communicate with the complainant - ensure they know what is happening in relation to their complaint and answer questions.
7. Track what is happening with a complaint.
8. Understand that complaint handling is part of your job.

**Managing Unreasonable conduct**

9. Understand the complaint handling process so you can explain this to the complainant.
10. Focus on the problem complained about not the person making the complaint.
11. Apply the relevant management strategies to their behaviour (see above)
12. Respond with consistency to individual complainants and across complaints.
13. Respond to the complainant with clear, timely and firm but polite communication.

**Preventing Unreasonable conduct**

14. Manage complainant expectations from the start of the process.
15. Require complainants to show respect for the process and staff involved with handling their complaint.

**Staff Responsibilities**

16. Remain calm and polite when faced with unreasonable conduct.
17. Show respect for the complainant, whether acting reasonably or not.
18. Always act impartially and professionally towards the complainant and the complaint.

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**ANNEX D TO  
ENCLOSURE 4 TO  
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**TIPS FOR TALKING WITH COMPLAINANTS**

1. Use a non-confronting style and be professional.
2. Actively listen to what the complainant is saying – make eye contact, engage, ask questions.
3. Clarify that you have all the relevant information. Do not assume or interpret.
4. If the complainant wants to keep adding complaints, incidents and witnesses, request that they compile a full list and agree to those matters on the list being the basis of their complaint.
5. Check you correctly understand the complaint.
6. Don't argue or debate. If Defence has a particular position on a matter explain the situation but don't enter into a debate.
7. Be careful in justifying or denying. If you must, clarify Defence policy but do not enter into a debate.
8. Apologise if there has been a mistake or omission or delay and explain how the matter can be rectified.
9. Always stay calm.

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**ANNEX E TO  
ENCLOSURE 4 TO  
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**EXAMPLE LETTER TO A MALICIOUS OR VEXATIOUS COMPLAINANT**

Dear XXXXXXX

1. On XX January 20XX you provided me with a written complaint relating to (*provide details, for example treatment in the workplace*). This complaint raised two issues of concern, namely:

- (*detail the issues raised by the complainant*)
- (*detail the issues raised by the complainant*)

2. On 30 January 2011 I requested that you provide me with further information to substantiate your complaint. You provided information on 13 February 2011. (*Provide details of this information*)

3. I have carefully considered the issues raised in your complaint of 19 January 2011 and the additional information you provided. (*Provide details of what you have considered, including any policies which are relevant*)

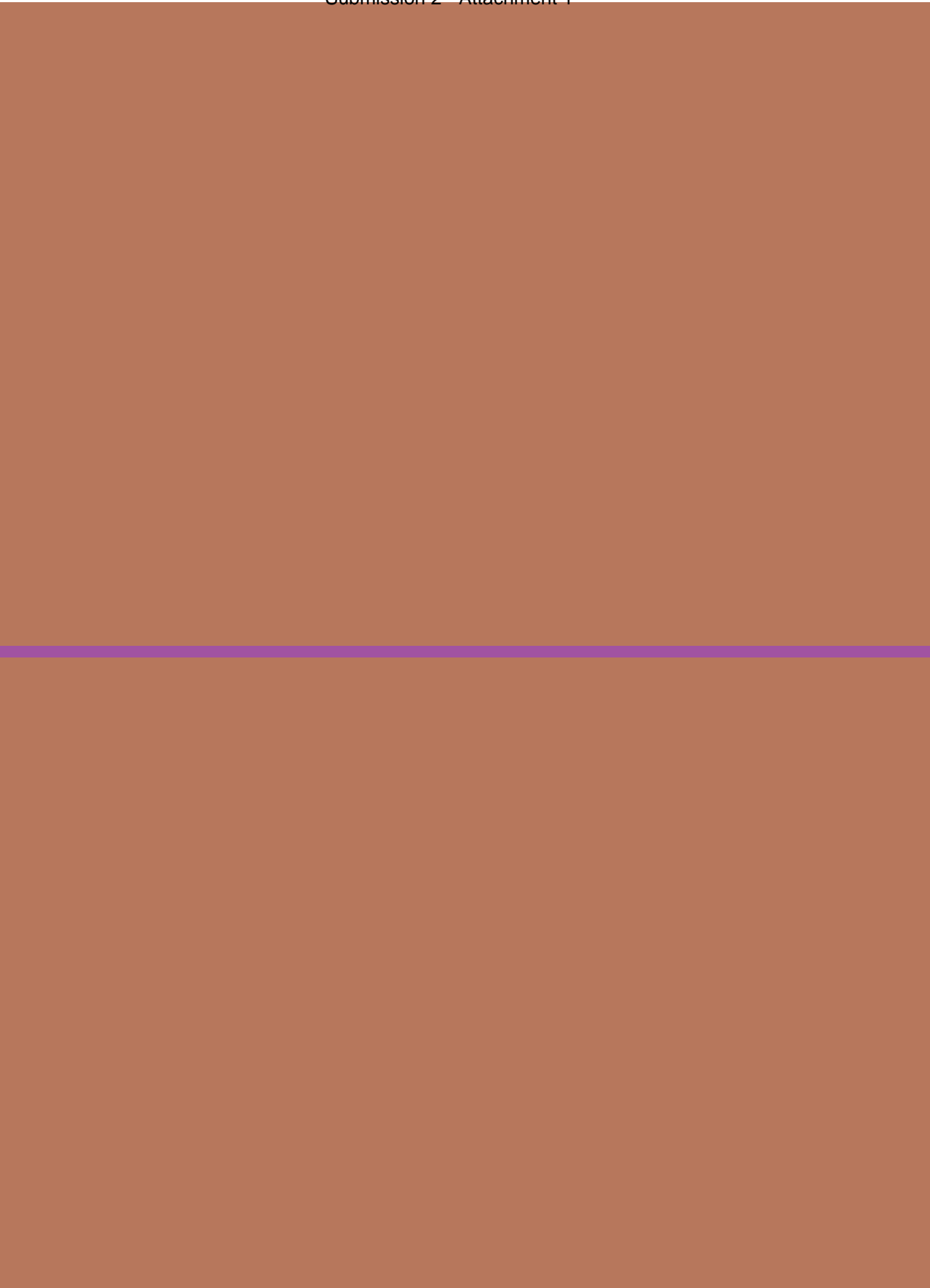
4. Despite the information you have provided and further inquiries I have undertaken, there is no evidence available to substantiate your complaint. (*Provide your reasons for deciding there is no evidence to substantiate the complaint*)

5. As there appears to be no evidence to substantiate your complaint I do not believe I can assist you any further and will not consider further correspondence relating to this particular complaint.

6. Should you wish to pursue this complaint further, it may be appropriate to contact Fairness and Resolution on (*phone number*) for further guidance.

Yours sincerely





# **INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE REVIEW OF THE MANAGEMENT OF INCIDENTS AND COMPLAINTS IN DEFENCE INCLUDING CIVIL AND MILITARY JURISDICTION**

INSPECTOR GENERAL AUSTRALIAN DEFENCE FORCE  
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**ANNEX F TO  
IGADF REVIEW  
06 SEP 11**

11. A former officer claimed he had not been shown procedural fairness when being considered for a promotional position in 2000, and that he was denied promotion for reasons which should not have been taken into consideration. The officer was not informed of those reasons at the time, and was therefore not given the opportunity to respond. Subsequently, on resigning from the ADF, the officer was denied permission for Defence industry employment, and this decision materially disadvantaged his family. The officer made a defective administration claim, which was poorly managed over several years by the delegate and involved the officer's being made what he thought was a satisfactory offer of settlement. It appears that the delegate may not have had authority to make that offer and the delegate subsequently asserted that any discussion of the offer had been on a 'without prejudice' basis.