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**Australian Government**

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**Defence**

**TWENTY-YEAR REVIEW**

**OF THE**

**OFFICE OF THE INSPECTOR-GENERAL**

**OF THE AUSTRALIAN DEFENCE FORCE**

**REPORT**

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**TWENTY-YEAR REVIEW  
OF THE  
OFFICE OF THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE  
REVIEW REPORT**

**EXECUTIVE SUMMARY**

1. The role and functions of an Office of the Inspector-General of the Australian Defence Force (IGADF) were proposed by the *Report of an Inquiry into Military Justice in the Australian Defence Force* (the Burchett Report) in 2001. The Burchett Inquiry initially reviewed how the ADF had managed a number of serious instances of bullying within the 3rd Battalion, The Royal Australian Regiment (3RAR). It then sought to clarify how widespread and pervasive in the ADF might be the idea that discipline should be enforced with the fist, by-passing due disciplinary processes, and to answer questions in relation to the functioning of the military justice system.

**Establishment**

2. The Burchett Report recommended that an office of Military Inspector General be established to provide constant scrutiny over the military justice system in the ADF to ensure its health and effectiveness. The office was to provide an avenue by which any failure of the military justice system may be examined and exposed, to make sure that review and remedies would be available to members of the ADF who were subjected to an injustice. It would also ensure that systemic injustices (if they arose) would be eliminated.

3. The Military Inspector General was to be independent of the normal chains of command and be directly responsible to the Chief of the Defence Force (CDF).

**Tasks**

4. Consistently with that recommendation in 2003 an office of the IGADF was established by the CDF. It operated initially on a non-statutory basis.

5. In 2005 a new Part VIII B was inserted into the *Defence Act 1903*. The provisions of that act established the office of the IGADF as a statutory appointee.

6. The stated objects of Part VIII B of the *Defence Act 1903* were to provide the CDF not only with a mechanism for internal audit and review of the military justice system but also with an avenue by which failures and flaws in that system could be exposed such that the cause of any injustice, whether systemic or otherwise might be remedied.

7. The IGADF was empowered to provide the CDF with that mechanism 'independent of the ordinary chain of command'.

8. In 2014 an additional three specific responsibilities were given to IGADF; they were to supervise the operation of the Redress of Grievance scheme, to inquire into any deaths that had a link to ADF service, and, to investigate complaints of misconduct in the military police.

### **Evolving environment**

9. The statutory responsibilities of IGADF have remained largely unchanged from those initially provided for in 2005 together with those which were added in 2014.

10. While the legislative provisions have remained relatively static, the internal and external environment in which the ADF and the IGADF operate changed greatly over the intervening decades.

11. When the IGADF was first stood up the Australian military still comprised three distinct service arms, Navy, Army and Air Force, each separate from the Department of Defence.

12. By significant contrast the ADF now operates as a single entity under the unified command of the CDF. Moreover in response to the changing strategic environment the ADF is organically integrated into the 'One Defence' structure. That structure is one in which defence contractors and public servants have become intermingled with, and in support of, the ADF.

13. Societal attitudes to service in the ADF also have evolved in the last 20 years. So too have the expectations of potential recruits and their families.

14. While the ADF's primary task remains to maintain the highest possible readiness for war fighting, the Australian community now requires Defence to be an inclusive organisation. Defence is expected not only to have a culture which drives high performance, but also to prioritise the physical, mental and emotional health of those who serve in its armed forces.

15. Such evolving cultural expectations have been repeatedly acknowledged by Defence as in the Secretary and the CDF's 30 November 2023 joint statement '*Commitment to a Culture that values our People and Serves to Defend Australia*'.

### **Key propositions**

16. Having regard to those environmental changes, a central recommendation of this Review is that the mission of the Office of the IGADF should be realigned to become a better fit for both the Defence structure of 2023 and heightened community expectations.

17. The Review proposes that the duties and functions of the Office be excised from the *Defence Act 1903*. They should be provided for in a new standalone IGADF Act.

18. The Review recommends IGADF's independence be enhanced. That is to be facilitated by the Office of the IGADF becoming a legally distinct accountable entity within

the Defence Portfolio. This will give the Office of the IGADF greater control over the mix of its staffing while permitting it to retain the access to Defence it requires.

19. The Review proposes that the Office of the IGADF be given greater visibility. Its physical premises should stand apart from any facility provided generally for Defence. To facilitate access to its services the Office should be rebranded with its own @igadf email address.

20. Future IGADFs will be appointed by the Governor-General for a single seven-year term.

21. The Review also recommends that the Office of the IGADF's leadership be strengthened by the appointment of two statutory Deputy IGADFs. Each will be conferred with specific responsibilities.

22. These recommendations are not based on the premise that the present IGADF or the former IGADF have ever suffered from a want of actual independence from the ADF. This Review has discovered nothing that supports the validity of that perception. However, that is not to the point.

23. The Review has become aware that a not insignificant body of well-motivated critics of the IGADF do hold a perception that the IGADF is 'umbilically-linked' to the command structure of the ADF. The existence of that perception is too widely based as would permit it to be ignored. To the extent that perception exists, it degrades the confidence that government can place on the institution as a guarantee to the community that members of the ADF have rights they can securely rely upon. The recommendations of this Report are therefore intended to ensure, to the greatest degree consistent with necessary operational requirements for the work of the Office, that no fair-minded person can have any basis to doubt the Office of the IGADF's true independence.

24. The additional appointments of two statutory Deputy IGADFs are proposed so that the IGADF can give priority to leadership for the assurance to the members of the ADF that the military justice system is operating soundly and exercise overall leadership of the Office as its responsible authority. Statutorily appointed Deputy IGADFs will be responsible for executing, subject to the ultimate authority of the IGADF, the other significant tasks the Office is responsible for including that of investigating service deaths. Their appointments will permit the Office of the IGADF to address such issues with greater focus. It has the additional benefit of 'future proofing' the institution, permitting it to accept, without the risk of the IGADF becoming distracted by 'mission creep', any further oversight functions relating to Defence as may be thought proper to allocate to the Office.

25. By providing those who serve in the ADF and their families independent assurance that abuses of military discipline brought to attention will be investigated without fear of favour, the Office of the IGADF will fulfil its function.

26. In times of conflict the lives of those who serve in the ADF can be put in hazard in the interests of their community. Such a risk is assumed by every individual who chooses to subject themselves to the command imperatives of military service. But the risks of rough

justice, bullying, sexual abuse, inappropriate conduct or humiliation are of an entirely different character. Yet in any human organisation, particularly of the scale of Defence, some instances of such conduct will occur. The IGADF's role in ensuring that such conduct is rooted out remains as critical as it was when the Burchett Report was published. The recommendations of this Review are designed to ensure the Office of the IGADF has the modern design and appropriate tools to undertake that task.

27. In the modern defence structure it is far from unimaginable that a serving member of the ADF might be the subject of bullying or other unacceptable conduct by a contractor—or by a public servant—or vice versa. The present legislative provisions do not provide a mechanism for the IGADF to initiate an own motion inquiry to respond to such circumstances. The Review recommends steps to remedy that gap.

### **Acknowledgements**

28. The Review has reason to be grateful to the IGADF and his office as well as the many members of Defence and former members of the ADF and their families for their input into its conclusions.

29. A full list of those the Review consulted and the observations it undertook are listed in an annex to this report.

30. The Review expresses particular gratitude for the constructive input provided by those it specifically consulted having regard to their prior record of public criticisms of the IGADF.

31. The Review expresses its appreciation that the IGADF made the assistance of Brigadier Rose Vivian available to it. Brigadier Vivian's insights and support of the Review were invaluable.

32. The Review finally expresses its gratitude to Dennis Richardson. Mr Richardson, a former Secretary of the Defence Department, originally was tasked with this Review. I thank him for assisting the original scoping of the issues and for ground-truthing the Review's premises.

TWENTY-YEAR REVIEW  
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REVIEW REPORT

SUMMARY OF RECOMMENDATIONS

Chapter 1: Independence of the IGADF

**Recommendation 1:** Part VIII of the *Defence Act 1903* be repealed and in lieu thereof the Office of the IGADF be established by standalone legislation and supporting regulations.

**Recommendation 2:** The Object of the Act establishing the Office of the IGADF should be to provide Defence with:

- (a) a mechanism for audit and review of the military justice system independent of the ADF chain of command;
- (b) an avenue independent of the ADF chain of command by which failures and flaws in the military justice system can be exposed and examined so that any injustice (whether systemic or otherwise) may be remedied;
- (c) superintendence of Redress of Grievance applications made by members of the ADF;
- (d) a mechanism for oversight of military police professional standards, and inquiry or investigation of complaints concerning military police; and
- (e) a mechanism for review and inquiry into the death of ADF members with proximate ADF service by which failures and flaws in the Defence system can be exposed and examined so that the risk of reoccurrence may where possible be addressed.

**Recommendation 3:** Amend the IGADF functions as currently stated in 110C(e) and (f) of the *Defence Act 1903* to ensure IGADF has power to initiate on their own initiative an investigation into any matter concerning alleged or suspected misconduct in respect of a matter in which a member of the ADF is involved, while preserving the right of both the Minister and CDF to direct IGADF to conduct a broader inquiry as they may think appropriate.

**Recommendation 4:** Remove the distinction currently reflected in s23 of *IGADF Regulation 2016* that confines certain information gathering powers to an inquiry that is undertaken at the direction of the Minister or CDF.

**Recommendation 5:** To secure the appearance of independence, as well as its fact, the IGADF be appointed for a single non-renewable term of seven years.

**Recommendation 6:** The IGADF be appointed by the Governor-General.

**Recommendation 7:** The Governor-General should be able to terminate the appointment of the IGADF only as presently provided for the Minister pursuant to s110L of the *Defence Act 1903*.

**Recommendation 8:** No change be made in respect of the qualification for appointment presently expressed in s110F of the *Defence Act 1903* except to clarify that the necessary experience a person must have in relation to military justice issues can have been acquired while serving in the Office of the IGADF. A serving member of the ADF should be eligible to be appointed as the IGADF or a Deputy IGADF but they should be required to resign any commission they hold before taking up that office.

**Recommendation 9:** When the office of IGADF is vacant or about to become vacant, the Minister, before any appointment is made, shall be required to consult with the serving IGADF, CDF and Secretary of the Department of Defence in relation to the appointment. If there is no serving IGADF, the Minister should consult with the longest serving Deputy IGADF.

**Recommendation 10:** The remuneration of the IGADF and a Deputy IGADF should be determined by the Remuneration tribunal.

**Recommendation 11:** References in legislation and regulations to an IGADF inquiry officer and Inquiry Assistant be removed. The statutory powers of the Office of the IGADF relating to investigations or inquiries be exercised by the IGADF, a Deputy IGADF or an Assistant IGADF appointed as such.

**Recommendation 12:** Legislate to ensure that other than as directed by IGADF or a Deputy IGADF, no Assistant IGADF acting in their capacity as an Assistant IGADF is subject to the direction of any person in relation to the performance of a function or power.

**Recommendation 13:** The Office of the IGADF become a Commonwealth entity within the Defence portfolio, responsible for its own administration as a separate entity.

**Recommendation 14:** The IGADF become the accountable authority for the Office of the IGADF for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

**Recommendation 15:** To enhance public visibility of the Office of the IGADF relocate its premises to an accessible location in Canberra with appropriate branding to recognise its independence from the chain of command. The Office's external communications should be branded distinctly as IGADF.

**Recommendation 16:** The legislation establishing the Office of the IGADF as a Commonwealth entity commence by proclamation only after mission critical memorandums of understanding with the Department and the ADF are in place to ensure the Office of the IGADF has been resourced to undertake transitional steps referred to in the final chapter of this Review including, but not limited to, having continued access to secure Defence networks required by the functions of the IGADF.



## Chapter 2: IGADF advisory functions

**Recommendation 17:** The CDF should give renewed attention as to whether one or more Authorised Complaint Recipients should be appointed in each Service headquarters to provide an alternate pathway for initiating an ADF member's Redress of Grievance.

**Recommendation 18:** IGADF should be resourced to allow it to increase the frequency of its routine audit of initial training establishments to a minimum cycle of two years.

**Recommendation 19:** The audit function of the Office of the IGADF is a critical integer of its success. A capacity for 'hot audits' should be provided for in addition to scheduled routine audits of ADF units.

**Recommendation 20:** The leadership responsible for the audit teams' day-to-day operation should continue to build a statistical database capable of informing the IGADF regarding areas of Defence responsibility where the risk of breakdowns of discipline and military justice are most prone to occur.

**Recommendation 21:** The IGADF in any event should regard it as one of their primary obligations to routinely communicate to Defence advice for improvements to the military justice system.

**Recommendation 22:** The IGADF legislation should state that command compliance with the IGADF audit function when exercised is mandatory. The IGADF should have the same power to require the production information, documents and answers to questions as is presently provided for in *IGADF Regulation 2016 s23* in respect of an IGADF inquiry into service deaths.

## Chapter 3: Inquiries into a death of a member of the Australian Defence Force

**Recommendation 23:** The purpose of the IGADF's duty to investigate deaths should be stated in the primary legislation as being:

- (a) To enable the IGADF to provide Defence and the CDF their recommendation for measures as would enhance the occupational safety of all members of the ADF; and
- (b) To provide an assurance to families of service members and the broader community that notwithstanding the significant inherent risks in their service in the ADF, the life and wellbeing of every member is respected and valued.

**Recommendation 24:** The regulations presently provided for in s110C of the *Defence Act 1903* should be substituted for with a statutory power of the IGADF to investigate any death of a member of the ADF when such a death occurs within two years of them having rendered actual service as a permanent or Reserve member of the ADF.

#### Chapter 4: Other IGADF inquiries

**Recommendation 25:** IGADF should have an express power to follow up any recommendation of an IGADF inquiry, audit or investigation.

**Recommendation 26:** If, as required or thought appropriate by reason of service exigencies, a commander exercising command prerogatives rejects a recommendation made by the IGADF or implements it only partially, that commander should be required to provide reasons in writing for their decision to the IGADF.

**Recommendation 27:** Unless the IGADF decides otherwise in respect of individual complaints that have been investigated or following the conclusion of a Redress of Grievance, the reasons provided by command for rejecting a recommendation should be provided to the aggrieved complainant.

**Recommendation 28:** A person who has been formally interviewed in the course of an inquiry should at all times be entitled to seek and obtain a copy of their record of interview.

**Recommendation 29:** The immunity provided for in s124(CA)(c) of the *Defence Act 1903* and s32 of the *IGADF Regulation 2016* should be identical to that applying to any inquiry conducted internally by Defence within the ADF so as to remove the extended derivative use immunity that currently applies only to a statement or disclosure made to the IGADF.

#### Chapter 5: Military Police Professional Standards

**Recommendation 30:** The existing arrangements for investigation of complaints made about military police do not require modification.

#### Chapter 6: Exceptionalism

**Recommendation 31:** Before, or if that is not practicable concurrent with, any new deployment of ADF members on operations the CDF should seek and the IGADF should make available, the expertise of IGADF to be applied to scenario testing designed to identify any risks of breakdown of military discipline that are or may be inherent by reason of 'micro-cultures', exceptionalism or otherwise in that deployment.

**Recommendation 32:** IGADF should be resourced to allow for routine audit of small units on a risk-informed basis.

**Recommendation 33:** Unless the CDF chooses to adopt a mechanism different from that recommended by the Afghanistan Inquiry Report the IGADF be resourced so as to provide the capacity for a standby multi-disciplinary specialist operations inquiry cell capable of being scaled up as required.

## Chapter 7: Statutory Deputies

**Recommendation 34:** To assist the IGADF to undertake an already expanded range of responsibilities and any that may subsequently be conferred on it, two Statutory Deputy IGADFs be appointed by the Minister after consulting with the IGADF. Their terms of appointment should be for a period of not more than five years but they should be eligible for reappointment.

**Recommendation 35:** The IGADF should retain ultimate authority over all aspects of the Office of the IGADF and manage the core Burchett Report functions of investigations and inquiries relating to the military justice system.

**Recommendation 36:** To provide for the diversity of roles and different human resource skills required, one Deputy IGADF should undertake the day-to-day management of the audit functions of the Office and one Deputy IGADF should have day-to-day management of the IGADF's function of inquiring into service deaths.

**Recommendation 37:** More flexible qualifications for appointment of the IGADF should apply to a Deputy IGADF. An appointee should be required to have appropriate qualifications to undertake the key functions of their respective offices.

**Recommendation 38:** The provisions of s110N of the *Defence Act 1903* providing for acting appointments be substituted for with a provision that during any vacancy of office or periods that the IGADF is overseas or otherwise unable to perform the duties of office, the most senior of the Deputy IGADF's in length of service shall act as the IGADF.

## Chapter 8: Miscellaneous and Transitional

**Recommendation 39:** The legislation establishing the Office of the IGADF should provide a comprehensive statutory basis for the IGADF to delegate all necessary powers and functions including in respect of those conferred on a statutory Deputy IGADF the power to sub-delegate.

**Recommendation 40:** The offences provided for in s29-31 of *IGADF Regulation 2016* be provided for in the principal act and be reviewed to ensure that they extend to the full range of the IGADF's functions. There should also be an offence of taking reprisal action against any person because they have or are suspected to have made a complaint to the IGADF.

***Recommendation 41:*** The penalties for such a breach be increased to a maximum of imprisonment for 12 months or a penalty of 100 penalty units, or both.

***Recommendation 42:*** IGADF seek advice from the Solicitor-General with respect to the constitutional necessity for s28(1)(a) and (b) of the *IGADF Regulation 2016*.

***Recommendation 43:*** Information about IGADF's role and functions should be included in annual mandatory awareness training.

***Recommendation 44:*** The IGADF should have express authority to undertake a preliminary assessment to determine whether the commencement of an IGADF inquiry is warranted.

***Recommendation 45:*** The new IGADF legislation should include a transitional provision to deem that the current officer holder continue as if appointed by the Governor-General for a seven year term expiring on 30 November 2026.

***Recommendation 46:*** The Minister for Defence should commission a short focussed review before the initial establishment of the Office of the IGADF as a Commonwealth entity to report on whether its establishment under the new legislation has been adequately prepared for.

***Recommendation 47:*** Having regard to the rapidly changing environment in which Defence operates there should be an internal review into the operation of the Office of the IGADF commissioned jointly by the IGADF, the Secretary and CDF after five years of the Office's operation as a Commonwealth entity, followed by an external review commissioned by the Minister for Defence after ten years of its operation and that cycle should be continued thereafter.

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**TWENTY-YEAR REVIEW  
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REVIEW REPORT**

**Introduction**

1. Since the establishment of the Office of the Inspector-General of the Australian Defence Force (IGADF), there have been multiple reviews of the military justice system and aspects of IGADF's jurisdiction. As a consequence of some of these reviews, IGADF has been allocated responsibility for additional functions. However, none of these previous reviews has been a comprehensive review of the Office of the IGADF. The twentieth anniversary of IGADF's establishment provided the impetus and opportunity to review the legislative basis for current IGADF functions and how the Office of the IGADF is structured and resourced to achieve them.
2. The Secretary approached a previous Departmental Secretary, Mr Dennis Richardson AC, about assisting with the Review.<sup>1</sup> Terms of reference were agreed and Mr Richardson was appointed to conduct a review into the arrangements and composition of the IGADF and the office established to support the appointment holder. The Review report was to be submitted to the Secretary, CDF and IGADF by 31 July 2023.<sup>2</sup> Mr Richardson was in May 2023 for personal reasons unable to continue as the Reviewer.<sup>3</sup>
3. The Secretary, CDF and IGADF agreed that the Hon Duncan Kerr Chev LH SC, a former Federal Attorney General, former Federal Court judge and former President of the Administrative Appeals Tribunal, would be suitable to conduct the Review in place of Mr Richardson. When consulted, the Minister for Defence's office identified that because a comprehensive review of the Office of the IGADF is in effect a review of public policy, the Review consequently required Prime Ministerial approval. In August 2023, the Prime Minister agreed the proposal to conduct the Review and that Mr Kerr conduct it.<sup>4</sup> Mr Kerr was available to conduct the Review from October 2023. Mr Kerr was commissioned to conduct a complete review of the IGADF and its office. The Review Terms of Reference directed Mr Kerr to:
  - a. review the basis by which the statutory office is established,
  - b. consider and make findings and recommendations as appropriate about the functions, operation and composition of the office established to support the IGADF, and

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<sup>1</sup> [BN59800543](#) Email, Office of Secretary of the Department of Defence / IGADF, RE: 230207 - EMAIL - IGADF Twenty-year Review [SEC=OFFICIAL], 23 February 2023.

<sup>2</sup> [BN56713387](#) Terms of Reference – Review of the Office of the Inspector-General of the Australian Defence Force, 28 March 2023.

<sup>3</sup> [BN65751200](#) Terms of Reference – Review of the Office of the Inspector-General of the Australian Defence Force, 20 September 2023; [BN72109303](#) Review meeting, 26 September 2023.

<sup>4</sup> [BN77499249](#) Prime Minister letter, MC23-062667, 8 August 2023.

- c. prepare and deliver a report of findings and recommendations by 31 March 2024.<sup>5</sup>

## Background

4. In the late 1990s the results of a military police investigation into events at the 3rd Battalion, The Royal Australian Regiment (3 RAR) sparked widespread concern about the illegal enforcement of punishments, referred to as 'rough justice'. In response, the Chief of the Defence Force (CDF) initiated an inquiry into the operation of the military discipline system, and proposed to establish a military Inspector General. CDF appointed a former Federal court judge, Mr James Burchett QC, to conduct the inquiry. In addition to examining military justice issues, the inquiry was tasked to identify the role and functions of an Inspector-General of the Australian Defence Force (IGADF).<sup>6</sup>

5. The Burchett Inquiry did not find there was a 'culture' of illegal enforcement of discipline in the ADF, but noted the possibility of occasional lapses unless preventative steps were taken. The inquiry made multiple recommendations about operation of the military discipline system. The inquiry also addressed the difficulty in the resolution of problems where it is the operation of the chain of command itself that is impeached. The inquiry concluded that a military inspector general independent of the normal chain of command and answering directly to the CDF would provide greater assurance of independence for those complaints brought forward. It recommended a military inspector general be appointed.<sup>7</sup>

6. To provide further historical context an expanded summary of what occurred in response to the Burchett Inquiry's recommendations is at enclosure 1 to this report.

## IGADF office

7. In January 2003, CDF administratively established the Office of the IGADF. After a recruitment process, CDF appointed Mr Geoff Earley as IGADF. The new IGADF did not hold military rank because Mr Earley resigned his commission to take up the appointment. He was initially employed on a contractual basis at a Senior Executive Band 2 equivalency 'to get things going'.<sup>8</sup> This was considered the most expeditious method to create an IGADF. Defence considered that creation of a civilian public service position would not sustain the perception of independence expected of the IGADF. Defence was at the same time aware that the existence of such a contract might also give the perception that the position was not truly independent. Consequently work commenced on a bid to statutorily establish the IGADF position.<sup>9</sup>

8. The newly established IGADF's role was to provide CDF with internal audit and review of the military justice system independent of the ordinary chain of command. The military justice system included both the ADF discipline and the Defence Inquiries systems. The Office was to identify and examine military justice failures to ensure 'review and remedy are available and that

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<sup>5</sup> [BN65751200](#) *Terms of Reference – Review of the Office of the Inspector-General of the Australian Defence Force*, 20 September 2023.

<sup>6</sup> [BN72040788](#) *Report of an Inquiry into Military Justice in the Australian Defence Force conducted by Mr J.C.S. Burchett QC*, 12 July 2001, paras 1, 5, 66, and 266.

<sup>7</sup> [BN72040788](#) *Report of an Inquiry into Military Justice in the Australian Defence Force conducted by Mr J.C.S. Burchett QC*, 12 July 2001, paras 66-69 and recommendation 55

<sup>8</sup> [BN74788216](#) Review record of meeting on 23 November 2023

<sup>9</sup> [BN75297535](#) CDF/OUT/2005/734 of 01 June 2005

systemic causes of injustice (if they arise) are eliminated'.<sup>10</sup> IGADF functions fell into four principal areas:

- a. inquiries and investigations concerning the military justice system;
- b. performance review of military justice arrangements;
- c. provision of advice, particularly in relation to the conduct of administrative inquiries; and
- d. the development and promotion of military justice values.<sup>11</sup>

9. In its first year of operation, the Office of the IGADF conducted 30 inquiries and commenced an audit program.<sup>12</sup>

### Statutory appointment

10. In December 2005, IGADF became a Statutory Appointment under the *Defence Act 1903*, appointed by the Minister for Defence. The tenure of IGADF appointment was limited to five years, but reappointment to the position was made available. The stated purpose of the IGADF was to provide CDF with: a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and to provide CDF an avenue by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.<sup>13</sup>

11. Statutory IGADF functions were:

- a. to inquire into or investigate matters concerning the military justice system;
- b. to conduct performance reviews of the military justice system, including internal audits, at the times and in the manner the IGADF considers appropriate;
- c. to advise on matters concerning the military justice system, including making recommendations for improvements;
- d. to promote military justice values across the Defence Force; and
- e. to do anything incidental or conducive to the performance of any of the preceding functions.<sup>14</sup>

12. The Defence Act empowered IGADF to carry out preliminary assessments as to whether an inquiry or investigation should be conducted by IGADF, and to refer matters to other appropriate authorities to be dealt with.<sup>15</sup> IGADF was also empowered to conduct own-motion

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<sup>10</sup> [BN72567529](#) Defence Instructions (General) ADMIN 61-1—*Inspector-General of the Australian Defence Force—role, functions and responsibilities*, 23 August 2003.

<sup>11</sup> [BN72567529](#) Defence Instructions (General) ADMIN 61-1—*Inspector-General of the Australian Defence Force—role, functions and responsibilities*, 23 August 2003.

<sup>12</sup> [BN74788216](#) Review meeting, 23 November 2023.

<sup>13</sup> [BN75328743](#) *Defence Act 1903* with amendments up to Act No. 42 of 2005, Part VIII B, s110A.

<sup>14</sup> [BN75328743](#) *Defence Act 1903* with amendments up to Act No. 42 of 2005, Part VIII B, s110C (1).

<sup>15</sup> [BN75328743](#) *Defence Act 1903* with amendments up to Act No. 42 of 2005, Part VIII B, s110C (3).

inquires. The legislation permitted CDF to direct an IGADF inquiry. Under the legislation, IGADF was not compelled to conduct an inquiry in response to a request for inquiry or investigation by anyone else.<sup>16</sup>

### **Additional IGADF functions**

13. Over time, Defence identified additional functions that could be performed by IGADF. For example, in 2006, Defence conducted an audit of the ADF Service police investigative capability. The audit report recommended the ADF introduce a Professional Standards framework and complementary measures to distinguish between levels of misconduct, similar to that employed by the Australian Federal Police.<sup>17</sup> In 2007, the Chiefs of Service Committee (COSC) agreed that complaints of a professional nature involving Service police be referred to IGADF in order to promote confidence in the performance of the policing function, and to ensure accountability, trust, confidence and transparency in relation to complaints about Service police or their procedures.<sup>18</sup>

14. In 2008, CDF promulgated Service police professional standards including a Code of Conduct and direction to IGADF to oversee complaints made against Service police. Complaints made against Service police were to be categorised to determine the degree of oversight required in each case. Minor matters could be investigated at the unit level, while more serious complaints were to be investigated by the Service headquarters or the ADF Investigative Service (ADFIS). IGADF was responsible oversight of all such complaints, and for determining how serious complaints were to be managed. This could include an IGADF inquiry or investigation.<sup>19</sup>

15. In 2013, the professional standards investigations capability, previously located within ADFIS Headquarters was transferred to the Office of the IGADF. This transfer of responsibility was to ensure that the conduct of investigations into allegations of breaches of the Service police Code of Conduct was seen to be undertaken independently of the ADFIS and Service police functions.<sup>20</sup> The Office of the IGADF continues to investigate all complaints made against Service police and is responsible for making 'fit and proper person' assessments. IGADF has no executive or command power in relation to ADF members, but make recommendations to the chain of command in respect of those fit and proper person assessments.<sup>21</sup>

### ***Re-thinking Systems Review***

16. The Secretary and CDF commissioned a review of systems and processes for conducting inquiries, investigations, reviews and audits in Defence in 2011. The *Re-thinking Systems Review* was finalised in 2014 having identified that many aspects of Defence systems were unnecessarily complex, inefficient and legalistic.

<sup>16</sup> [BN75328743](#) *Defence Act 1903* with amendments up to Act No. 42 of 2005, Part VIII B, s110D.

<sup>17</sup> [BN76676181](#) *Report of an audit of the Australian Defence Force Investigative Capability*, 31 July 2006, paras 4.14 and 7.6.

<sup>18</sup> [BN76669616](#) COSC Outcome Agendum 13/07 – *Military Justice Implementation*.

<sup>19</sup> [BN76660824](#) CDF Directive 15/2008 – *Service police professional standards: A Code of Conduct and management of complaints against Service police*.

<sup>20</sup> [BN76867268](#) IGADF *Report for the period 01 January to 31 December 2013*.

<sup>21</sup> [BN72769352](#) CDF Directive 25/2019 – *Military Police Professional Standards Framework: A Military Police Code of Conduct and management of Military Police Professional Standards matters*.



17. As part of the Defence response to the Review, COSC in 2014 decided to pursue the following reforms:
- a. Transfer of responsibility for the investigation of Service-related deaths to IGADF, to provide a more efficient means than the CDF Commission of Inquiry construct while assuring the government and the public that Defence is responding appropriately to Service deaths.
  - b. Consolidate the layers of the ADF Redress of Grievance process and transfer management of the process to IGADF to provide a quicker, more independent and expert mechanism for ADF members to seek formal review of decisions.
  - c. Legislative amendments to enhance IGADF's independence from the ordinary chain of command, in order to reinforce the integrity and credibility of this office<sup>22</sup>

### Service-related deaths

18. The *Re-Thinking Systems Review* identified the CDF Commission of Inquiry process as extremely costly and inefficient. As part of the remedy, *Defence (Inquiry) Regulations 1985* were amended to remove the automatic requirement for all Service-related deaths to be investigated through a CDF Commission of Inquiry (unless directed otherwise by the Minister for Defence). CDF directed that IGADF manage all initial administrative inquiries into the death of an ADF member from 1 July 2014.<sup>23</sup>

19. Staff transferred from the CDF Commission of Inquiry cell to IGADF to form the new Directorate of Select Incident Review (DSIR), responsible to coordinate and manage inquiries into deaths of ADF members and other serious incidents. DSIR was directed by an O6 ADF legal officer and the directorate comprised five permanent ADF members, including four legal officers, and an Australian Public Service (APS) officer. The work of the Directorate was supplemented by the use of part-time Reserve officers as necessary.<sup>24</sup>

20. In 2015, the *Defence Act 1903* was amended to provide a statutory basis to support regulatory changes including reallocation of responsibility for investigation of Service deaths to IGADF.<sup>25</sup> IGADF was now responsible for determining in each case the process for reviewing or investigating each death. For example, though conduct of a public hearing, conduct of an inquiry in private, or conduct of a desktop review only.<sup>26</sup>

<sup>22</sup> [BN76597996](#) *Re-think Systems Review – summary of agreed reforms*, accessed at [Re-Thinking Systems Review | Defence](#), 15 January 2024.

<sup>23</sup> [BN76724130](#) CDF Directive 16/2014 – *Reporting of deaths of ADF members and support to IGADF and CDF-appointed inquiries*.

<sup>24</sup> [BN76813478](#) *IGADF Report for the period 01 January 2014 to 30 June 2015*.

<sup>25</sup> [BN76618556](#) *Defence Legislation Amendment (Military Justice Enhancements— Inspector-General ADF) Act 2015*, Amendment 5.

<sup>26</sup> [BN76607684](#) COSC Outcomes Agendum 33/14 – *Enhancing ADF decision-making guidance, Redress of Grievance process and investigation and inquiry practice - Response to Re-thinking Systems Review; and Sponsor's Executive Summary*, paras 28-33.

## Redress of Grievance

21. The Redress of Grievance process managed by Complaints Resolution in Defence People Group had included up to three layers of review. This multi-layering created delays, duplicated effort and delayed achievement of finality in decision-making. COSC decided to replace this process with a single right of complaint to a member's Commanding Officer followed by one opportunity of formal review, to be undertaken by IGADF. The intent was for most grievances to be dealt with in the first instance as an ordinary function of command and leadership, by commanders exercising discretion to consider and review matters.<sup>27</sup>

22. Staff transferred from the Defence People Group to IGADF to form the new Directorate of Military Redress and Review (DMRR) on 1 July 2014. In addition to a new APS Director, DMRR comprised four APS officers, including one legal officer and two case officers, and 15 permanent and part-time Reserve ADF members, including seven case officers. DMRR managed the formal grievance and complaint processes and prepared review briefs for final decision by CDF and Service Chiefs, initially using the extant Redress of Grievance process.<sup>28</sup>

23. The 2015 amendment to the *Defence Act 1903* provided for regulatory changes to fully implement the new Redress of Grievance process. In October 2016, Part 7 of the *Defence Regulation 2016* provided for the streamlined complaint handling process.<sup>29</sup> Consideration by IGADF continues to be a safeguard for ADF members who feel they are not able to obtain redress from their immediate commanders; for example, because the complaint involves their chain of command or superior officer, or where they are dissatisfied with the response of the Commanding Officer to their complaint.<sup>30</sup> ADF members who are dissatisfied with the outcome of the IGADF consideration may seek further review from the Defence Force Ombudsman.

## Legislative amendments

24. In order to enhance the independence of IGADF, COSC agreed there should be a separate IGADF regulation, that IGADF should report directly to Parliament, and that IGADF should have powers and protections similar to an Ombudsman. In addition to managing the ADF Redress of Grievance process and conducting investigation or review of service-related deaths, IGADF would continue to provide military justice oversight, including investigating complaints against Service police. The IGADF would also conduct investigations into 'hard cases' at the request of the CDF and Service Chiefs.<sup>31</sup> In 2015 Parliament agreed amendments to the *Defence Act 1903* to:

- a. Make it clear that the IGADF mechanism for internal audit and review of the military justice system is independent of the ordinary chain of command.

<sup>27</sup> [BN76597996](#) *Re-think Systems Review – summary of agreed reforms*, accessed at [Re-Thinking Systems Review | Defence](#) on 15 January 2024

<sup>28</sup> [BN76813478](#) *IGADF Report for the period 01 January 2014 to 30 June 2015*

<sup>29</sup> [BN76753970](#) *IGADF Report on first 18 months of operation of the new Redress of Grievance Process under the Defence Regulation 2016*

<sup>30</sup> [BN76607684](#) COSC Outcomes Agendum 33/14 – *Enhancing ADF decision-making guidance, Redress of Grievance process and investigation and inquiry practice - Response to Re-thinking Systems Review; and Sponsor's Executive Summary*, paras 6-10

<sup>31</sup> [BN76607684](#) COSC Outcomes Agendum 33/14 – *Enhancing ADF decision-making guidance, Redress of Grievance process and investigation and inquiry practice - Response to Re-thinking Systems Review; and Sponsor's Executive Summary*, paras 35-36

- b. Provide for the Minister to direct IGADF to investigate or inquire into a matter concerning the Defence Force.
- c. Make it clear that the IGADF may be prescribed functions that relate to a member's service in the Defence Force other than the military justice system.
- d. Make it clear that regulations can be prescribed that abrogate the privilege against self-incrimination for witnesses appearing before the IGADF or inquiry officers appointed by the IGADF, as is the case for Boards of Inquiry and other types of inquiry appointed in Defence. Evidence given by a witness under any such regulatory abrogation of the privilege against self-incrimination attracts a statutory bar on that evidence being used against the witness giving it, excepting use of the evidence for proceedings for giving false evidence to the inquiry.
- e. Require the IGADF to prepare an annual report relating to the operations of the IGADF for tabling in Parliament.
- f. Strengthen the independence of IGADF by making it clear that, where CDF directs IGADF to conduct an inquiry or investigation, the IGADF may cease the inquiry or investigation if the IGADF forms a belief that the continuation of the inquiry or investigation is not otherwise warranted, having regard to all the circumstances.<sup>32</sup>

**IGADF Regulation 2016**

25. In 2016, *IGADF Regulation 2016* was made in a separate instrument to reflect the statutory independence of the IGADF from the ordinary chain of command. In addition to the IGADF functions specified in the *Defence Act 1903*, the Regulation prescribed the following as functions of the IGADF:

- a. to inquire into the death of a member of the Defence Force, where the relevant death appears to have arisen out of, or in the course of, the member's service in the Defence Force;
- b. to inquire into complaints made by members of the Defence Force under Part 7 of the *Defence Regulation 2016*;
- c. to inquire into or investigate complaints relating to Service police officers; and
- d. to advise on, or determine, the procedure for handling complaints relating to Service police officers, including conducting audits of the implementation of the complaint-handling procedure.<sup>33</sup>

**Assistant IGADF appointments**

26. The *Defence Act 1903* empowered IGADF to appoint a person as an inquiry officer, inquiry assistant, or Assistant IGADF. Eligibility for such an appointment was detailed in *IGADF Regulation*

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<sup>32</sup> [BN75342202](#) *Defence Legislation Amendment (Military Justice Enhancements— Inspector-General ADF) Bill 2014 – Replacement Explanatory Memorandum.*

<sup>33</sup> [BN76743585](#) *IGADF Regulation 2016* as made.

2016 and allowed for appointment of any member of the Defence Force, an APS employee or any other person who has agreed in writing to the appointment. As well as using permanent ADF and APS staff, the IGADF makes extensive use of legal officers and previously permanent officers now serving in the Reserve to conduct inquiries as Assistants IGADF. At times these ADF members included members of the Reserve who were also judicial officers.

27. A question was later raised in 2018 about the constitutional validity of a Judge of a court, or a State or Territory, vested with federal jurisdiction, being appointed or acting as an Assistant IGADF. Defence amended *IGADF Regulation 2016* to address the risk that such an appointment may be incompatible with the performance of such a person's judicial functions. This amendment removed the capacity for the IGADF to modify a report prepared by an Assistant IGADF who is a judge, and the capacity for the IGADF to influence the conduct of the inquiry or personally take part in the inquiry in such a case.<sup>34</sup>

### **Inquiry information disclosure**

28. The *IGADF Regulation 2016*, as made, required IGADF to provide a report about an inquiry to the Minister or CDF when they directed that inquiry. Also, IGADF must provide the report into an inquiry into the death of a member of the Defence Force. The recipient, whether Minister or CDF, may publicly release all or part of the report. Where IGADF has not been directed to conduct an inquiry and instead has conducted an 'own-motion' inquiry, IGADF may provide the findings and/or the inquiry report to any person for whom they believe it is appropriate to do so in the circumstances.

29. In 2021, a suggestion was made that the IGADF's disclosure powers should be strengthened to provide a clearer statutory basis for provision of inquiry information to law enforcement and other agencies. Defence amended *IGADF Regulation 2016* to allow IGADF to disclose information relating to the conduct of an inquiry, including the inquiry report, to law enforcement agencies and other agencies such as regulatory bodies and State and Territory courts including coroners' offices. The IGADF may do so when they consider the information to be relevant to the performance of that agency's functions and in a form appropriate for disclosure to that agency.<sup>35</sup>

### **National Anti-Corruption framework**

30. In 2022, enactment of the *National Anti-Corruption Commission Act 2022* (NACC Act) confirmed IGADF as a Commonwealth Integrity Agency, and the IGADF as the head of that agency.<sup>36</sup>

31. In respect of suspected corruption issues in Defence, the NACC may itself investigate, or alternatively refer these issues to IGADF for investigation. The legislation also allows for the NACC to jointly investigate an issue that could involve serious or systemic corruption. As such IGADF could be a joint investigator where a matter is within IGADF jurisdiction.

<sup>34</sup> [BN76752361](#) *IGADF Regulation 2016*, 13 October 2018.

<sup>35</sup> [BN76756030](#) *IGADF Amendment Regulations 2021 Explanatory Statement*.

<sup>36</sup> [BN76814908](#) *National Anti-Corruption Commission Act 2022* Subsections 11(1) and 15(p).

32. As a consequence of the raising of the NACC, *IGADF Regulation 2016* was updated in 2023 to specify that IGADF may disclose inquiry-related information to the NACC.<sup>37</sup>

33. IGADF is working with the NACC to clarify how the overlap of jurisdictions will operate in practice.

### **Operating environment**

34. The demands placed on the Office of IGADF have increased in complexity and volume, both in the office's daily work, and support to work in addition to its core functions. This includes an increase in the amount and type of support needed by external review and/or legal processes such as the Royal Commission into Defence and Veteran Suicide, matters otherwise under investigation or before the courts, and the Administrative Appeals Tribunal. There has also been a significant increase in Defence activity that requires IGADF review and input; for example, the Enterprise Resource Planning (ERP) Case Management System project.

35. Each of these activities requires different but significant input from the IGADF. IGADF is in a position where it cannot not support these activities. Each such activity requires significant and specific assistance.

36. The work involved to produce inquiry-related information to the Royal Commission has been substantial. Supporting the Office of the Special Investigator (OSI) has also involved considerable effort. IGADF expects the support to increase as the work of the OSI continues, and as the OSI refers matters to the Commonwealth Director of Public Prosecutions.

### **Twenty-Year Review**

37. The Twenty-Year Review of the IGADF was publicly announced on the IGADF website on 28 September 2023. The Review also called for public submission on 30 October, 1 November and 15 November 2023 with an advertisement published in a variety of national, metropolitan and regional newspapers. The Review received 15 written submissions.

38. The Reviewer completed a comprehensive desktop review of the relevant legislation and Defence policies.

39. The Reviewer conducted 43 meetings with internal and external stakeholders. These included meetings with Defence and other Commonwealth officials, advocates and members of the public who have been critical of the IGADF, and Commissioners on the Royal Commission into Defence and Veteran Suicide.

40. The Review conducted ten roundtable discussions with currently serving ADF personnel at the 3rd Brigade, RAAF Base Townsville, HMAS *Cairns* and the 51st Far North Queensland Regiment. The Review also held a round table discussion with Ex-Service Organisations in Sydney.

41. The Reviewer also observed IGADF audits conducted at two joint training establishments in Bandiana. During these audits, the Reviewer was provided an opportunity to speak to focus groups assembled for the IGADF audit after they had completed audit process.

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<sup>37</sup> [BN75353016](#) *National Anti-Corruption Commission (Consequential Amendments) Regulations 2023*

42. The stakeholders the Review met with are listed in annex A to this report.

43. The Review also received a number of written submissions. A number of these submissions focussed upon an individual matter and how the Office of the IGADF had managed a particular inquiry. The Review does not suggest that anyone who made a submission critical of the integrity of the current or former IGADF held the views they expressed other than in good faith.

44. However, while this Review had no formal investigative powers, the Review did seek and obtain relevant background materials sufficient to satisfy itself that its trust in the integrity of the two individuals who have held the office of the IGADF since its establishment was not misplaced. That issue is returned to, and the Review's conclusions are set out, in more detail below.

### CHAPTER 1: INDEPENDENCE OF THE IGADF

45. The Review has been impressed by the unanimity expressed at the highest levels of Defence that confidence in the independence of the IGADF is critical if those who serve and the community at large is to have faith in the ADF and its military justice system.

46. The observations of the Hon PLG Brereton AM RFD SC who met with the Reviewer go to that very question. At the time a Supreme Court justice and a Major General in the Army Reserve, Mr Brereton undertook the IGADF Afghanistan Inquiry as an Assistant IGADF. More recently he became Australia's first National Anti-Corruption Commissioner. Mr Brereton commented as follows:

In my experience and to my observation, the office of IGADF is robustly independent, and its independence is respected by the commander of the ADF. I have not encountered or observed any impediment to or fetter on the independence of the IGADF. I have worked with and for the current IGADF extensively, and have seen nothing to suggest that he is other than entirely independent of and unconstrained by command. I know from my discussions with him that he holds to that view, and is protective of the independence of his office, which is demonstrated by the circumstance that his office has not infrequently produced reports that are critical of command at diverse levels. During the course of the Afghanistan Inquiry, I encountered no hint of pressure or influence, as to the direction, subject matter or outcomes of the inquiry, from the IGADF or from command; universally I received the impression that all wanted only for the truth to be discovered, regardless of the implications. Although I did not know the previous as [sic] IGADF well, my limited observation of and encounters with him and his work – including in particular some of his reports, which I have had occasion to read in the context of subsequent inquiries - again indicates nothing other than the independence of mind, thought and attitude that the office is intended to enjoy.<sup>38</sup>

47. The Review also met with the Commonwealth Ombudsman, Mr Iain Anderson. The Ombudsman has an oversight function in that it may receive complaints about Defence and the IGADF.

48. Mr Anderson confirmed that the Ombudsman had never been concerned by what it had seen regarding the work of the IGADF sufficient to make any recommendation, suggestion or comment. He noted that the IGADF had never met the threshold for concern by his office. To the

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<sup>38</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024.

contrary he advised that complaints about Defence had trended downwards since the IGADF had been given responsibility for the management of the Redress of Grievance process.<sup>39</sup>

49. The Review shares those impressions.

50. However, were this Review simply to express its confidence in the independence of the IGADF it would miss a key point. While actual independence is critical, so too is the acceptance of that understanding in the wider community.

### **Perceptions of a lack of independence**

51. The Review has been made aware that a not insignificant body of well-motivated critics have come to share a quite different perception. Their perception is that the IGADF remains 'umbilically linked' to the command structure of the ADF and, as a result, is not and has never been truly independent.

52. A developed example of that perspective appears in *Failures of Command*, a book written by Mr Hugh Poate. Mr Poate is the father of a service member who had been shot and killed during an insider 'green on blue' attack in Afghanistan. His son's death later became the subject of an IGADF inquiry. Mr Poate's book contains a scathing criticism of that process. He writes:

Despite public relations claims by Defence to the contrary, the IGADF has an umbilical attachment to the ADF chain of command. This situation fits the principal of 'regulatory capture', where a regulatory body has been created to act in the public interest, but it also conducts itself to protect or further the interests of the organisation it is charged with regulating.<sup>40</sup>

53. The Review met with Mr Poate and a number of other of the IGADF's most stringent critics. It is grateful for the insights they offered. That the Review differs from their assessments is ultimately inconsequential. The views they expressed as to the IGADF's perceived want of credible independence have become and are too widely shared and ingrained in public discussion to permit their concerns and perceptions to be ignored as unfounded or dismissed by bland reassurances to the contrary.

54. All human institutions make errors; as noted, those this Review is aware of committed by the IGADF do not justify a conclusion of want of independence.

55. However, those who have expressed scepticism about the independence of the work of the IGADF plausibly refer to aspects of its structuring as the basis of a more cynical assessment. Those include indicia such as that the Assistant IGADFs who routinely undertake the work of the office subject to the IGADF's oversight are usually permanent or Reserve members of the ADF. As such they notionally remain subject to command. The indicia they cite also include that the IGADF does not have a separate physical or electronic address distinct from the ADF, that the Office of the IGADF is not a separate Commonwealth entity responsible for its own administration as a separate agency, and that the establishment and functions of the IGADF is to be found in Part VIII B of the *Defence Act 1903* rather than in standalone legislation.

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<sup>39</sup> [BN74785958](#) Review meeting, 28 November 2023.

<sup>40</sup> [BN72107219](#) Poate, Hugh. *Failures of Command: The death of Private Robert Poate*, New South Publishing Sydney, NSW 2021, p296. A criticism repeated in Mr Poate's submission to the Review.

56. Even some elements of the statutory scheme for the Office of the IGADF are contended to lend weight to that perception.

57. That there may be a basis for that perception is an artefact of history.

**Language used in the legislation**

58. In his *Report of an Inquiry into Military Justice in the Australian Defence Force July 2001* Mr Burchett QC recommended, inter-alia, that a Military Inspector General be appointed to provide the CDF with oversight of the military justice system, ‘independent of the ordinary chain of command’.<sup>41</sup>

59. The legislation establishing the IGADF understandably drew on the language Mr Burchett had used when he had recommended a Military Inspector General be appointed to be directly responsible to the CDF.

60. Using the same language when implementing the later decision to create a statutory IGADF inadvertently left room for some ambiguity.

61. The 2005 Explanatory Memorandum for the Bill for an Act to establish the Office of IGADF referred to the object of establishing the IGADF a statutory office holder as follows:

to provide a mechanism for internal audit and review of the military justice system which is independent of the ordinary chain of command and an avenue by which failures in the military justice system can be exposed and examined in order to assist in remedying any injustice.<sup>42</sup>

62. In its current form s110A is as follows:

The main object of this Part is to provide the CDF with:

(a) a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and

(b) an avenue, independent of the ordinary chain of command, by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.<sup>43</sup>

63. That statutory language thus refers to a main object of the IGADF as being to provide CDF with a mechanism for ‘internal’ audit and review of the military justice system ‘independent of the ordinary chain of command’.

64. A number of critics who have expressed strong scepticism about the independence of the IGADF told the Review that they read those provisions as locating the IGADF as ‘internal’ to the ADF and as authorising the CDF to exercise final command over the holder of that office.

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<sup>41</sup> [BN72040788](#) *Report of an Inquiry into Military Justice in the Australian Defence Force conducted by Mr J.C.S. Burchett QC*, 12 July 2001, paras 66-69 and recommendation 55.

<sup>42</sup> [BN75325708](#) *Defence Legislation Amendment Bill (No. 2) 2005 Explanatory Memorandum*, para 36.

<sup>43</sup> [BN73153839](#) *Defence Act 1903*, compiled 1 September 2021.



65. Why they ask, if that is not the case, is the IGADF guaranteed independence only from the 'ordinary chain of command'?

66. Indeed the 2005 Explanatory Memorandum might be thought to assume the correctness of that understanding:

For the position of the Inspector General ADF to work successfully, he or she must enjoy the confidence of Chief of the Defence Force and be able to work with Chief of the Defence Force, particularly noting Mr Burchett's recommendation that Inspector General ADF should be directly responsible to the Chief of the Defence Force.<sup>44</sup>

Such a reading of s110A, understood as conferring command authority upon the CDF, while not shared by the Review, is not wholly implausible.

67. However, that acknowledged, it is important to record that, in practice, the independence of the IGADF has never been put in issue by the CDF.

### **Practical independence**

68. Both Mr Earley and his successor in the office of IGADF, Mr James Gaynor made it clear to the Review that no present or past CDF has ever sought to issue a command or to trench in any way on their independence in carrying out their statutory duties.

69. The Review met with Defence's military and civilian leadership. All confirmed to the Reviewer that Defence in all its manifestations is convinced of the need for, and places a high value on the independence of the IGADF.

70. As Mr Matt Yannopoulos, Associate Secretary, Department of Defence put it in everyday language: 'If you didn't have an IGADF you would have to invent it'<sup>45</sup>.

71. Defence relies on IGADF's standing as an independent inquirer to provide it and the wider community with an assurance of probity in the operation of the military justice system as it equally does with respect to the additional functions the IGADF later acquired.

72. Having regard to those mutually reinforcing circumstances and that history, it is entirely improbable that circumstance might arise as would require judicial attention to be given to the correct construction of the language of s110A.

73. Yet perceptions matter and have real world consequences notwithstanding the absence of facts that can be proven.

74. An apprehension based on reasonable grounds is a reason for disqualifying an administrative or judicial decision maker notwithstanding there are no facts that can be proven that the decision maker would be actually biased.

75. Mr Earley and Mr Gaynor each resigned their former military commissions before taking up office as IGADF. They did not do so because they doubted their own probity and robust

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<sup>44</sup> [BN75325708](#) *Defence Legislation Amendment Bill (No. 2) 2005 Explanatory Memorandum*, para 113

<sup>45</sup> [BN72109490](#) Review meeting, 28 September 2023

independence, but to avoid the perception, however unjustified it might be that they might be influenced by a conflict of interest. However, that step alone has proved insufficient to satisfy external critics of the office.

### **The Defence operating environment**

76. Viewed from one perspective Defence is, as Dennis Richardson put it, the most complex piece of bureaucratic architecture that has ever existed in Australia. It operates in an environment in which change is a constant and reviews proliferate. When the IGADF was first stood up the Australian military still comprised three distinct service arms, Navy, Army and Air Force, each separate from the Department of Defence.

77. The ADF now operates as a single entity under the unified command of the CDF. Moreover, in response to the changing strategic environment the ADF has been organically integrated into the 'One Defence' structure. ADF, Defence contractors and public servants now often work alongside each other.

78. But viewed from another perspective, the role of the ADF remains as it has always been. It is to maintain Australia's highest possible readiness for war fighting. To do so it must continue to recruit men and women from all walks of life and integrate them into a command based system in which the use of controlled lethal force may be required of them.

79. In undertaking that task at the scale that is necessary it is inevitable that sometimes things will go wrong. Their going badly wrong in 3 RAR in 1998 is what led, in the aftermath of the Burchett Report, to the establishment of the IGADF.

80. It is uncontentious that much changed for the better since the IGADF was stood up.

81. The bastardisation of recruits and trainees is no longer tolerated. Such practices have been largely stamped out. Physical force is no longer tolerated as an appropriate tool of training or discipline.

82. But in any large group of men and women instances of bullying and sexual harassment will happen. So too will instances of misuse of power. In a disciplined force in which group loyalty is necessary and small teams often work together there will be pressures to not rock the boat. Vigilance remains required to ensure that the military justice system works effectively and does not turn a blind eye to such instances. They need to be dealt with before they become normalised. The inquiry and audit functions of the IGADF are essential in those regards.

83. Moreover, the task of management of the ADF's human capital has become more complex.

84. The ADF now works closely with public servants and contractors in an integrated 'One Defence' environment. In consequence a service member can be bullied or abused by a civilian employee of Defence or vice-versa.

85. The pool of people recruited to the ADF necessarily has become more gender and culturally diverse. Retention as well as initial recruitment is increasingly challenging. If there ever

was a time when members of the ADF could be expected to just rub along in a quasi-macho culture which does not respect them, that time is now well past.

86. Defence can only meet its personnel objectives by sustaining a culture that not only drives high performance but also prioritises the physical, mental and emotional health of those who serve in its armed forces.

87. That necessity has been repeatedly acknowledged by Defence. Its most recent expression is contained in the Secretary and the CDF's 30 November 2023 joint statement '*Commitment to a Culture that values our People and Serves to Defend Australia*'.<sup>46</sup>

88. Those factors underpin this Review's premise that the value proposition of the IGADF to Defence requires it not only to be independent in its operations but to be acknowledged as such by those with whom it has dealings.

### **Evolution of the Office of the IGADF**

89. In the 20 years of its existence the IGADF has had additional supervisory and probity functions added to its core responsibility of maintaining the credibility of the military justice system—the superintendence of the Redress of Grievance scheme, the management of complaints of misconduct within the military police and inquiring into any death of a serving ADF member.

90. What is common to all of those quite different responsibilities is that they have been conferred on the IGADF because it is familiar with and understands the ADF but, at the same time, is expected to be robustly independent of its chain of command.

91. It is predictable that should other instances arise where a Defence function is thought to require independent external review or oversight that duty will also be conferred on the IGADF.

92. The Review has earlier noted that Defence relies on IGADF's standing as an independent inquirer to provide it and the wider community with an assurance of probity in the operation of the military justice system. The IGADF must have an unquestioned reputation of independence if it is to perform that function for Defence.

93. As a commentator recently noted:

Military service is unique in society. It comes with the obligation of 'unlimited liability' which requires uniformed personnel to surrender certain rights, subject themselves to military law (by obeying lawful orders) and, ultimately, to accept that the risk of injury or even death comes with the obligation to serve.<sup>47</sup>

94. In exchange for that surrender, members of the armed forces are entitled to expect that they will be treated honourably and fairly. If there is any lack of confidence in that expectation,

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<sup>46</sup> [BN75102445](#) Defence, *Commitment to a culture that values our people and served to defence Australia*, 30 November 2023.

<sup>47</sup> [BN76898810](#) Professor Langford, DSC and Bars (Phd), 'No silver bullet for our shortages in Defence', *The Australian*, 17 January 2024, p11.

the already challenging task of recruitment and retention will continue to worsen and will threaten Defence capabilities.

95. Potential recruits and their families are entitled to be confident that a truly independent avenue of redress will be available if in addition to the inherent risks of military training and operations they or their loved ones are ever bullied or abused—or a complaint about misuse of the power of command has been unfairly dealt with.

96. Defence relies on the IGADF to provide its personnel and their families with that assurance of trust and fairness in the military justice system.

97. For that reason any want of confidence in the independence of the IGADF within the service or the broader Australian community diminishes the credible value of the proposition the IGADF offers the Australian Government and Defence.

### **A substantive response**

98. The Review has noted that a not insignificant number of well-motivated critics of the IGADF have expressed skepticism about its independence. Many of the concerns that have generated that critique have roots in dissatisfactions relating to the way in which the IGADF has undertaken its function of investigating service deaths. Some of those criticisms are justified. The Review addresses the subject of service deaths in greater detail later in this report.

99. The way forward this Review proposes is to recognise that those perceptions exist and that they can be, and should be, substantively responded to.

100. While the Review again restates its confidence in the actual independence of the IGADF, it is undoubtedly true that some of the indicia of formal independence that other integrity organisations possess are lacking in the instance of the Office of the IGADF. Their absence provides fertile ground for misapprehensions to be formed. It is timely and important to address those issues head-on before such apprehensions become entrenched as the default view.

101. The Review is persuaded that it is time to update the legislation governing the establishment and functions of the IGADF.

102. Presently those provisions are located in Part VIII of the *Defence Act 1903*. The Review is satisfied that that gives too little prominence to the independent functions that the IGADF serves. The Review therefore proposes that Part VIII of the *Defence Act 1903* be replaced by standalone legislation and standalone supporting regulations.

103. The Review has already noted the awkward ambiguity in the expression of the objects of the IGADF as are presently stated in s110B of the *Defence Act 1903*. It is satisfied that the changes in the Defence environment should be responded to by an objects clause in the stand-alone legislation establishing the Office of the IGADF referring to Defence as a whole. That will require the deletion the potentially misleading references to its functions being internal to the ADF and independent only from the ordinary chain of command.

104. The Review accordingly proposes that the objects of the legislation establishing the Office of the IGADF be restated without any potential that they might be read as permitting the CDF to give commands to the IGADF.

105. The new legislation accordingly should provide that the object of the Office of the IGADF is to provide Defence with:

- a. a mechanism for audit and review of the military justice system independent of the ADF chain of command; and
- b. an avenue independent of the ADF chain of command by which failures and flaws in the military justice system can be exposed and examined so that any injustice (whether systemic or otherwise) may be remedied.

106. The object clause should also encompass the three additional functions that have been conferred on the IGADF since its establishment:

- a. superintendence of Redress of Grievance,
- b. investigation of deaths of service personnel, and
- c. review of military police professional standards.

107. It should also anticipate that the IGADF may in the future be conferred with additional integrity functions by regulation.

108. Those changes would not disturb the existing legal position that the product of an IGADF function is not self-executing. The Review has proceeded on the basis that the ADF is a disciplined force and that responsibility for outcomes within that disciplined force must continue to reside in its chain of command and, ultimately, in the CDF. The IGADF is not a substitute decision maker. Only in respect of making a determination about the propriety of a person's service in the military police are its outcomes binding. The Review does not suggest any change to that position.

109. However, later recommendations of this Review propose measures intended to ensure greater transparency in how the IGADF's recommendations are dealt with by those holding command.

**RECOMMENDATION 1: Part VIII of the *Defence Act 1903* be repealed and in lieu thereof the Office of the IGADF be established by standalone legislation and supporting regulations.**

**RECOMMENDATION 2:** The Object of the Act establishing the Office of the IGADF should be to provide Defence with:

- (a) a mechanism for audit and review of the military justice system independent of the ADF chain of command;
- (b) an avenue independent of the ADF chain of command by which failures and flaws in the military justice system can be exposed and examined so that any injustice (whether systemic or otherwise) may be remedied;
- (c) superintendence of Redress of Grievance applications made by members of the ADF;
- (d) a mechanism for oversight of military police professional standards, and inquiry or investigation of complaints concerning military police; and
- (e) a mechanism for review and inquiry into the death of ADF members with proximate ADF service by which failures and flaws in the Defence system can be exposed and examined so that the risk of reoccurrence may where possible be addressed.

#### **Own motion Inquiry and information gathering powers**

110. The IGADF has no present capacity to initiate 'own motion' investigations into issues of misconduct in Defence if those involved are not confined to members of the ADF. The present provision is inappropriate having regard to the evolution of the One Defence doctrine and the fact that the ADF now works closely with APS and contractors in an integrated One Defence environment. In consequence a member of the ADF potentially can be bullied or abused by a civilian employee of Defence or vice-versa.

111. The functions of the IGADF as are currently stated in 110C(e) and (f) of the *Defence Act 1903* should be amended to ensure that the IGADF has clear authority to initiate an own motion investigation into any matter concerning alleged or suspected misconduct in respect of a matter in which a member of the ADF is involved. Further, the distinction that is currently reflected in s23 of the *IGADF Regulation 2016* that confines certain information gathering powers of the IGADF to an investigation that has been undertaken at the direction of the Minister or CDF, should be abolished. That limitation is inappropriate to retain given the evolution of the One Defence doctrine.

112. Both of those provisions are inconsistent with IGADF being, and be seen to be, independent of the CDF.

113. For avoidance of doubt the Review would retain the right of both the Minister and CDF to direct the IGADF to conduct a wider inquiry into any matter involving Defence.

**RECOMMENDATION 3:** Amend the IGADF functions as currently stated in 110C(e) and (f) of the *Defence Act 1903* to ensure IGADF has power to initiate on their own initiative an investigation into any matter concerning alleged or suspected misconduct in respect of a matter in which a member of the ADF is involved, while preserving the right of both the Minister and CDF to direct IGADF to conduct a broader inquiry as they may think appropriate.

**RECOMMENDATION 4:** Remove the distinction currently reflected in s23 of *IGADF Regulation 2016* that confines certain information gathering powers to an inquiry that is undertaken at the direction of the Minister or CDF.

### IGADF tenure and appointment

114. One of common indicia of robust independence that other integrity organisations possess is security of tenure. That sometimes is coupled with such tenure as has been provided for being limited to a single term. The latter is prophylactic against the prospect that the holder of an integrity office will pull their punches or defer to the re-appointing entity (or those with influence upon that entity) in order to keep their job.

115. In discussion with key internal and external stakeholders the Review has been impressed by their common assent to the proposition that the perception that the IGADF should be appointed by the Governor-General. There has also been common assent to the proposition that any such appointment should be for a single non-renewable term of seven years. A single term of seven years accords with international best practice for government institutions involved in the promotion and protection of human rights, good governance and the rule of law.<sup>48</sup>

116. In a note to this Review Mr Brereton put the argument for such a term limit with force and brevity that the Review cannot improve upon:

The independence of the IGADF would be further enhanced if the appointee were not eligible for re-appointment. This would remove any actual or perceived reluctance to make adverse findings that might be produced by a desire, unconscious or otherwise, to secure reappointment. This consideration applies equally, regardless of whether or not the IGADF has a recent – or any – ADF background. However, particularly if the appointee is not to be eligible for re-appointment, the term of appointment should be seven rather than the current five years. Many independent statutory officer appointments are for seven-year terms. A seven-year term would support stability and consistency, particularly if an appointee were not eligible for re-appointment. It would also be more likely to attract quality applicants.<sup>49</sup>

117. The Review is satisfied that to best secure the appearance of independence, as well as its fact, the legislation establishing the Office of the IGADF provide that future IGADFs be appointed by the Governor-General for a single non-renewable term of seven years.

<sup>48</sup> [BN74990910](#) UN General Assembly, Seventy-seventh session, Third Committee, Agenda item 68(b), *The role of Ombudsman and mediator institutions in the promotion and protection of human rights, good governance and the rule of law* of 1 November 2022; and [BN74991421](#) European Commission for Democracy through Law, *The Venice Principles*, endorsed 2 May 2019.

<sup>49</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024.

118. The Governor-General should be able to terminate the appointment of the IGADF only for the reasons presently provided in s110L of the *Defence Act 1903*.

**RECOMMENDATION 5: To secure the appearance of independence, as well as its fact, the IGADF be appointed for a single non-renewable term of seven years.**

**RECOMMENDATION 6: The IGADF be appointed by the Governor-General.**

**RECOMMENDATION 7: The Governor-General should be able to terminate the appointment of the IGADF only as presently provided for the Minister pursuant to s110L of the *Defence Act 1903*.**

### IGADF selection

119. The Review notes that both Mr Earley and Mr Gaynor voluntarily resigned their commissions prior to their taking up their positions as IGADFs. That was an act of sound judgment. It avoided the potential for a conflict of interest to arise. However, the Review believes that this should not be optional. The Review would not preclude a serving member of the ADF from an appointment as the IGADF or a Deputy IGADF. Recent membership of the ADF has not compromised the independence of either of those who have held the principal office to date. However, a person with such a history should be required to resign their commission before taking up their office.

120. The reference in the above to 'a Deputy IGADF' anticipates some later recommendations of this Report which are premised on the IGADF's duties already being both too diverse and too significant for any one person to effectively oversight. They reflect that focussed attention needs to be given to certain specific responsibilities. The Review proposes the appointment of two statutory Deputy IGADFs. That subject needs greater development and will be returned to later. However, it is necessary to anticipate that recommendation because some of the following proposals assume that course will be adopted.

121. With respect to the required qualifications for appointment as IGADF some of the well-motivated critics of IGADF the Reviewer met with suggested that a respected retired judge coming from outside of Defence would bring independence to the role and was the kind of person who should be appointed as the IGADF. However after giving the matter further consideration in discussion with the Reviewer none continued to press that position.

122. All ultimately conceded that a person lacking deep familiarity with the nature of the ADF, its structures, processes and cultures would find it impossible to know (or even suspect) when they might be being blindsided.

123. Mr Brereton notes that the unique role and functions of the ADF, and its tendency for closely holding information, makes it difficult even for those with familiarity but much more so for



those without. He suggests that an essential qualification for the office is that an appointee have a thorough and contemporary understanding of the ADF, its structures and processes.<sup>50</sup>

124. The Review rejects that any significant change need to be made to the way in which the qualification for appointment is presently expressed in s110F of the *Defence Act 1903*. That provision requires knowledge of and experience in relation to military justice issues and an understanding of their relevance to the role of the Defence Force.

125. The Review acknowledges that ideally an appointee's knowledge and experience will be current: Mr Brereton is undoubtedly correct to observe that the ADF evolves continuously and change is rapid and knowledge very quickly loses its currency.

126. However, a requirement of recent and direct experience, desirable as that might be, would further narrow the already small pool of potential appointees. It could exclude the best person for the position having regard to their overall capacity.

127. The only small change the Review proposes out of abundance of caution, is to clarify that the necessary experience a person must have in relation to military justice issues can be acquired while serving in the Office of the IGADF. The appointment of a person with that background who has demonstrated their capacity to step up to a leadership role should not be precluded.

128. Presently the terms of s110E of the Defence Act requires that the Minister must have regard to any recommendations made by the CDF in making an appointment. Such a mandatory obligation is inapt for an appointment made by the Governor-General in Council.

129. That obligation should be substituted for by a requirement modelled on s6 of the *High Court Act 1979* requiring the Minister for Defence to consult with not only the CDF but also the retiring holder of the office. If that office is vacant as a result of death or incapacity the obligation should be to consult with the longest serving Deputy IGADF. As is the case of the consultations required to be undertaken by the Attorney-General required by s6 it is implicit that the Minister will make the Cabinet aware of those consultations when the occasion for consideration of a recommendation to the Governor-General arises.

130. For completeness the Review proposes that the remuneration of the IGADF (and any statutory Deputy IGADF as may be appointed) should continue to be determined by the Remuneration Tribunal.

**RECOMMENDATION 8: No change be made in respect of the qualification for appointment presently expressed in s110F of the *Defence Act 1903* except to clarify that the necessary experience a person must have in relation to military justice issues can have been acquired while serving in the Office of the IGADF. A serving member of the ADF should be eligible to be appointed as the IGADF or a Deputy IGADF but they should be required to resign any commission they hold before taking up that office.**

<sup>50</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024

**RECOMMENDATION 9:** When the office of IGADF is vacant or about to become vacant, the Minister, before any appointment is made, shall be required to consult with the serving IGADF, CDF and Secretary of the Department of Defence in relation to the appointment. If there is no serving IGADF, the Minister should consult with the longest serving Deputy IGADF.

**RECOMMENDATION 10:** The remuneration of the IGADF and a Deputy IGADF should be determined by the Remuneration tribunal.

### Assistants IGADF

131. For the same reason the role of the IGADF requires familiarity with the ADF so too are many of the tasks required to be undertaken by Assistant IGADFs. That is not universal and a mix of staff is desirable. However, it is incontestable that the Office of the IGADF will continue to require the services of seconded ADF serving members and reservists to undertake a significant body of its work.

132. The legislation and regulations pertaining to IGADF inquiries allow IGADF to appoint Assistants IGADF, Inquiry Officers, and Inquiry Assistants.<sup>51</sup> However, IGADF practice has always been to appoint Assistant IGADFs for the purpose of conducting inquiries. That has served to differentiate IGADF inquiries from Defence administrative inquiries conducted by Inquiry Officers who may be assisted by one or more Inquiry Assistants appointed under *Defence (Inquiry) Regulations 2018*. The Review is satisfied that maintaining this differentiation is appropriate. There is no necessity to retain the nomenclature of and Inquiry Officer or an Inquiry Assistant in future IGADF legislation.

133. However, the Review has drawn attention to external perceptions that as persons notionally subject to command the independence of any serving member of the ADF working for the IGADF can be over-ridden.

134. The *Defence Act 1903* currently recognises that in certain contexts an ADF member must be protected from directions by the chain of command: see s122B and s110UB of the *Defence Act 1903*.<sup>52</sup> The Review proposes that an analogous protection be extended to any ADF member seconded to the Office of the IGADF when undertaking duties for the IGADF.

135. The legislation establishing the Office of the IGADF should provide that otherwise than as may be directed by the IGADF or a Deputy IGADF, no Assistant IGADF acting in such capacity, is subject to direction or command in relation to the performance of their function or powers.

**RECOMMENDATION 11:** References in legislation and regulations to an IGADF inquiry officer and Inquiry Assistant be removed. The statutory powers of the Office of the IGADF relating to investigations or inquiries be exercised by the IGADF, a Deputy IGADF or an Assistant IGADF appointed as such.

<sup>51</sup> [BN73153839](#) *Defence Act 1903*, s110P.

<sup>52</sup> [BN73153839](#) *Defence Act 1903*, compiled 1 September 2021

**RECOMMENDATION 12:** Legislate to ensure that other than as directed by IGADF or a Deputy IGADF, no Assistant IGADF acting in their capacity as an Assistant IGADF is subject to the direction of any person in relation to the performance of a function or power.

### A separate entity

136. The above discussion has focussed on measures appropriate to ensure that any person appointed to head the Office of the IGADF and their assistants will be and will be seen to be independent. However, the critique of the IGADF's want of independence goes beyond their personal independence. It extends to how the IGADF's office is funded and supported.

137. The perception that the IGADF is 'umbilically connected' to the ADF (and therefore is wanting in independence) sometimes is advanced on the premise that the IGADF lacks structural independence from Defence. Some aspects of that critique are difficult to rebut. It is certainly true the IGADF currently relies on Defence to provide it with its accommodation, its communications systems, its payroll and human relations services and the like.

138. But there is no reason why that critique cannot also be directly addressed and dealt with.

139. To ensure that the Office of the IGADF is, and will be perceived to be, unambiguously independent the Review proposes that the Office of the IGADF become a Commonwealth entity within the Defence portfolio. Doing so would make it responsible for its own administration as a separate agency. As such an entity it would be separately funded and would report directly to Parliament.

140. The IGADF should become the accountable authority for the purposes of the *Public Governance, Performance and Accountability Act 2013*.<sup>53</sup>

141. As the head of a separate agency the IGADF will be able to exercise greater flexibility in recruitment of staff. It also allows for greater control over the IGADF's public facing activities.

142. In that specific regard the Review proposes that the visibility of the Office of the IGADF should be enhanced. Its premises should be relocated to an accessible address in Canberra branded appropriately to recognise the Office's independence from Defence. The Office's external communications also should be branded distinctly as being those of the IGADF. It should not continue to use generic Defence e-mail addresses.

143. The model the Review has drawn on in making this proposal is that of the Australian Signals Directorate (ASD). The ASD already is a separate Commonwealth entity within the Defence portfolio. It is responsible for its own administration.

144. The additional costs to government for achieving those outcomes will be relatively modest. The IGADF has outgrown its present accommodation. A move from its present location will be required in the not distant future in any event.

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<sup>53</sup> [BN76911108](#) *Public Governance, Performance and Accountability Act 2013*, Compilation No. 4, Division 2

145. Facially the funding for the Office of the IGADF will need to increase. As an entity responsible for its own administration everything required to pay for its accommodation, communications services, payroll and human relations services will become costs to it. But most of apparent additional funding will not be new. Most will be costs no longer absorbed by Defence simply as part of its larger operations. However, the Review acknowledges that some additional funding will be required, not the least for the additional administrative support an accountable authority requires to manage the services which the IGADF will have become directly responsible for. The budget provided to the Office of the IGADF as an allocation from within the Defence portfolio will need to accommodate such requirements. Other recommendations of this Review have proposed additional functions for the Office which will require budgetary funding.

146. The Review is mindful that such a transition will involve those involved in having to resolve many complex issues. That was the experience of the ASD when it was stood up as a separate agency within the Defence portfolio.<sup>54</sup> The complexities will be no less great in the instance of the IGADF.

147. For that reason the Review accepts that the some aspects of the legislation the Review is proposing, and in particular that which will establish the Office of the IGADF as a separate Commonwealth agency should not immediately come into force. The Office as a Commonwealth entity should be commenced by proclamation only after the Office of the IGADF has been provided with an agreed budget and mission critical memorandums of understanding with the Department and the ADF have been put in place to permit it to have continued access to secure ADF information technology and networks. Those will be required for its effective functioning.

148. The final chapter of this Report addresses those transitional issues in more detail.

**RECOMMENDATION 13: The Office of the IGADF become a Commonwealth entity within the Defence portfolio, responsible for its own administration as a separate entity.**

**RECOMMENDATION 14: The IGADF become the accountable authority for the Office of the IGADF for the purposes of *the Public Governance, Performance and Accountability Act 2013*.**

**RECOMMENDATION 15: To enhance public visibility of the Office of the IGADF relocate its premises to an accessible location in Canberra with appropriate branding to recognise its independence from the chain of command. The Office’s external communications should be branded distinctly as IGADF.**

**RECOMMENDATION 16: The legislation establishing the Office of the IGADF as a Commonwealth entity commence by proclamation only after mission critical memorandums of understanding with the Department and the ADF are in place to ensure the Office of the IGADF has been resourced to undertake transitional steps referred to in the final chapter of this Review including, but not limited to, having continued access to secure Defence networks required by the functions of the IGADF.**

<sup>54</sup> [BN72971953](#) Review meeting, 27 October 2023.

## CHAPTER 2: IGADF ADVISORY FUNCTIONS

149. IGADF's mission is to constantly scrutinise and monitor the military justice system to ensure its health and effectiveness; and to examine and expose situations of military injustice in order to eliminate them. In providing advice back to Defence on these matters, IGADF is empowered to make findings and recommendations and provides these to command and other appropriate areas in Defence. Two of the principle mechanisms that inform IGADF about operation of the military justice system are the Redress of Grievance scheme and the military justice performance audit program.

### Redress of Grievance

150. Military law has always imposed a duty to obey, without exception, a lawful order. So long as they serve where a person may be posted and the duties they may be obliged to accept, are in the hands of command.

151. The concept of Redress of Grievance therefore has a unique function in the military. It serves to ameliorate the impact of unfair decisions. It is of ancient providence. It existed, in the disposition of the Crown, in the British military at the time of the first settlement of Australia.<sup>55</sup> It was inherited when the ADF was stood up.

152. The right to request a Redress of Grievance continues to exist because while the duty to obey is compulsory it has always been recognised that the power of command can be exercised (or omitted to be exercised) unfairly whether motivated by personal animus or simply by reason a result of lack of regard to the legitimate interests of a subordinate.

153. However over the course of time the process of seeking a formal Redress of Grievance and having it resolved had come to involve up to three layers of review. That created delays and duplicated effort. That led to deep frustrations about the effectiveness and accountability of the system.

154. In response, Part 7 of the *Defence Regulation 2016* conferred new responsibilities on the IGADF. In its present form the scheme permits a member of the ADF to complain about a decision, act or omission relating to their service in the ADF.<sup>56</sup>

155. The three main categories of Redress of Grievance complaints relate to a decision about an ADF member's termination of service, a decision about their career or a decision about their entitlements. Others less common involve grievances in relation the poor handling of a complaint or medical issues for example classification, process and treatment.

156. When a Redress of Grievance is initiated it must be reported to the IGADF within 14 days. The IGADF's Directorate of Military Redress and Review then assists to shape and supervise the (streamlined) internal management of the process. As a safeguard the possibility of direct consideration by the IGADF from the outset continues to be available where the process is complex or inappropriate for consideration within the ordinary chain of command.

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<sup>55</sup> [BN77313375](#) British Articles of War of 1765, s XXII—*Of Redressing Wrongs*.

<sup>56</sup> [BN76911182](#) *Defence Regulation 2016*, Compilation No. 6, Part 7.

157. Detailed statistics of and information regarding the process is regularly published as part of the IGADF's Annual Reports.
158. While there has been a modest recent increase in the average time taken to resolve Redress of Grievance complaints from submission to finalisation, the timeliness and efficiency of the system is much improved from that which existed prior to the involvement of the IGADF. The historic average of completion of Redress of Grievances was in excess of 18 months. Currently it stands at approximately 100 days.
159. In contrast to the other additional responsibilities that have been conferred on the IGADF since its establishment the Review received no representations to suggest that there was any structural issue that required its attention.
160. Redress of Grievance complaints can be submitted on almost any aspect of a member's service. Matters subject of complaint may originate from the actions of the member's chain of command, the Department of Defence generally, and third parties such as Defence Housing Australia and commercial entities contracted to Defence to provide administration and services.
161. The Redress of Grievance complaint system does not confer substitute decision making power on the IGADF. The legislation only empowers IGADF to make findings and recommendations. Those findings and recommendations are not confined to the lawfulness of a command—it permits attention to be given to the individual circumstances and the propriety and fairness of a decision. The IGADF's findings are provided to the complainant member and the appropriate area of Defence to consider; however, as a matter of law, having regard to the exigencies of command, the ADF is not obliged to accept or implement them.
162. The IGADF tracks acceptance or otherwise of findings and implementation of recommendations. It is rare for Defence to not accept the IGADF's findings and/or to not implement the recommendations, or some other appropriate remedial action. Where the IGADF's findings are not accepted, reasons are sought for the IGADF to consider further action such as reporting higher in Defence or to the CDF directly, or to specifically include in the IGADF's annual report to Parliament.
163. The Review does not propose any variations to the scheme.
164. Even so, there appears to be an opportunity administratively to improve the scheme's operation that the Review is satisfied should be given renewed attention to by the CDF.
165. *Defence Regulation 2016* allows for submissions of complaints relating to Redress of Grievance to a person other than the member's Commanding Officer.<sup>57</sup>
166. Section 39 of *Defence Regulation 2016* gives the CDF the power to appoint an Officer or an APS member not below APS 6 level to be an authorised complaints recipient. An Authorised Complaints Recipient can then receive complaints as an alternative to a member submitting their request for Redress of Grievance to their Commanding Officer.

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<sup>57</sup> [BN76911182](#) *Defence Regulation 2016*, s41

167. Some members of the ADF may be reluctant to submit a request for a Redress of Grievance directly to their Commanding Officer in the event the Commanding Officer has been involved in, or otherwise appears to the service member to be potentially conflicted.

168. The CDF has delegated the power to appoint Authorised Complaint Recipients to the Service Chiefs. However, to date the Service Chiefs have not appointed any Authorised Complaint Recipients.

169. The Review is conscious that the nature of military service requires command to maintain involvement in matters affecting members. It accepts that if command is excluded from information and awareness of matters affecting their subordinates that may in turn impact upon military capability.

170. However, there appears to be no reason why a Commanding Officer could not be kept apprised of the work of an Authorised Recipient Officer considering the merits of a complaint from an ADF member under their command.

171. The Review therefore commends to the CDF renewed consideration of the opportunity to improve the operation of the Redress of Grievance scheme by the appointment of one or more Authorised Complaint Recipients, in each service headquarters.

**RECOMMENDATION 17: The CDF should give renewed attention as to whether one or more Authorised Complaint Recipients should be appointed in each Service headquarters to provide an alternate pathway for initiating an ADF member's Redress of Grievance.**

### **Military Justice Audits**

172. Military justice performance audits have always been a core function of the IGADF.

173. The cyclical audits conducted by the IGADF are not intended to be punitive. They are meant to reinforce and embed proper and lawful military justice processes.

174. For that reason IGADF audit checklists are available to ADF units at all times, and, in any event, are provided at least 90 days before a scheduled audit.<sup>58</sup> The aim is to build a robust understanding of the importance of compliance across all units and to facilitate self-correction where that is legitimate. In undertaking an audit the IGADF uses performance based criteria to evaluate whether the unit's military justice activities are compliant with military law and policy.

175. Audit frequency depends on a unit's size and role. The IGADF aspires to conduct audits every two years for Special Forces units, every three years for ADF initial training establishments and not less than every five years for other major ADF units with a posted strength of at least 50 members. Generally that schedule is adhered to but events such as when COVID required the suspension of the audit process for a period in 2021-2022 can intervene.

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<sup>58</sup> These are available on the *Defence Protected Network* at: [Pages - Directorate of Military Justice Performance Review](#)

176. Headquarters recently have been added to be reviewed every five years.
177. Smaller units are audited only if a Service requests an audit or a circumstance arises which the IGADF identifies as warranting it being undertaken.
178. Routine audits only review the most recent past 12 months of a unit's activities.
179. IGADF auditors must be satisfied that a unit has established and maintained arrangements to implement military justice. The audit team requires evidence to establish that fact. They inspect documents, review electronic records and systems and hold discussions with unit staff and military police, legal officers and chaplains.
180. Each audit team also conducts focus group discussions with the unit personnel to obtain insight into their perceptions and experiences of the unit's compliance with, and use of, the military justice system. To facilitate open discussion ADF members will usually be divided into differently ranked groups and genders. What is said in a focus group is confidential and only de-identified information is included in any audit report. But those frank discussions assist a rounded picture of the health of the military justice system in the unit to emerge.
181. The process is educative. It is robust and painstaking.
182. At the conclusion of every audit the IGADF provides a written report to the audited unit's Commanding Officer and distributes that report to the unit's chain of command including the relevant Service Chief. The IGADF also provides the CDF with a monthly update of all audits and with a full report of any unit that has been assessed as having material deficiencies. The Reviewer participated as an observer in the IGADF's routine audit of the Army School of Ordnance in Victoria 13-17 November 2023 and was impressed by the audit teams rigour and thoroughness—and their concern for fairness.
183. The IGADF's Annual Report 2022-2023 at pp 16-22 provides a more detailed outline of the work of the IGADF's Directorate of Military Justice Performance Review. It reveals that over that 12-month period the IGADF conducted 54 audits (12 Navy, 28 Army, 13 Air Force and one Focus Group only (Air Force) of ADF units.<sup>59</sup>
184. Ten of those units were determined to have had material deficiencies in their implementation of the ADF's military justice obligations. The Annual Report records that those material deficiencies were linked to one, or a combination of the following:
- a. systemic breakdown in military justice procedures that negatively affected members' rights, mostly due to non-compliance of procedural fairness processes or under-reporting of incidents;
  - b. significant number of participants in focus group discussions fearing reprisals if they complained;
  - c. misogynistic conduct against a majority of female unit members; or

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<sup>59</sup> [BN67948073](#) *Inspector-General of the Australian Defence Force Annual Report 01 July 2022 to 30 June 2023*, pp16-22



d. poor or non-existent record keeping practices to provide evidence of actions and outcomes.<sup>60</sup>

185. A re-audit is always conducted within 12 months whenever an audit has identified a material deficiency. A re-audit is in addition to and does not affect the routine cycle.

186. A unit which has had problems complying in a routine audit may also be subjected to a more comprehensive audit over a longer 24-month period.

187. Failing an audit is therefore not without consequences. Moreover in the highly competitive environment in which senior ADF officers routinely are faced with the prospect of ‘up or out’ a failure of command that has been identified in an audit may be decisive.

188. In conjunction with the formal audit process any individual who has participated in a focus group discussion can seek a one-on-one meeting with the audit team to raise their specific circumstances. If they do so their concerns are treated in confidence. A serious complaint (with the consent of the individual) may be referred to their Commanding Officer. Alternatively it may trigger a targeted IGADF inquiry being later established.

189. The Review is satisfied that the function served by the Office of the IGADF in its audit role is well understood, well established, well managed and successful.

190. However there are four proposals for enhancement that the Review considers should be given attention.

191. The first is that the IGADF should be resourced to allow it to increase the frequency of its routine audit of initial training establishments to a minimum cycle of two years.

192. The induction of young men and women into the ADF is a most critical time. If a new recruit’s experience of the ADF and its military justice system fails to match the expectations of the Secretary and the CDF as expressed in their joint statement ‘*Commitment to a Culture that values our People and Serves to Defend Australia*’<sup>61</sup> it is not improbable that such a recruit will become cynical of those values being adhered to later in their service. Bad early experiences are not easily forgotten. Bad habits learned early can stick.

193. A recent routine IGADF audit of one training facility identified material deficiencies in its application of military justice. That unit will be the subject of a re-audit as a result—but the present three-year cycle is too infrequent not to leave open the possibility that trainees might have a sour initial experience of induction before such problems are picked up.

**RECOMMENDATION 18: IGADF should be resourced to allow it to increase the frequency of its routine audit of initial training establishments to a minimum cycle of two years.**

<sup>60</sup> [BN67948073](#) Inspector-General of the Australian Defence Force Annual Report 01 July 2022 to 30 June 2023, p19.

<sup>61</sup> [BN75102448](#) Defence, *Commitment to a culture that values our people and serves to defend Australia*, 30 November 2023

194. The second enhancement that the Review proposes is that the IGADF be resourced to allow for, in exceptional cases, a 'hot audit'—that is to allow the IGADF to conduct an unscheduled and unannounced audit of a unit. For such a 'hot audit' capacity to be effective the Office of the IGADF will need to recruit a small number of experienced investigators to implement that function when required.

195. Such a 'hot audit' audit should not be routine.

196. However, there are circumstances that the Review believes would justify its use. The cyclical pattern of routine ADF reviews means that sometimes there will be years before a routine audit is scheduled to be conducted.

197. If there is reason to believe that significant deficiencies have arisen in a unit which makes it inappropriate to await the ordinary cycle a hot audit capacity should be available to the IGADF.

198. Moreover the success of a routine audit assumes that the unit subject to that audit will have complied with its obligation to make a randomly selected group of its personnel of all ranks available to participate in focus group discussions.

199. Given the long notice given before a routine audit is conducted it ought to be unusual that operational tasks cannot be made to fit around that obligation. That is the usual experience. Notwithstanding, it is not entirely uncommon for operational requirements still to be offered as an explanation for the absence of certain potential participants. In most instances that explanation is uncontentious. However, a routine audit team has no effective capacity to look beyond what they may suspect to be a fudged explanation designed to keep potential dissatisfied members of a unit being made available to discuss their experiences with the audit team.

200. If there is good reason for suspicion that a routine audit has been hampered by a want of cooperation on the unit's part the capacity to return unannounced should be available.

201. And if a routine audit of a unit has revealed serious material deficiencies there is a case that the re-audit that automatically follows need not to be announced in advance.

202. The Reviewer has discussed the possibility of providing the IGADF with a 'hot audit' capacity with the CDF. That was done in light of an example which suggested its potential utility. The CDF was strongly supportive in that instance. However there is no present capacity for that to occur.

203. The Review accepts that any unannounced audit of a unit's compliance with its military justice obligations will be potentially disruptive of the routine work of that unit.

204. While the Review proposes that the IGADF be resourced for that capacity, nonetheless for reasons going to operational requirements, it accepts that any hot audit, save in the rarest of circumstances, should be undertaken by the IGADF only after consulting with the CDF to ensure that the process is undertaken with the full backing of the ADF's chain of command.

**RECOMMENDATION 19: The audit function of the Office of the IGADF is a critical integer of its success. A capacity for ‘hot audits’ should be provided for in addition to scheduled routine audits of ADF units.**

205. The third enhancement involves improving the exchange and analysis of information with the ADF and Defence generally.

206. The IGADF in its audit function and in its other roles collects a mass of information about the health of the military justice system. But that information, with some key exceptions, has not been routinely mined for the richness of the insights it potentially can provide to the ADF.

207. There are exceptions—one that serves as a potent illustration of the potential for better use of that data is exemplified by the advice IGADF Gaynor provided to the CDF in July 2020. In his correspondence Mr Gaynor referred to statistical analysis he had directed be undertaken using de-identified data collected from 13, 574 ADF members who participated in focus group discussions from 213 units conducted from fiscal years 2015/2016 to 2018/2019 and the findings of a multivariate analysis he had previously undertaken between 2011 and 2014.

208. He wrote:

The combined analyses of almost a decade’s worth of military justice survey data are instructive. They demonstrate that the incidence of unacceptable behaviour is likely to be lower in a unit if members are confident their command will take action to address unacceptable behaviour. This is likely because potential complainants feel empowered to complain about unacceptable behaviour, and because potential perpetrators believe they will face consequences. Both these factors would drive the number of unacceptable behaviour incidents down.

Since 2012 *Pathway to Change: Evolving Defence Culture* has driven cultural change in Defence. The cultural intent statement underpinning Pathway to Change emphasises leadership accountability as well as ethics and workplace behaviours. I recommend the ADF continue to emphasise the importance of commanders and managers acting on *every* unacceptable behaviour incident, even minor allegations. It is also crucial that all personnel, particularly commanders and managers, continue to receive adequate training and support to know how to identify and take appropriate action in response to unacceptable behaviour.<sup>62</sup>

209. The IGADF’s advice may have assisted to inform the CDF’s subsequent directive that no infraction is to be walked past.<sup>63</sup>

210. The Review does not suggest that the IGADF and CDF think it appropriate that a blizzard of trivial disciplinary proceedings should be commenced. There are a range of remedies provided for in the military justice system that involve no great formality, including counselling and the Disciplinary Infringement Scheme.<sup>64</sup>

<sup>62</sup> [BN72753371](#) IGADF/BN19133404, *Correlation between confidence in command and reported rates of unacceptable behaviour*, 29 July 2020.

<sup>63</sup> [BN73693794](#) CDF Directive 7/2023, *Bystander behaviour*, 31 October 2023

<sup>64</sup> See [BN76464593](#) *Military Personnel Manual* Part 9, para 2.19; and [BN76411907](#) *Disciplinary Infringement Manual*, Chapter 1.

211. For that reason there is no need for a draconian system that treats every minor breach as a capital offence. However an essential feature of an effective armed service is the need for discipline which is, and is seen to be, consistently enforced. All members of a unit need to have confidence that any complaint they make will be followed up. They need to trust that their Commanding Officer (or NCO) will deal with, at the appropriate level, every established instance of unacceptable behaviour. They must be told soon as possible what has been the outcome. That is what the IGADF's research confirmed.

212. Defence and the ADF to date have lacked a uniform record keeping and IT system. That, the Review has been informed, will no longer be the fact after May of this year. In May 2024 16 legacy systems are scheduled to migrate to a single system named 'CASE'.<sup>65</sup>

213. There will be significant advances in the capacity of intelligent systems to interrogate such data and identify statistical consistencies and statistical anomalies.

214. Section 110C(1)(c) of the *Defence Act 1903* specifically gives the IGADF responsibility to advise on matters concerning the military justice system including making recommendations for improvements.

215. The IGADF is a permanently invited guest on the ADF's Military Justice Steering Group.

216. However, administrative lore is replete with acknowledgements that the urgent often displaces attention being given to important strategic objectives. There has been no shortage of the urgent in the work of the IGADF. Those urgent obligations may have displaced sufficient attention being given to the task provided for in s100C(1)(c). That tasking is not reflected as a priority in the current and recent iterations of the IGADF's strategic plans.

217. However, the capacity to use the wealth of information that the IGADF collects to allow the IGADF undertake that role has great potential.

218. One minor example will suffice. The IGADF and the CDF (correctly in the Review's opinion) have led cultural change. The military justice system now requires that commanders and managers act on every unacceptable behaviour incident, even minor allegations.

219. That necessarily means that some minor conduct that would not previously have been the subject of any attention within the military justice system will be recorded as an offence. In that context it may be that the extension of the period in which very minor events remain on a service member's discipline record before being excised (until their next promotion) has become counter-productive. The Review takes no position in that regard save to record that the data collected by the IGADF across its various functionalities is likely to provide objective information relevant to such a question one way or the other.

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<sup>65</sup> As part of the Defence ERP Program, Defence is implementing an enterprise Case Management System for entering, tracking, resolving and reporting incidents and cases related to integrity, personnel, security and other issues. This program will transition multiple legacy case management, legal and audit systems in Defence into an integrated capability that can provide a single source of truth and facilitate improved military justice governance and assurance. See [BN78462494 Tranche2 – Case Management](#), available on the Defence Protected Network at: [Pages - Tranche 2 - Case Management](#).

220. Such a capacity is also relevant to the assistance the IGADF might provide to the CDF in relation to the issue of exceptionalism which the CDF has highlighted as an issue requiring attention. That subject is addressed in its own right later in this Report.

**RECOMMENDATION 20: The leadership responsible for the audit teams' day-to-day operation should continue to build a statistical database capable of informing the IGADF regarding areas of Defence responsibility where the risk of breakdowns of discipline and military justice are most prone to occur.**

**RECOMMENDATION 21: The IGADF in any event should regard it as one of their primary obligations to routinely communicate to Defence advice for improvements to the military justice system.**

221. The fourth and final enhancement is more fundamental.

222. There currently is no effective power of compulsion underpinning IGADF audits.

223. *IGADF Regulation 2016 s36* is as follows:

The Inspector-General ADF may require a member of the Defence Force, or an employee of the Department, to give all reasonable assistance in connection with the conduct of a performance review of the military justice system, including an internal audit.<sup>66</sup>

224. The requirement that 'all reasonable assistance' be given leaves room for those commanding a unit the subject of audit to self-identify those limits. From time to time this has given rise to misunderstandings. On some rare occasions it has led to avoidance of their responsibilities.

225. It is important that this Review not overstate the problem. Most audits receive the full cooperation of those commanding a unit. However, that is not always the case.

226. Some IGADF audit teams have encountered instances of a unit hiding documents, moving electronic files or refusing to provide full Objective (records) assistance.

227. Army command has not granted IGADF audit teams routine access to the Army Incident Management System (AIMS). Access to AIMS has to be requested in respect of specific periods of time. Approval is routine but if an audit team later requires updated information from the AIMS system an IGADF auditor has no electronic access in their own right and must resort to directing the entry be opened and then reading the relevant information 'over the shoulder'.

228. To ensure the integrity of IGADF audits workarounds have been resorted to when non-compliance has become an impediment to the audit task. Most Assistant IGADF leading IGADF audit teams hold senior commissioned rank. When an audit team has been denied what it requires for audit purposes, those audit team leaders have relied on their military rank to require further compliance.

<sup>66</sup> [BN74860313](#) *IGADF Regulation 2016*, s36.

229. That is not only clumsy but it is also an inappropriate mechanism for an independent assurance body having a statutory duty to conduct audits to have been compelled to rely upon.

230. The Review proposes that the IGADF have authority to compel the production of information in relation to an IGADF audit. The omission of such clear authority appears to be by oversight. However, as the Office moves to becoming an independent entity, leaving that omission unaddressed will risk the effectiveness of the IGADF's audit function.

231. To maintain credibility in relation to performance reviews and audits the IGADF should have the same power to require the production information, documents and answers to questions as is presently provided for in *IGADF Regulation 2016* s23 in respect of an IGADF inquiry into service deaths.

**RECOMMENDATION 22:** The IGADF legislation should state that command compliance with the IGADF audit function when exercised is mandatory. The IGADF should have the same power to require the production information, documents and answers to questions as is presently provided for in *IGADF Regulation 2016* s23 in respect of an IGADF inquiry into service deaths.

### CHAPTER 3: INQUIRIES INTO A DEATH OF A MEMBER OF THE AUSTRALIAN DEFENCE FORCE

232. In 2014 the IGADF was given the additional function of inquiring into a death of any member of the ADF. The current expression of that function is as provided for by s5 of *the IGADF Regulation 2016* in the following terms.

For paragraph 110C(1)(f) of the [Defence] Act [1903] the Inspector General ADF has the following functions.

(a) to inquire into the death of a member of the Defence Force, where the relevant death appears to have arisen out of, or in the course of, the member's service in the Defence Force...<sup>67</sup>

233. The conferral of that function on the IGADF replaced former arrangements that had mandated that there be a hearing presided over by a judicial officer in every case, unless otherwise directed by the Minister, if a member's death appeared to have arisen out of or in the course of a member's service.

234. The explanation for this change appears to have been a desire to avoid judge-led Commissions of Inquiry developing into adversarial processes, with the inherent risk of that causing distress to potentially affected persons and other witnesses and, more generally, to make the process simpler, quicker and less expensive.

#### Assumptions made

235. One underlying assumption appears to have been that the task of inquiring into a death of a member of the ADF would be readily capable of being undertaken by any person with the

<sup>67</sup> [BN74860313](#) *IGADF Regulation 2016*, s5.

same skillset as those coming over to the IGADF from Defence who had previously supported that function together with those persons the IGADF already had available to undertake inquiries and investigations related to the military justice system. Conferring the function of investigating service deaths on the IGADF was anticipated to reduce the substantial costs associated with setting up a CDF Commission of Inquiry for every service death, while retaining flexible, credible and independent oversight of these sensitive matters.

236. To a significant degree that assumption has proved to be justified. In large measure this Review is satisfied that the work product of the IGADF has been professionally undertaken. The IGADF's reports have fed into responses Defence has taken to avoid or minimise the risk of harm to its service members.

237. There is no technical reason why any skilled inquirer cannot equally effectively examine the circumstances of a death drawing upon the same forensic techniques required for the examination of an alleged instance of a breakdown of military justice.

238. If the transferred mission involved no more than identifying the cause of a death, an investigation of its circumstances and advising CDF of such future actions that may avoid their recurrence, there is no credible reason to think that the human resources ordinarily available within the IGADF would not be adequate to undertake that task.

239. However investigative skills alone while necessary are insufficient if the object of an inquiry into an ADF death also extends to assuring the families of a deceased ADF member that the service of their son or daughter, husband, wife or partner remained respected and valued by the nation they had served. The broader experience and sensitivity required for that purpose is unlikely to be possessed by every Assistant IGADF.

240. As at the time the responsibility for inquiring into service deaths was conferred upon the IGADF, it was unclear that that latter object was understood to be mission critical. The planning arrangements for transfer of responsibility for inquiry into an ADF member's death to IGADF did not go to that issue.

### **Purpose of inquiry into a death**

241. In preparation for transfer of responsibility for inquiry into Service deaths to IGADF, in 2014 IGADF drafted a concept of operations (CONOPS) to explore options for the conduct of these inquiries. The draft described the purpose of an IGADF inquiry as follows:

An inquiry into a Service death may not inherently be particularly complex in terms of numbers of witnesses and documentary evidence. However, the seriousness of an incident which has led to a fatality, combined with the need to ensure that any contributory flaws in Defence practices and procedures are explored in order to prevent future deaths, indicate that the inquiry process should be sufficiently robust to provide assurance of its reliability to ADF leadership and responsible Ministers, and should provide appropriate protection to the interests of the deceased.<sup>68</sup>

The purpose of any administrative inquiry in Defence is to determine the facts and circumstances surrounding an incident and situation. Inquiries are undertaken so that informed decisions may

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<sup>68</sup> [BN76911265](#) IGADF, *Draft Conops for conduct of inquiries into Service deaths*, para 2.

be taken about the action required including, where appropriate, action to avoid a recurrence. Therefore, while there may be some overlap in the matters to be inquired into, inquiries into Service deaths have a different purpose from—and will usually examine broader circumstances than—a coronial inquest, the purpose of which is to determine the time, manner, place, nature and cause of death.<sup>69</sup>

242. The draft referred to a deceased's family (limited to their next of kin) on only two occasions. A next of kin was to be entitled to be present at the conferencing phase of an inquiry once scoping and evidence gathering had been completed. However, there is no indication that the next of kin would have a status beyond that of an observer in that process.

243. A next of kin was also required to be debriefed on the final report's outcomes, including 'where appropriate [being] provided a copy of the report'.<sup>70</sup>

244. The then CDF Directive concerning inquiries into deaths of ADF members said only that 'the serious injury or sudden death of members of the Defence Force demands prompt action to determine the causes of the injury or death and the action, if any, that must be taken to prevent a recurrence'.<sup>71</sup>

245. The cryptic expression of s5 of the *IGADF Regulation 2016* (set out above) which implemented the transfer of that function was coupled with a complete absence of any statutory rationale to clarify the objects sought to be thereby achieved.

246. All legislatively conferred powers must be read as having a purpose which, if not expressed in terms, is to be understood having regard to the context in which they are embedded: *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 100<sup>72</sup>; *Walton v Gardiner* (1993) 177 CLR 379 at 409<sup>73</sup>; see also as discussed by Edelman J in *Jones v Commonwealth* [2023] HCA 34 at [171]-[172]<sup>74</sup>.

247. The statutory purpose of providing the CDF with insight into future actions that the ADF might take to avoid the recurrence of a circumstance that had given rise to a death can readily be inferred to be a purpose of s5 having regard to the context in which the IGADF was conferred with the function of inquiring into service deaths.

248. It is less obvious that it is open to be inferred that the function required any enlargement of the involvement of the families of deceased service members or extend to assuring them and the broader community that the service of a former ADF member continued to be respected and valued.

<sup>69</sup> [BN76911265](#) IGADF, *Draft Conops for conduct of inquiries into Service deaths*, para 3.

<sup>70</sup> [BN76911265](#) IGADF, *Draft Conops for conduct of inquiries into Service deaths*, sub-para 7k.

<sup>71</sup> [BN76724130](#) CDF Directive 16/2014 – *Reporting of deaths of ADF members and support to IGADF and CDF-appointed inquiries*.

<sup>72</sup> [BN76937800](#) *Brownells Ltd v Ironmongers Wages Board* [1950] HCA 3; (1950) CLR 108 (5 April 1950)

<sup>73</sup> [BN76938365](#) *Walton v Gardiner* [1993] HCA 77; (1993) CLR 378; (1993) 112 ALR 289; (1993) 67 ALJR 485 (29 April 1993)

<sup>74</sup> [BN76938638](#) *Jones v Commonwealth of Australia* [2023] HCA 34 (1 November 2023)



### A new paradigm

249. Nonetheless, whatever the legal position might be, the current IGADF explained in discussion with the Reviewer (and in his evidence to the Royal Commission into Veteran Suicide) that over time he had become aware that the reports his office were providing served a broader purpose than simply to inform the CDF of his recommendations. For the family of a deceased ADF member, an IGADF report was the last official record of the deceased they would see.<sup>75</sup>

250. The IGADF took the view that it was not inconsistent with the legal position for the families of such persons (including those not formally next of kin) to be treated as stakeholders in the process, should they want that. The family members of a deceased member therefore should be consulted about the process and be kept informed of an inquiry's progress. The DSIR Guidance Manual as it evolved came to reflect those expectations.<sup>76</sup>

251. The IGADF provided guidance to his Directors of Select Incident Review upon their induction that every enquiry into a death in service was to be conducted on a trauma informed basis and, to the degree possible in a process that might involve the legal rights of others, having regard to the views of family members.

252. The IGADF inquiry directions template was updated to include the statement:

Although you have these information gathering powers, you are to take a trauma-informed approach, ensuring safety, respecting confidentiality, being consultative, and ensuring participants are fully informed about the nature of the inquiry and their participation. Families and close contacts can provide valuable insights.<sup>77</sup>

253. The IGADF placed reliance upon his Directors of Select Incident Review to give effect to that guidance.

254. That was perhaps explicable by reason of the other pressing exigencies (including the demands placed on his office by the Afghanistan Inquiry and its aftermath) together with breaks in personal contact due to COVID.

### Shortcomings in dealing with families

255. It is now clear that the IGADF's guidance was both imperfectly understood and inadequately implemented within DSIR. Too many inquiries continued to be conducted with insufficient sensitivity as to their impact upon family members. The Acting Director of Select Incident Review, still in office at the commencement of this Review, was disarmingly honest in conceding that he had not understood what the purpose of review of service deaths was for.<sup>78</sup>

256. The IGADF gave evidence to the Royal Commission into Veterans Suicide that he had been absolutely appalled when, in mid-2023, he had been told that some families of service members that had died by suicide had not been informed of the inquiry outcomes. The Director of Select

<sup>75</sup> [BN73696158](#) Royal Commission into Defence and Veteran Suicide, Transcript of 7 September 2023, [84], p8337.

<sup>76</sup> [BN76961648](#) IGADF/BN44601074 *Directorate of Select Incident Review Guidance Manual for Standard Operating Practices*, Version 2, 29 November 2022.

<sup>77</sup> [BN38167313](#) DSIR email of 8 June 2021; see for example, [BN29684932](#) Inquiry Directions of 17 June 2021.

<sup>78</sup> [BN72320355](#) Review meeting, 23 October 2023.

Incident Review had told him that he did not know how many, or over what period of time, that had been the case.<sup>79</sup>

257. In response the IGADF relieved his then Deputy of most of her other responsibilities to enable her to supervise and check the work of DSIR. IGADF directed the Deputy to arrange for all affected families to be contacted in a trauma informed way. If they had not been earlier assisted, she was to arrange for them, if they wished, to read an unreacted copy of the report into their family member's death, and then to be provided a privacy redacted copy should they want one.<sup>80</sup>

258. The IGADF has since appointed a new Director Select Incident Review to implement this function. The appointee is a civilian with experience of undertaking investigations requiring sensitive management.

259. While aspects of these matters may also engage the attention the Royal Commission into Veteran Suicides, this Review is satisfied that a number of steps are appropriate to be taken in consequence to minimise the distress of family members involved in inquiries into the death of a Service member.

### Refined legislation

260. The Review proposes that the regulation that presently states the IGADF's function of investigation of service deaths should be repealed and replaced. The function of providing reassurance to families is too important not to be expressly provided for.

261. The terms in which the function currently is stated should be fundamentally redrafted. The requirement that the inquiry power operate if a death 'appears to have arisen out of, or in the course of, the member's service in the Defence Force' is problematic.

262. So stated it is open to be read as imposing a jurisdictional threshold which must be surmounted before the IGADF can exercise their inquiry powers. Similar language found in other statutory contexts has been held to negate jurisdiction unless the jurisdictional fact is first found. The review is confident from wide discussion that that was never the intention of the regulation.

263. The Review is satisfied that the purpose of the function vested in the IGADF is to ensure that every death of a member of the ADF in service (subject to a qualification the Review later makes) is be inquired into unless the IGADF is satisfied either on preliminary assessment or during the course of an inquiry that the death had no material connection to the member's service.

264. While accepting that the question is one for the Parliament and the Minister, the IGADF gave evidence to the Royal Commission into Veteran Suicide that he would welcome such a clarification.<sup>81</sup>

265. The objects of the function should be statutorily expressed. The IGADF Act should clarify that the purpose for the function of inquiring into service deaths extends not only to determining

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<sup>79</sup> [BN73696158](#) Royal Commission into Defence and Veteran Suicide, 7 September 2023, [84], pp8338-8339; and [BN73696968](#) Royal Commission into Defence and Veteran Suicide, 8 September 2023, [85], pp8347-8348.

<sup>80</sup> [BN76985213](#) IGADF/BN58720275, *IGADF Directive 02/2023 – Interim arrangements for the management of specified Office of the Inspector-General of the Australian Defence Force (OIGADF) functions and roles*, 25 July 2023.

<sup>81</sup> [BN73696968](#) Royal Commission into Defence and Veteran Suicide, 8 September 2023, [85], pp8379-8382.

what may have led to a fatality as would inform the CDF about actions appropriate to avoid any recurrence, but also to providing assurance to the families of a deceased service member and the broader community that the life and wellbeing of every ADF member is meaningful, respected and valued.

**RECOMMENDATION 23: The purpose of the IGADF's duty to investigate deaths should be stated in the primary legislation as being:**

- (a) **To enable the IGADF to provide Defence and the CDF their recommendation for measures as would enhance the occupational safety of all members of the ADF; and**
- (b) **To provide an assurance to families of service members and the broader community that notwithstanding the significant inherent risks in their service in the ADF, the life and wellbeing of every member is respected and valued.**

### Jurisdiction

266. The qualification the Review has earlier referred to is advanced to overcome what appears to be an unintended unfairness as between the position of a former service member who has been involuntarily separated from the ADF and a reserve service member who has voluntarily returned to civilian life and has ceased to have any actual connection to the ADF.

267. A member of the ADF who has not reached their compulsory retirement age but has entirely ceased to undertake any reserve roles and has not been required to render service remains officially a member of the ADF for a period of five years.<sup>82</sup>

268. By contrast a member of the ADF involuntarily separated from the ADF whether for misconduct or health reasons instantly loses that status.<sup>83</sup>

269. For that reason the death of a voluntarily separated ADF soldier, sailor or aviator occurring at any time in the period of five years after their last parade is the subject of at least an IGADF preliminary assessment as to whether their death had a material connection to their former military service. However, in the case of the death of a person who has been involuntarily separated no such grace period applies. The IGADF has no legislatively conferred function to investigate such a death even if it might bear the hallmark of one connected to that person's former service.

270. Yet a person whose departure from the ADF has been otherwise than on their own terms might be predicted to be more vulnerable to self-harm in consequence.

271. On occasion the IGADF has obtained a direction from the CDF permitting him to conduct an inquiry into the death by suicide of a person recently involuntarily separated from the ADF.<sup>84</sup> However, the Review is satisfied that the discrepancy in the treatment of persons who have

<sup>82</sup> BN76911182 *Defence Regulations 2016*, s21-23.

<sup>83</sup> BN76911182 *Defence Regulations 2016*, s24.

<sup>84</sup> [BN72320355](#) Review meeting, 10 October 2023.

ceased to have actual service connection with the ADF calls for systematic rather than discretionary attention.

272. There are compelling pragmatic reasons to accept that any hypothesis that a person's death by suicide (or indeed any other cause) might have a material connection to their former service becomes increasingly implausible the longer a person has been separated from their former service in the ADF. A cut off line will need to be set to keep the task within realistic bounds.

273. Two years is the period used by the Australian War Memorial for inclusion of someone who has died during or as a result of service in a conflict or operation on the Roll of Honour after returning to Australia from their deployment.<sup>85</sup>

274. For the purpose of defining a policy mandating an IGADF preliminary assessment into the death of someone who has served in the ADF, two-years seems a reasonable timeframe. This Review proposes that the line be set at two years following an ADF member's most recent period of duty or attendance at work as an ADF member in Defence. This is irrespective of whether the member is no longer rendering service because their service has been terminated, or they are an inactive member of the Reserve.

275. To implement that objective the Review proposes that for the purposes of the IGADF's function of reviewing a service death, that any person who has been involuntarily separated from the ADF be deemed to have retained their former status (but only for that function) for a period of two years.

276. The same pragmatic considerations apply to a death of a person who has voluntarily ceased all actual connection with the ADF.

277. The IGADF's function of inquiring into service deaths ought not require the IGADF to investigate instances in which a person's service connection has, for a period of more than two years, become merely a matter of form. The obligation to inquire should not impose significant additional burdens on IGADF. The Review tasks it as a given that if it is concluded that a death was not service related, that conclusion should conclude the IGADF inquiry process.

278. To facilitate that function both Defence and the Department of Veteran's Affairs should be required to report to the IGADF any death of an involuntarily separated ex-service person occurring within two years of their discharge they become aware of.

**RECOMMENDATION 24:** The regulations presently provided for in s110C of the *Defence Act 1903* should be substituted for with a statutory power of the IGADF to investigate any death of a member of the ADF when such a death occurs within two years of them having rendered actual service as a permanent or Reserve member of the ADF.

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<sup>85</sup> [BN75001162](#) Australian War Memorial, *Roll of Honour*, [Roll of Honour | Australian War Memorial \(awm.gov.au\)](#) accessed 8 December 2023.

## Complex relationships

279. The above recommendations assume the Office of the IGADF will be restructured in the form other parts of this Review recommend.

280. Critically they assume that the Office of the IGADF will become a Commonwealth entity and one of two statutory Deputy IGADFs will be appointed (subject only to the IGADF's ultimate authority) to be directly responsible, inter-alia, for the IGADF's function of inquiring into service deaths.

281. The breadth of the IGADF's duties are already both too diverse and too significant for any one person to effectively oversight—even without having to undertake the additional administrative responsibilities that the requirements of the *Public Governance, Performance and Accountability Act 2013* will impose. The Review notes the good sense of what in public administration is often referred to as the Tinbergen rule of 'one instrument one target'<sup>86</sup>. Different tasks require different management.

282. The function of inquiring into service deaths in a way that meets modern community expectations requires the Office to have greater control of its human resources. It needs not only to draw on highly skilled investigators with military backgrounds capable of undertaking complex inquiries as will be required where a death has resulted from the crash of an aircraft, a training mishap or the possible negligence of a ship's captain but also professionals with the necessary human skills appropriate for the task of engaging with the families of a deceased.

283. The Review has chosen to refer to the interests of the family of a deceased rather than to their next of kin. That is for good reason: when a person dies before their time, as will almost always be the case in the instance of a service death, that will leave many grieving—not just their legal next of kin.

284. That circumstance will require focussed attention and oversight. It also will need constant attention because such work cannot be made routine. It will never adequately squeeze into a one size fits all set of Key Performance Indicators.

285. Those who have been left behind must be treated with respect, consulted and kept informed but many families will seek to speak with more than one voice. Managing the webs of human relationships and raw emotions with respect due to their loss while ensuring that identifying the circumstances of a death and providing sound advice to the CDF is done in a timely way always will be inherently challenging to operationalise.

286. Managing the human impacts of a service death in a trauma informed way is a function that will never be done perfectly. This requires great clarity of purpose, which was lacking for the period before the IGADF's attention was drawn to failings within the directorate.

287. Moreover there is a direct link between the failure to adequately engage with the families of a deceased and the want of confidence that has been expressed in the independence of the Office of the IGADF.

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<sup>86</sup> [BN78470317](https://7/4/374334295/a-note-c.tinbergen.rules) Schaeffer, Peter. *A Note on the Tinbergen Rule*, <https://7/4/374334295/a-note-c.tinbergen.rules> accessed 9 November 2023.

288. Where families have suffered the loss of a service member it is entirely predictable that any falling short in openness will have the tendency to suggest that the affected inquiry has been influenced to cover up command failings.

289. That issue was addressed in more detail in Chapter 1 of this Review.

#### CHAPTER 4: OTHER IGADF INQUIRIES

290. The major portion of IGADF inquiries are conducted in response to a submission or complaint to IGADF concerning a military justice issue. Many of these concern dissatisfaction with the manner in which Defence has responded to a complaint, while other inquiries focus on operational events or incidents of serious or complex nature. The IGADF has also inquired into Defence policy settings and their operation.

291. The range of inquiries is diverse. Overall these appear to have been done well; however, the Review received a number of submissions raising individual circumstances in which errors were said to have been made. The Review could not be a vehicle for testing each individual complaint but accepts that not every inquiry has been undertaken perfectly or the outcomes communicated in a manner that has sufficiently reassured a complainant that its objectives were fulfilled. This is inevitable in any human system, noting the Review has seen that personal and structural integrity is manifested in IGADF's work and reporting.

292. IGADF has made efforts to establish benchmarks to be applied for the time it takes to complete an inquiry without success. The Review understands that there cannot be a standard profile for the way an investigation can be fitted over a desired timeline, but that the office should establish check-in points to give a sight line on whether any particular inquiry is not on track to achieve an outcome in a reasonable timeframe.

293. IGADF is empowered to make findings and recommendations but Defence remains responsible for the decisions made in respect of those recommendations. Of note, the Review identified that some of the regulations governing IGADF inquiry information have introduced unforeseen challenges in implementation of those recommendations.

#### **Power to follow up recommendations**

294. The Review is aware that in a minority of instances the loop between the IGADF and the ADF has not been closed in respect of an inquiry report's recommendation.

295. In most instances that has been by way of inadvertence. But whatever the reason may be it is unacceptable that on occasions the IGADF has been left without full visibility as to the actions the ADF has taken in response to a recommendation. The degree of acceptance of its recommendations is a critical measure of the effectiveness of the Office.

296. In a note to the Review Mr Brereton observed that the effectiveness of the IGADF and recommendations made in its reports would be enhanced by the introduction of a power to follow

up recommendations made in inquiry reports. He suggested that such a power could be based on s 169 of the *National Anti-Corruption Commission Act 2022*.<sup>87</sup>

297. Having regard to the importance of this issue the Reviewer raised how best the Review should deal with it not only with each of the Service Chiefs but also the CDF. In those discussions the Reviewer made clear his view that consistently with the prerogative of command ultimate responsibility for outcomes must remain within the ADF.

298. For operational or other reasons an IGADF recommendation on occasion might be implemented by a means other than that recommended, or implemented only in part, and, in very rare cases, might be entirely rejected.

299. There was, pleasingly, uniform assent by the Chiefs of Navy, Army and Air Force and the CDF to the Reviewer's suggestion that the balance should be struck such that if any IGADF recommendation was not accepted in full or in part, an explanation in writing must be provided to the IGADF and, where appropriate and possible having regard to any security concerns, to any service member whose interests were adversely affected thereby.

300. There was equally full acceptance that in every case where a recommendation had been adopted the loop should be closed and the IGADF apprised of the outcome.

301. The Review is satisfied that if that does not occur, the IGADF should have a power to follow up an instance in which there has been a failure to close the loop. It also is satisfied that there is no reason not to include within that provision a requirement that reasons in writing be given in respect of any instance in which an IGADF recommendation has not been accepted in full.

302. If a request for follow up is not attended to within a reasonable time or written reasons for not accepting an IGADF recommendation are not provided that failure should be open to be the subject of open report to the Minister for Defence and noted in the IGADF's annual report to the Parliament.

303. Section 169 of the *National Anti-Corruption Commission Act 2022* is a useful starting point subject to modifications appropriate to reflect the above.<sup>88</sup>

**RECOMMENDATION 25: IGADF should have an express power to follow up any recommendation of an IGADF inquiry, audit or investigation.**

**RECOMMENDATION 26: If, as required or thought appropriate by reason of service exigencies, a commander exercising command prerogatives rejects a recommendation made by the IGADF or implements it only partially, that commander should be required to provide reasons in writing for their decision to the IGADF.**

<sup>87</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024.

<sup>88</sup> [BN76814908](#) *National Anti-Corruption Commission Act 2022*.

**RECOMMENDATION 27:** Unless the IGADF decides otherwise in respect of individual complaints that have been investigated or following the conclusion of a Redress of Grievance, the reasons provided by command for rejecting a recommendation should be provided to the aggrieved complainant.

### Disclosure of inquiry information

304. This is a relatively simple point that can be simply fixed. In the course of an inquiry an Assistant IGADF may conduct formal interviews. The present regulations permit the IGADF to give a person a copy of their own record of interview if they request it during the course of an inquiry. However once that inquiry has been completed the position is otherwise. That has become the subject of some aggravation. The Review is satisfied that a person's entitlement to request and obtain a copy of their own interview should not turn on the timing of a request.

**RECOMMENDATION 28:** *A person who has been formally interviewed in the course of an inquiry should at all times be entitled to seek and obtain a copy of their record of interview.*

### Derivative use immunity

305. In *Police Service Board v Morris*, (Morris) Brennan J, as he then was, reasoned as follows:

The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and efficiency. It cannot be thought that the Police Regulations intend a police officer to be able to cloak with his silence activities which are prejudicial to the achievement of these purposes. To permit, under a cloak of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force.<sup>89</sup>

306. It is uncontentious that a similar analysis applies equally to the operations of the ADF.

307. The decision of the High Court in *Morris* involved a question of construction. It was as to whether the relevant police regulations had sufficiently manifested an intention to abrogate the common law entitlement that citizens generally possesses to refuse to answer any question which may incriminate them or expose them to a civil penalty.

308. The common law is that no one need answer questions. Parliament can require persons to answer questions, but an Act will not be interpreted as requiring a person to incriminate themselves unless it does so by express words or necessary implication, that is, by unmistakable language. In the facts of *Morris* whether the Police Regulations had manifested that intention was answered in the affirmative.

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<sup>89</sup> [BN72931885](#) *Police Service Board v Morris*, [1985] HCA 9; (1985) 156 CLR 397 (27 February 1985).



309. In respect of a serving member of the ADF no further consideration need be given to this threshold question. Various provisions of the *Defence Act 1903* and the respective regulations made pursuant to it explicitly and unambiguously permit questions the answer to which might incriminate an ADF member to be asked. They must be answered in every instance unless they relate to a criminal charge that is already before a court.

310. However, the *Defence Act 1903* provides two distinct and separate mechanisms to authorise the obligation to answer questions. They differ with respect to the consequences that attend the use of any compelled answers.

311. In respect of Defence administrative inquiries concerning the ADF not undertaken by IGADF, which can be loosely described as CDF commissioned inquiries, s124(1)(gc) of the *Defence Act 1903* authorises the making of regulations. That power has been exercised to make the *Defence (Inquiry) Regulations 2018*.

312. Those regulations authorise the CDF (and the Minister) to establish a Commission of Inquiry.<sup>90</sup>

313. They also authorise the CDF to appoint an Inquiry Officer to undertake an inquiry into any matter concerning the ADF.<sup>91</sup>

314. In both instances, except in relation to a circumstance in which a criminal charge has already been preferred<sup>92</sup>, a witness is not excused from answering a question, when required to do so, on the ground that the answer to the question might tend to incriminate that person<sup>93</sup>.

315. In respect of such a 'CDF inquiry' s124(2C) of the *Defence Act 1903* then operates to provide an immunity for a witness's testimony. That section provides that a statement or disclosure made by a witness in the course of giving evidence before such an inquiry is not admissible in evidence against that witness in any civil or criminal proceedings in any federal court or court of a State or Territory or in proceedings before a service tribunal; otherwise than in proceedings by way of a prosecution for giving false testimony.

316. This form of protection against the hazard of self-incrimination conveniently can be referred to as a 'use' immunity. It means that a confession made under compulsion to answer a question cannot be led in evidence in other proceedings.

317. By contrast an answer given under compulsion in an investigation undertaken pursuant to regulations made pursuant to s124(1)(h) of the *Defence Act 1903* (as is the case those conducted by the IGADF) is governed by the much wider terms of s124(2CA) of the *Defence Act 1903*. Section 124(2CA) is as follows:

If a witness makes a statement or disclosure in the course of giving evidence before the Inspector-General ADF or a person appointed under section 110P:

(a) the statement or disclosure; and

<sup>90</sup> [BN73902108](#) *Defence (Inquiry) Regulations 2018*, s8.

<sup>91</sup> [BN73902108](#) *Defence (Inquiry) Regulations 2018*, s44.

<sup>92</sup> [BN73153839](#) *Defence Act 1903*, s124(2B)

<sup>93</sup> [BN73902108](#) *Defence (Inquiry) Regulations 2018*, s38(1)(a) and s67(1)(a)

(b) the making of the statement or disclosure; and

(c) any information, document or thing obtained as a direct or indirect consequence of making the statement or disclosure;

are not admissible in evidence against the witness in:

(d) any civil or criminal proceedings in any federal court or court of a State or Territory; or

(e) proceedings before a service tribunal;

other than in proceedings by way of a prosecution for giving false testimony at the hearing before the Inspector-General ADF or person appointed under section 110P.<sup>94</sup>

318. Thus in addition to the person's answers being prevented from being led in evidence in other proceedings as a confession, their answers are protected so as to exclude any 'derivative use' of them.

319. There is no public record available to explain the reason for the discrepancy with respect to the different indemnities that apply.

320. The only rationale that the Review has identified for the form of the IGADF immunities take is that their enactment was in accord with the preferred drafting model the Attorney General's Department recommended accompany the conferral of new compulsory powers. There appears to have been no recognition of the fact that those powers were not relevantly new or of the inconsistency that other Defence Act inquiries would continue to operate without those limitations.

321. The difference between the two different kinds of indemnities that are provided for by the *Defence Act 1903* can be crudely illustrated by a simple example.<sup>95</sup>

322. Suppose a person required by law to answer a question admits to having strangled someone and then provides information about the remote location where he has buried the body.

323. A corpse is located where the person said he had buried it. Some DNA specific to the murderer is found under the victim's fingernails.

324. A 'use' indemnity prevents the confession of the murder and the murderer's account of where they had buried the body being used as evidence against them in any criminal proceeding or service tribunal.

325. A 'derivative use' immunity of the kind provided for in s124(2CA) goes much further.

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<sup>94</sup> [BN73153839](#) *Defence Act 1903*, s124(2CA)

<sup>95</sup> For further reading as to the subject matter of immunities in respect of compelled answers in Australia see [BN72710571](#) Sofronoff P, 'Derivative use immunity and the investigation of corporate wrongdoing', [1994] QUTLawJl, (1994) 10 Queensland University of Technology Law Journal 122; [BN72751167](#), Rogers D, *Coercion in Crime Commissions and the abrogation of the privilege against self-incrimination*, Queensland Law Reform Commission, August 2003, Discussion Paper WP No 57; and [BN73687141](#) Donaghue S, *Royal Commissions and permanent Commissions of Inquiry*, Butterworth, 2001, pp201-259.

326. The kind of indemnity provided for in an IGADF inquiry prevents any information, document or thing obtained as a direct or indirect consequence of making a statement or disclosure being admissible in evidence against the person who has confessed to the murder in any criminal proceeding or service tribunal.

327. Because the body in the example was located as a direct result of the information that had been provided by the murderer a derivative use immunity almost certainly would extend not only to any evidence regarding the finding of the body but also to the DNA found under its fingernails. It thus extends to real evidence about objective facts as would ordinarily be admissible in any criminal proceeding as speaking for themselves.

328. The qualification that the indemnity ‘almost certainly’ extends that far is necessary because there is no clear High Court authority to allow the Review confidence either as to the reach of the immunity or in respect of where the burden of proof lies to establish that evidence has or has not been contaminated by reason of its compelled derivation.

329. The latter is as important as the former. In *Hamilton v Oades*<sup>96</sup> Mason CJ observed in reliance on earlier observations of Murphy J in *Sorby v Commonwealth*<sup>97</sup> that an immunity against derivative use tends to be ineffective by reason of the problem of proving that other evidence is derivative.

330. That reasoning however has been strongly questioned. In *Royal Commissions and Permanent Commissions of Inquiry*<sup>98</sup> Stephen Donaghue before his appointment as Commonwealth Solicitor-General noted:

[The] assumption [that the burden of proof is on accused] runs counter to the normal rule in Australia that the onus of proof in relation to the admissibility of evidence in a criminal trial rests on the prosecution...This burden can be difficult to discharge and it is this difficulty the leads to suffusions that derivative use immunity is ineffective. If it is ineffective, however, it is because it provides too much protection to witnesses, sometimes resembling transactional immunity. It therefore seems likely that if the High Court ever considers the matter in detail, it will decide that the burden of proving that evidence was not obtained in violation of a derivative use indemnity falls on the prosecution.<sup>99</sup>

331. Mr Donaghue’s reference to the indemnity providing ‘too much protection to witnesses sometimes resembling transactional immunity’ is a powerful reason to hesitate as to its appropriateness in the IGADF context. Transactional immunity is a full immunity from prosecution for the acts that are the subject of an inquiry.

332. Other statutes which originally contained derivative use immunities have seen that immunity removed. Immunity from derivative use was removed from the ASIC legislation by the *Corporations Legislation (Evidence) Amendment Act 1992* as a result of a parliamentary committee having been satisfied that the immunity was hampering investigations into corporate wrongdoing.

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<sup>96</sup> [BN77145338](#) *Hamilton v Oades* [1989]; (1989) 166 CLR 486 (12 April 1989) at 496.

<sup>97</sup> [BN77146098](#) *Sorby v Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 (18 March 1983).

<sup>98</sup> [BN73687141](#) Donaghue S, *Royal Commissions and permanent Commissions of Inquiry*, Butterworth, 2001, p235.

<sup>99</sup> [BN73687141](#) Donaghue S, *Royal Commissions and permanent Commissions of Inquiry*, Butterworth, 2001, p235.

333. As Mr Donaghue notes the immunity was found to have had the effect of allowing major suspects to exploit it by providing the investigators with a full confession. That made it difficult to conduct prosecutions. It was hard to prove that any evidence later intended to be relied upon had not been derived as a result of evidence given under those powers<sup>100</sup>. Until the amendment was passed to abolish the derivative use immunity ASIC had had to work around the problem by not requiring major suspects to answer questions or produce documents.

334. The Australian Crime Commission (originally the National Crime Authority) has had a similar history. The derivative use immunity that originally was provided for compelled evidence was removed by *National Crime Authority Legislation Amendment Act 2001*.<sup>101</sup> It was substituted for by a simple use immunity of the kind that now applies in a CDF inquiry.

335. A derivative use immunity is not provided for in the recently enacted *National Anti-Corruption Commission Act 2022*.<sup>102</sup>

336. The aftermath of the IGADF Afghanistan Inquiry has brought this issue into sharp focus. The Review is satisfied that the issues that have since arisen warrant reconsideration of the appropriateness of retaining a derivative use immunity for the Office of the IGADF.

337. This Review has been scrupulous neither to seek nor to obtain any information not already in the public domain in respect of the inquiry conducted by MAJGEN and then-Justice Brereton in his capacity as an Assistant IGADF.

338. However, the Reviewer did meet with those responsible for following up that inquiry and has discussed in general terms the issues that have been of concern to them. The Review is in no doubt that the existence of the derivative use indemnity as it applied to the IGADF's Afghanistan Inquiry has created and continues to create significant difficulties for the Office of the Special Investigator and those in the Office of the Director of Public Prosecutions responsible for evaluating the prospects of bringing criminal prosecutions in respect of the matters that were the subject of that inquiry.

339. It is inappropriate to particularise the difficulties that they have encountered. However in summary the Office of the Special Investigator advised the Review that it has been compelled, having regard to the provision of s124(2CA) to attempt to produce briefs of evidence on the necessary basis, that any charge brought cannot be informed by anything not capable of being demonstrated to have been discovered independent of knowledge of any statement given by a compelled witness. That is a strained process. It requires deliberate blindness on the Office's part to objective facts capable of being led in evidence unless a chain of provenance can exclude that it has not been discovered as a direct or indirect consequence of a person's making a compelled statement or disclosure to the IGADF inquiry. Self-evidently that task is very difficult. In some instances, it may be impossible to discharge.

340. It may be accepted that such an immunity has some advantages. As Mr Brereton observed in a note to the Review:

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<sup>100</sup> [BN73687141](#) Donaghue S, *Royal Commissions and permanent Commissions of Inquiry*, Butterworth, 2001, p 233.

<sup>101</sup> [BN77352910](#) *National Crime Authority Legislation Amendment Act 2001*.

<sup>102</sup> [BN76814908](#) *National Anti-Corruption Commission Act 2022*.

Viewed from the perspective of one conducting an IGADF inquiry—and not from the perspective of one conducting a follow-up criminal investigation or prosecution—my view is that the derivative use immunity was of assistance to the IGADF Afghanistan Inquiry. To be able to assure a witness that not only could what they told us not be used in evidence against them, but also that nothing discovered directly or indirectly as a result could be used against them, in my view assisted in eliciting the truth from some individuals.<sup>103</sup>

341. If the sole purpose of an IGADF enquiry is understood as limited to providing to the CDF information about events that have occurred within the ADF that advantage might be persuasive against change.

342. However, the Review is unpersuaded that difficulty in obtaining witness co-operation is a reason for a different approach in the ADF context than that which applies in the Australian Crime Commission and many like integrity bodies.

343. It no doubt is true that the informal bonds of solidarity that operate within small groups in the ADF will often make fact finding difficult but that is equally so with organised crime groups where the reputation of being a ‘dog’ (informer) may carry with it a death sentence.

344. Moreover, it is not the case that the sole purpose of an IGADF is simply to provide the CDF with otherwise un-actionable intelligence.<sup>104</sup> Part VIII B of the *Defence Act 1903* makes it clear that an object of the establishment of the IGADF was to provide an avenue by which failures and flaws in the military justice system could be exposed and examined **‘so that the cause of any injustice (whether systemic or otherwise) may be remedied’**. (emphasis added).

345. Section 110C(1)(d) provides that it is a function of the IGADF to promote military justice values across the Defence Force.

346. Nothing could be more inimicable to those objects and that function than that the use of the very mechanism the *Defence Act 1903* provides for IGADF to conduct an independent inquiry into the most egregious misconduct and violations of military justice values also provides at best, a significant practical impediment, and at worst, an avenue to seek a permanent stay of prosecution to the worst perpetrators of the subversion of the military justice system.

347. If those who have been identified as having perpetrated violations of Defence discipline are practically immunised thereby from criminal proceedings or even from accountability in a service tribunal the inevitable result must harm the self-esteem of others in the ADF and result in loss of confidence in the military justice system. It will erode public confidence in government and public administration.

348. There is a better way. As the Explanatory Memorandum to cl 113 of the Bill which introduced the *National Anti-Corruption Act 2022* noted in rejecting the inclusion of a derivative use indemnity in that instance:

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<sup>103</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024.

<sup>104</sup> A similar inclusion underpins the Right Hon Sir Charles Haddon-Cave’s open ruling on undertakings as head of the independent inquiry relating to Afghanistan in the United Kingdom. See Enclosure 2 to this Report, *Open Ruling on Undertakings*.

It is important that material derived from investigation material can be used to investigate, disrupt and—where appropriate—prosecute persons involved in serious or systemic corrupt conduct, including by prosecuting persons who have been witnesses before the Commissioner. For example, material provided by a witness in a hearing may lead the Commissioner to pursue new lines of investigation, which ultimately culminate in a brief of evidence against the witness. It is critical that such evidence can be used to disrupt corrupt conduct, including by prosecuting persons who have been witnesses.

Further, it would open court proceedings up to inappropriate delay, and be contrary to the interests of justice, if evidence referred by the NACC could not be admitted until the prosecution had established its provenance. Previous experience under the former *National Crime Authority Act 1984* demonstrated that providing a derivative use immunity for examination material was inappropriate as it undermined the capacity of the National Crime Authority to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act 2001*, the derivative use immunity in the National Crime Authority Act required the prosecution to prove the provenance of each piece of evidence in the trial of a person that the National Crime Authority had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.

Importantly, the NACC Bill would preserve the inherent power of the courts to make orders that are necessary to ensure a fair trial of the witness (see clause 106). This could include orders to limit or remove any prejudice from the prosecution’s lawful possession or use of investigation material or derivative material.<sup>105</sup>

349. While the analogy is not exact the circumstances addressed are very similar. The reasoning is persuasive. The Review is satisfied that a like provision should apply to the IGADF.

350. A CDF inquiry is not handicapped by a limitation that extends to derivative use. The Review proposes that the anomaly be redressed such that both will operate consistently.

351. It is implausible to retain a wider derivative use immunity which operates solely to handicap the work of the IGADF and provides an impediment to subsequent prosecutions.

**RECOMMENDATION 29: The immunity provided for in s124(CA)(c) of the *Defence Act 1903* and s32 of the *IGADF Regulation 2016* should be identical to that applying to any inquiry conducted internally by Defence within the ADF so as to remove the extended derivative use immunity that currently applies only to a statement or disclosure made to the IGADF.**

## CHAPTER 5: MILITARY POLICE PROFESSIONAL STANDARDS

352. The *IGADF Regulation 2016* provided for the functions of the IGADF to be expanded, inter-alia, to permit it to advise on, or determine, the procedure for handling complaints in relation to Service police officers.

<sup>105</sup> [BN77114221](#) NACC Bill 2022, *NACC (Consequential and transitional provisions) Bill Explanatory Memorandum*, paras 7.393-7.395

353. In consequence the IGADF has jurisdiction to investigate complaints made about Service police officers and to determine whether a military police member remains a fit and proper person to serve in that role. The IGADF Professional Standards team has authority to examine such complaints by way of assessment, inquiry or an investigation under the *Defence Force Disciplinary Act 1982*.

354. In that regard the IGADF’s function with respect to Service police professional standards is a hybrid one of oversight and management.

355. It is unique within the IGADF in that if the IGADF determines a matter concerning the fitness of a person to serve as a member of the military police, that outcome is self-executing.

356. The IGADF’s professional standards team is small. Consistent with its hybrid duties it comprises a full-time IGADF team leader and three permanent senior military police investigators, seconded to it, one from each service arm.

357. Complaints which can trigger the IGADF’s involvement can come from outside Defence or made anonymously. In practice the majority are self-reported or submitted by ADF units.

358. A snapshot of the outcome of the outcomes of complaints for FY 2022-2023 is contained in the table below:

Unit of respondent	Total complaints	Adverse findings	
		Breach of MP code of conduct	Code of conduct breach <u>and</u> found not fit and proper to serve as MP
Joint Military Police Force	34	7	2
1 MP Battalion	12	2	1
Navy establishment	18	8	0
Anonymous	1	1	0

Overview of Military Police Professional Standards Complaints FY 2022-2023<sup>106</sup>

359. At the Review’s request the Reviewer met with the Provost Marshal of the ADF. The Provost Marshal expressed his opinion that it was challenging to his status and to his prerogative of command that the management and disposition of all complaints against Service police, no matter how minor, were dealt with by the IGADF.

360. The Review is sympathetic to the Provost Marshal’s concerns. However, the difficulty of identifying a list of ‘minor’ offending suitable to be designated to be managed internally in the contest of the work of the military police is self-evident. What in other contexts might be of trivial concern can be significant in respect of the fitness of a person to serve in the military police.

<sup>106</sup> [BN67948073](#) *Inspector-General of the Australian Defence Force Annual Report 01 July 2022 to 30 June 2023*, p15.

361. Juvenal's ancient question *quis custodiet ipsos custodes?* (who guards the guardians?) never has received an entirely satisfactory answer.<sup>107</sup>

362. The Review encourages the IGADF's military justice team and the IGADF to continue to explore with the Provost Marshal whether there might be some securely bounded class of minor matters (those not potentially going to the fitness of a Service police member to serve in that capacity) that can be excised from the IGADF's decision to determine all complaints. The existing regulations would provide that flexibility.

363. The issue is not one legal capacity but of retaining confidence in the robustness of the process.

364. The practice of police investigating their own is inherently fraught.

365. Until and unless the IGADF is satisfied that a change of the kind sought by the Provost Marshal can be achieved without loss of confidence in the integrity of the system the existing arrangements should be retained.

366. The Review is unpersuaded that it should recommend a change to the present system.

**RECOMMENDATION 30: The existing arrangements for investigation of complaints made about military police do not require modification.**

## CHAPTER 6: EXCEPTIONALISM

367. On 3 November 2023 the CDF wrote to the Review to ask it to consider an issue, important to Defence, falling within its terms of reference. That issue concerned what might be open to the IGADF to assist Defence address the problem of exceptionalism.<sup>108</sup> As the Review understands it the term exceptionalism is used to describe a circumstance where a cultural divergence can lead to some members within the ADF ceasing to regard themselves as subject to the same constraints of conduct and military justice as apply to everyone else.

368. The CDF wrote:

Of particular relevance, the Afghanistan Campaign Study recommended Defence conduct a review into our internal capability, and the capability of independent bodies such as the IGADF, to routinely examine and pre-emptively scan units vulnerable to exceptionalism to help identify emerging risks. In light of this recommendation, I ask you consider as a part of your review whether this role should form part of the functions of the IGADF. I note exceptionalism frequently manifests in normalised breaches of legal and moral rules or societal expectations. This divergent culture is inherently linked to undermining military discipline and the proper performance of the Military Justice System.

<sup>107</sup> 'Satira VI' is a verse satire by the Roman satirical poet Juvenal, written around 115CE. In it Juvenal asks 'who guards the guardians'. See [Beyond Juvenal: "who will guard the guardians?" - Cherwell](#) accessed 1 February 2024; [SATIRE VI - JUVENAL - SUMMARY & ANALYSIS - Ancient Rome \(ancient-literature.com\)](#) accessed 1 February 2024.

<sup>108</sup> [BN73684388](#) CDF EC23-004388 / BN72106456, 3 November 2023.



An appreciation of the IGADF's current capacity to examine diverging culture within ADF units, and any additional resources necessary to enable that work, will be of particular relevance as a key step to ensure that we properly mitigate the risk of cultures of exceptionalism developing across the ADF. In making this request I note the IGADF is uniquely placed to observe indicators of cultural exceptionalism in units as part of its routine work investigating complaints and conducting military justice audits.

Rather than identifying specific units, Australian Defence Force Headquarters (ADFHQ) has consolidated a list of anecdotal risk factors which may contribute to ADF elements developing a culture of exceptionalism. This has also been informed by the Defence People Group's paper on exceptionalism. Risk factors may include (but not be limited to):

- Small or isolated workforces.
- Specialised workforces with technical skill-sets.
- Units subject to high-tempo employment with limited opportunity for respite.
- Physically dispersed units that are dislocated from their command elements.
- Units that select and train within a closed community, sometimes with advocacy, protection and promotion within the community.
- Units that undertake minimal routine engagement with areas outside of the immediate workforce.
- Units that encourage a 'Can do' culture, to win or achieve at all costs.
- Units that lack diversity or lack curiosity.

I provide this list to illustrate the types of conditions that may present risk. Broadly, they more frequently occur in units or groups that present challenges for commanders to actively monitor and support, or which may have limited exposure to, or integration with, wider ADF culture.<sup>109</sup>

369. In a note to the Review Mr Brereton raised the same issue. He recalled that the IGADF Inquiry he had headed had included the following recommendation:

An independent tri-service multi-disciplinary specialist operations inquiry cell be established, for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel with a mix of expertise drawn from arms corps (to provide the requisite understanding of the battlespace and operations), lawyers (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as an independent resource for command in any military operation. Such a cell could reside in the Office of the Inspector-General of the ADF (IGADF), where it would have available the powers of compulsion available under the *IGADF Regulation 2016* (with the associated protections).<sup>110</sup>

370. Mr Brereton noted that the rationale for that recommendation was as follows:

Commanders at all levels were failed by oversight mechanisms provided by QAs and IOIs. ADFIS investigations, though sometimes entirely appropriate, are a blunt instrument with which to

<sup>109</sup> [BN73684388](#) CDF EC23-004388 / BN72106456, 3 November 2023.

<sup>110</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024, para 10.

confirm or allay suspicions of wrongdoing. The Inquiry notes the suggestion that commanders could benefit from coronial-like powers with associated protections, beyond fact-findings, QAs, IOIs and ADFIS investigations that might be utilised to find the truth of matters and provide commanders with accurate information upon which to base decisions that might include administrative or disciplinary response options.

One problem with the ad-hoc approach to inquiries was that IOs, each conducting a separate individual inquiry, did not have the opportunity to see the emergence of patterns. A standing professional inquiry agency would be better positioned to do so. Any inquiry mechanism needs to have a substantial degree of independence, an index of suspicion, and the forensic skills, experience and techniques to question the veracity of evidence and to test it.<sup>111</sup>

371. Mr Brereton noted that it was not apparent that that recommendation had been addressed.

372. The Review accepts that this is so, but it is plain from the CDF's correspondence to the Review that substantial work has been and is continuing to be undertaken to evaluate how best to address the problem that the IGADF's Afghanistan Inquiry had identified and had made that recommendation about.

373. The first thing the Review should emphasise is that the problem of 'exceptionalism' is not unique to Defence.

374. It is a wicked problem. It emerges as a possibility whenever an individual or a group with power over others has been entrusted with a task requiring both specialisation and a degree of autonomy. There are many examples. The armed robbery squad of the Victorian Police for a period went out of control. It had the reputation of dispensing its version of justice at the end of a gun. Roger Rogerson and those he corrupted to enable his conduct in NSW did the same in that State.

375. If exceptionalism is not effectively countered in a disciplined force it can metastasise to the degree it controls its host. That became the case with the Queensland Police service under the command of Sir Terry Lewis.

376. In addition to the risk factors the CDF has identified the Review observes, as the example of Roger Rogerson usefully illustrates, exceptionalism is commonly associated with charismatic leadership (as opposed to legal and traditional authority) when coupled with the sense of entitlement that often co-exists with it. A charismatic leader can be celebrated despite, and sometimes because of, their contempt for boundaries.

377. The term 'exceptionalism' nonetheless needs to be used carefully.

378. The ADF must continue to recruit exceptional people to fulfil its duty to the nation. The ADF needs to continue to equip exceptional people to undertake exceptional and difficult tasks. Whether in the Navy, Army or Air Force a member of the ADF needs to have loyalty to those they serve alongside and be willing to risk danger on behalf of their fellows.

379. The response to the problem of exceptionalism cannot be to privilege mediocrity.

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<sup>111</sup> [BN76836077](#) MAJGEN Brereton Submission of 08 January 2024, para 11.

380. The Review should be modest in proposing solutions. This is a problem that has never been entirely solved.

381. However there appears to be three key opportunities for the IGADF to be enhanced to better assist the CDF to address risk management.

382. They are risk identification, risk minimisation and risk control.

### **Risk identification**

383. The Review has already noted that the data that the IGADF collects has yet to be comprehensively utilised to help inform the ADF regarding improvements to the military justice system. The IGADF's audit reports (and its data more generally) should routinely be analysed to refine the knowledge about the risk factors which the CDF needs to know about when shaping the force structure of the ADF.

384. Identifying risk becomes even more important when the ADF is planning for operations. One of the risks is that latent exceptionalism, not previously revealed, might manifest itself in the field. The Review therefore proposes that the IGADF be involved to provide its advice into mission planning for any future operational deployments so that potential risks which might manifest as exceptionalism in the conduct of service personnel can be identified and brought into account from the outset.

**RECOMMENDATION 31: Before, or if that is not practicable concurrent with, any new deployment of ADF members on operations the CDF should seek and the IGADF should make available, the expertise of IGADF to be applied to scenario testing designed to identify any risks of breakdown of military discipline that are or may be inherent by reason of 'micro-cultures', exceptionalism or otherwise in that deployment.**

### **Risk minimisation**

385. There are certain existing features of the IGADF's functions which already address risk minimisation.

386. The cycle of IGADF routine audits already gives priority to those of ADF special forces units. The Review's recommendation that there be a capacity for unannounced 'hot audits' should complement that.

387. Nonetheless as this Review has earlier noted smaller units of less than 50 personnel to date have not been incorporated into the routine cycle of IGADF audits.

388. In this context that is problematic. Two of the risk factors that the CDF has been warned about regarding exceptionalism relate to small or isolated workforces and those that are physically dispersed and dislocated from their command elements.

389. The Review therefore proposes that the IGADF be resourced to respond to those risk factors, with such refinements its own data might reveal to be appropriate, to allow it to build into its audit cycle the routine expectation that even small units, on a risk informed basis, will be made subject to audit.

**RECOMMENDATION 32: IGADF should be resourced to allow for routine audit of small units on a risk-informed basis.**

### Risk control

390. The IGADF's Afghanistan Inquiry noted that one of the problems with the superintendence of military actions in Afghanistan was that investigations were conducted in isolation from each other and that therefore the emergence of patterns was never identified.

391. The Review has already indicated that planning for risk should be built into any mission from the outset and that the IGADF should be integral to that process. A key learning from the IGADF's Afghanistan Inquiry is that occasional specific superintendence is insufficient. Investigation of operational incidents needs to be longitudinal over the whole timeline of operations.

392. Mr Brereton's recommendation was that the relevant investigation cell to undertake that responsibility reside in the Office of the IGADF. The Review is satisfied that that functionality, if appropriately resourced, can be facilitated within the Office of the IGADF without the need for additional legislative requirements.

393. The Review has no reason to propose an alternative to the mechanism that Mr Brereton recommended. To serve that function the IGADF would require the funding of some additional human resourcing but the relevant investigative cell could operate on a small standby basis with operational readiness to scale up as required. The professional skills of the team could be drawn on for other IGADF functions when not in the field.

**RECOMMENDATION 33: Unless the CDF chooses to adopt a mechanism different from that recommended by the Afghanistan Inquiry Report the IGADF be resourced so as to provide the capacity for a standby multi-disciplinary specialist operations inquiry cell capable of being scaled up as required.**

## CHAPTER 7: STATUTORY DEPUTIES

394. The Review's earlier recommendations in respect of service deaths assume that the Office of the IGADF will become Commonwealth entity and that one of two statutory Deputy IGADFs will be appointed and become directly responsible, inter-alia, for the IGADF's function of inquiring into service deaths.

395. Assuming the balance of this Review's recommendations are accepted the case for those two appointments is overwhelming.

396. The Review accepts that the extreme pressures that the IGADF has had to cope with as a result of COVID lockdowns and its conduct of the Afghanistan Inquiry are in the past. However, the latter of those events is not a closed book. An appeal in those civil proceedings is yet to be heard. Any criminal proceedings that may arise out of the work of the Office of Special Investigator will continue to generate, for the foreseeable future, significant and resource heavy demands (by reason of security classification) for responses to subpoena and notices to produce.

397. Even without that pressure the breadth of the IGADF's duties already have become both too diverse and too significant for any one person to effectively oversight. That is so even before the IGADF undertakes the significant additional administrative responsibilities that the requirements of the *Public Governance, Performance and Accountability Act 2013* will impose.

398. The Review therefore proposes that the leadership of the Office of the IGADF be expanded. Expanding its leadership team will allow the IGADF to focus their direct oversight on the core task of inquiries relevant to the health of the military justice system while certain other functions of the office can be supervised by a Deputy who, subject to the IGADF's direction, can provide direct and consistent line of sight responsibility for their discharge.

399. The Review has already set out its reasoning the specific and complex set of responsibilities that attend the role of investigation of service deaths should be a core responsibility of one of those Deputies.

400. The Review proposes that the IGADF's audit functions which will be expanded if this Review's recommendations are accepted, combined with the analysis of data collected by the Office of the IGADF should be the core responsibility of a second Deputy.

401. Since the IGADF was established as a statutory office 20 years ago new functions have been bolted on to it. Those have been in respect of service deaths, military policing and Redress of Grievances. While those share some commonalities they are distinct and different roles.

402. It is predictable that the Office of the IGADF will continue to be identified as being the most appropriate repository for any further integrity functions Defence needs served by an independent but respected external agency.

403. The Review's proposal that the leadership of the Office of the IGADF be expanded will future proof it against the risk that any additional conferral of a new function will be beyond the Office's capacity to absorb that tasking.

404. Moreover, the fundamental premise of this Review is that while retaining the capacity to understand and hold the respect of the ADF, the Office of the IGADF must be and must be seen to be independent of military command.

405. That perception risks being undermined so long as any Deputy the IGADF might administratively appoint can (as presently is the position) remain a member of the ADF and, as such, notionally subject to the chain of military command.

406. The Review proposes that any Deputy IGADF, the most senior of whom should automatically step into the shoes of the IGADF whenever the IGADF is on leave or is otherwise unavailable, be required to resign their commissions.

407. The independence of two Deputy IGADF's (and the security of tenure that goes with it) should be statutorily provided for.

408. No room should be allowed for a perception a Deputy IGADF might mute criticism of the ADF's senior command influenced by hope of future preferment.

409. However, because any Deputy IGADF will remain subject, ultimately, to direction by the IGADF both the mechanism for their appointment and the qualifications they require to hold ought to be more flexible than that stipulated for the latter office.

410. It should be possible to appoint as Deputy IGADF a person who has skills and experience relevant to their intended specific duties.

411. For example, the best candidate with skill and experience (and sensitivity) appropriate to manage the key task of reviewing service deaths might well not have an existing Defence background. However they must have the capacity to quickly gain an understanding of military justice issues as will permit them to command the respect of those in the ADF with whom they necessarily will have dealings. It would be desirable that a Deputy appointed to take responsibility for the audit function should be a person with direct experience of the military justice system or the responsibilities of administration and command within the ADF.

412. A Deputy IGADF would be appointed by the Minister by written instrument and hold office on a full-time basis for the period specified in their instrument of appointment not exceeding five years but be capable of reappointment.

413. By analogy to the existing provision in s110E(2) of the *Defence Act 1903* the Minister should be required to have regard to any recommendation made by the IGADF to address the prospect that the IGADF might otherwise be saddled with a Deputy they lack confidence in.

**RECOMMENDATION 34:** To assist the IGADF to undertake an already expanded range of responsibilities and any that may subsequently be conferred on it, two Statutory Deputy IGADFs be appointed by the Minister after consulting with the IGADF. Their terms of appointment should be for a period of not more than five years but they should be eligible for reappointment.

**RECOMMENDATION 35:** The IGADF should retain ultimate authority over all aspects of the Office of the IGADF and manage the core Burchett Report functions of investigations and inquiries relating to the military justice system.

**RECOMMENDATION 36:** To provide for the diversity of roles and different human resource skills required, one Deputy IGADF should undertake the day-to-day management of the audit functions of the Office and one Deputy IGADF should have day-to-day management of the IGADF's function of inquiring into service deaths.

**RECOMMENDATION 37:** More flexible qualifications for appointment of the IGADF should apply to a Deputy IGADF. An appointee should be required to have appropriate qualifications to undertake the key functions of their respective offices.

**RECOMMENDATION 38:** The provisions of s110N of the *Defence Act 1903* providing for acting appointments be substituted for with a provision that during any vacancy of office or periods that the IGADF is overseas or otherwise unable to perform the duties of office, the most senior of the Deputy IGADF's in length of service shall act as the IGADF.

## CHAPTER 8: MISCELLANEOUS AND TRANSITIONAL

### Legal professional privilege

414. As presently constituted under Part VIIIB of the *Defence Act 1903* it is tolerably clear that the IGADF is, as are each of the ADF and Defence, an emanation of the Commonwealth. Legal professional privilege inhering in the Commonwealth therefore does not arise and will not be waived when legal advice provided to one is shared with the other.<sup>112</sup>

415. It is tolerably clear that the same position will be preserved with the establishment of the Office of the IGADF as a Commonwealth entity subject to the provisions of the *Public Governance, Performance and Accountability Act 2013* unless by statute the Office is given a separate legal personality such that it can be understood not to share a common body politic.<sup>113</sup> The Review has not proposed and sees no necessity for that.

416. However, in abundance of caution notes that care should be taken to avoid the possibility of legal professional privilege being capable of being asserted in relation to the provision of legal advice inter-se the Office of the IGADF and the Commonwealth in its other emanations and in particular Defence and the ADF. It would be inimitable to the proper functioning of the Office for that to be permitted to become a problem.

### Authorisations and Delegations

417. The ordinary working of the Office of the IGADF requires that the powers conferred on the IGADF routinely be delegated to those appointed by IGADF to be responsible for the conduct of inquiries and other tasks. The present provisions of the *Defence Act 1903* and the regulations made pursuant to it expressly permit certain of the IGADF's powers and functions to be delegated. That leaves many others as the subject of *Carltona* delegations.<sup>114</sup>

418. The Review understands that no difficulty has arisen in those regards. However, greater certainty in application would be desirable.

<sup>112</sup> [BN79448220](#) NSW Council for Civil Liberties Inc v Classification Review Board (No 1) (2006) 235 ALR 313: see per Edmonds J at [31].

<sup>113</sup> [BN79446877](#) Mann v Carnell (1999) 201 CLR 1.

<sup>114</sup> *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560; the principle applies in Australia; [BN79447232](#) Minister for Aboriginal Affairs v Peko Wallsend Ltd [1986] HCA 40.

419. Having regard to the Review's recommendation that two statutory Deputy IGADFs be appointed, it proposes, in the drafting of legislation to establish the Office of the IGADF as a separate Commonwealth entity, that the occasion be taken to provide a comprehensive statutory basis for the IGADF to delegate any and all of their powers and functions as they see fit, including, in respect of statutory Deputy IGADF the power to sub-delegate those powers and functions in respect of any duties a Deputy IGADF has been given authority to carry out.

**RECOMMENDATION 39:** The legislation establishing the Office of the IGADF should provide a comprehensive statutory basis for the IGADF to delegate all necessary powers and functions including in respect of those conferred on a statutory Deputy IGADF the power to sub-delegate.

### Penalties

420. The penalties provided for conduct which is inconsistent with the duties of the IGADF are inconsistent.

421. At the high end are those provided for in Part III of the *Crimes Act 1914*. Although Part III is headed 'Offences Relating to the Administration of Justice', s31 extends the definition of a judicial proceeding to include 'a proceeding before a body or person acting under a law of the Commonwealth....and in which evidence may be taken on oath'.<sup>115</sup>

422. The IGADF is such a person in respect of the conduct of an inquiry—as is any Assistant IGADF to whom an appropriate delegation has been given.

423. A maximum penalty of five years' imprisonment applies to the majority of such offences. Those include: as provided for in s35, giving false testimony; as provided for in s36, fabricating evidence; as provided for in s36A, intimidation of witnesses; as provided in s37, corruption of witnesses; and, as provided in s39, destroying evidence.

424. The penalty provided for the offence of deceiving a witness (s38) carries a maximum of two years' imprisonment, and that provided for the offence of preventing a witness attending (s40) carries a maximum penalty of one years' imprisonment.<sup>116</sup>

425. By contrast the more specific offences provided for in Part IV Division 5 of the *IGADF Regulation 2016* have only relatively trivial penalties.

426. The maximum penalty provided for a failure to answer questions (s29), contempt (s30), and taking reprisals (s31), is 10 penalty units.<sup>117</sup> The present value of a penalty unit is \$313.00.<sup>118</sup>

427. On the assumption that that power of the IGADF to take evidence on oath will be retained (as the Review is satisfied remains appropriate) the significant penalties provided for in

<sup>115</sup> [BN78011824](#) *Crimes Act 1914*, Part III, s31.

<sup>116</sup> [BN78011824](#) *Crimes Act 1914*, Part III, s35-40.

<sup>117</sup> [BN74860313](#) *IGADF Regulation 2016*, s29-30

<sup>118</sup> [BN78013173](#) *Crimes (Amount of Penalty Unit) Instrument 2023*.



Part III of the *Crimes Act 1914* will continue to have potential application. However, such a proceeding would need to be commenced by indictment and tried before a jury.

428. Those provisions will remain available to prosecute the most egregious instances of misconduct.

429. The summary offences that are prescribed specifically to protect the work of the IGADF are much more likely to be utilised to prosecute anything other than the very worst instances of misconduct.

430. Yet the level of penalties presently provided for those summary offences fails to reflect the seriousness of the conduct they prohibit.

431. The gulf between outcomes applying to those different procedures should not be so vast: one on indictment that is capable of resulting in a long term of imprisonment, the other punishable only by a slap on the wrist.

432. The penalties provided for the summary offences in Part IV Division 5 of the *IGADF Regulation 2016* have become significantly out of date. They need to be revised upwards. By way of illustration the penalties that Parliament recently provided for a contravention of the information seeking powers in s44 of the *Inspector-General of Aged Care Act 2023* include the option of imprisonment for up to six months and in some instances, a fine of up to 100 penalty units. Those provided for in s60 of the *NACC Act* provide for a penalty of up to two years imprisonment.

433. The review is satisfied that as an integrity agency the IGADF should be protected by significant penalties if responded to with defiance or by an abuse of its processes. It proposes that the penalties for those summary offences be increased to provide for a maximum of 12 months imprisonment or a fine of up to 100 penalty units or both.

434. Moreover the provisions in Part IV Division 5 of the *IGADF Regulation 2016* which define those offences also have become significantly outdated. They currently apply only to an IGADF inquiry.

435. The offence provisions should extend to the full range of the IGADF's work including its audit function. In addition, they should extend to a provision analogous to those provided for in s29 and 30 of the *National Anti-Corruption Commission Act 2022* to make it an offence to take reprisal action against any person because they have or are suspected to have made a complaint to the IGADF.

**RECOMMENDATION 40:** The offences provided for in s29-31 of *IGADF Regulation 2016* be provided for in the principal act and be reviewed to ensure that they extend to the full range of the IGADF's functions. There should also be an offence of taking reprisal action against any person because they have or are suspected to have made a complaint to the IGADF.

**RECOMMENDATION 41:** The penalties for such a breach be increased to a maximum of imprisonment for 12 months or a penalty of 100 penalty units, or both.

**IGADF inquiries conducted by a judicial officer**

436. Division 4A of the *IGADF Regulation 2016* provides for a unique form of inquiry if constituted by an Assistant IGADF who is a serving judicial officer.

437. Those provisions reflect the constraints regarded as necessary having regard to high constitutional principles regarding the nature of non-judicial power capable of being conferred on a judicial officer.

438. Given the exigencies applying at the time of their making it was understandable that a very cautious ‘belt and braces’ approach was taken.

439. Absent advice from the Solicitor-General the Review would not propose an alteration to those provisions.

440. However the Review thinks it appropriate that the Solicitor-General’s advice be sought with respect to the constitutional necessity for s28(1)(a) and (b).

441. Those provisions authorise an Assistant IGADF who is a judge to add anything they see fit to the matter they have been commissioned to inquire into, and to vary the terms of reference of their inquiry without either consulting or obtaining the agreement of the IGADF.

442. Those unique provisions potentially licence an inquiry extending to one at large, bound neither by any terms of reference or time.

443. The Review has in mind that that prospect may provide an unnecessary disincentive for the IGADF to make such appointments.

**RECOMMENDATION 42: IGADF seek advice from the Solicitor-General with respect to the constitutional necessity for s28(1)(a) and (b) of the *IGADF Regulation 2016*.**

**Increasing knowledge of the IGADF to be coupled with capacity to triage trivial or vexatious complaints**

444. Doing all of the things that this Review has proposed will give greater visibility of the independent role of the IGADF. Increasing its visibility is overdue. The Review conducted ten roundtable discussions with currently serving ADF personnel at 3rd Brigade, RAAF Townsville, HMAS Cairns and 51 Far North Queensland Regiment. Only a few of those who participated in those roundtables knew of the existence of the IGADF. Even fewer had an understanding of how they could access the IGADF if they were to become concerned about a miscarriage of the military justice system. However, this circumstance should not be taken to suggest that those who have a complaint do not ultimately discover the process as is evidenced by the fact that the number of submissions seeking an inquiry have increased significantly over the past two years.

445. If the existence of an integrity institution is unknown to those whose interests it is intended to serve it will become a residual institution. The Review proposes that information about the IGADF be included in annual mandatory awareness training.

446. The Review accepts that giving greater visibility and convenience of access, to the work of the IGADF within the ADF is likely to result in more requests for the IGADF's intervention being made. That outcome is consistent with the IGADF's long standing responsibility to be available to address complaints about the operation of the military justice system.

447. However, not every complaint will warrant the commencement of a formal IGADF inquiry. Trivial or vexatious complaints should be capable of being summarily disposed of.

448. Presently s110DB of the *Defence Act 1903* gives the IGADF authority to end an inquiry if they are satisfied that its continuation is not warranted having regard to all the circumstances. That statutory provision should be added to in order to clarify that the IGADF may also undertake a preliminary assessment (triage) to determine whether the commencement of an inquiry, other than one that the Minister or the CDF has requested be undertaken is warranted.

**RECOMMENDATION 43: Information about IGADF's role and functions should be included in annual mandatory awareness training.**

**RECOMMENDATION 44: The IGADF should have express authority to undertake a preliminary assessment to determine whether the commencement of an IGADF inquiry is warranted.**

#### **Transitional arrangements that should apply to the current office holder.**

449. The term of the current Inspector General of the ADF, Mr James Gaynor, does not expire until 30 November 2026.<sup>119</sup> Nothing the Review has recommended is inconsistent with Mr Gaynor serving out the balance of his term and, in due course, assuming the additional responsibilities that that office holder will become responsible for as the accountable authority for the Office of the IGADF for the purposes of the *Public Governance, Performance and Accountability Act 2013*.<sup>120</sup>

450. The Review proposes that the legislation to establish the Office of the IGADF include a transitional provision to deem that the current holder of the office of Inspector General of the ADF continue office as if he had been appointed by the Governor-General to serve a seven-year term expiring on that date.

**RECOMMENDATION 45: The new IGADF legislation should include a transitional provision to deem that the current officer holder continue as if appointed by the Governor-General for a seven year term expiring on 30 November 2026.**

<sup>119</sup> [BN49661846](#) *Inspector-General of the Australian Defence Force Annual Report 01 July 2021 to 30 June 2022*, p1.

<sup>120</sup> [BN79419338](#) *Public Governance, Performance and Accountability Act 2013*.

### **Arrangements required before establishing Office of IGADF as a Commonwealth entity**

451. The Review has earlier drawn attention to some of the issues that will need to be settled prior to constituting the Office of the IGADF as a Commonwealth entity responsible for its own administration within the Defence portfolio.
452. The Review has proposed the legislation establishing the Office of the IGADF as such commence by proclamation only after mission critical arrangements are in place to ensure that the Office will have the capacity necessary to undertake its new functions.
453. An indicative checklist of what in addition to an agreed budget will be required can be found at Annex B.
454. To give assurance that the necessary arrangements have been put in place, the Review proposes that once the legislation to establish the Office of the IGADF as a Commonwealth entity has been enacted the Minister commission an Implementation Review. The task of the Implementation Review would be to stress test the adequacy of the arrangements that are being put into effect and to advise the Minister when those parts of the Act which await proclamation to establish the Office as a distinct Commonwealth entity should be put into operation.

**RECOMMENDATION 46: The Minister for Defence should commission a short focussed review before the initial establishment of the Office of the IGADF as a Commonwealth entity to report on whether its establishment under the new legislation has been adequately prepared for.**

### **Ensuring the ongoing effectiveness of the Office of the IGADF**

455. This Review is the first comprehensive examination of the work of the Inspector General of the ADF that has been commissioned since that office was established some 20 years ago. Not only has the environment in which Defence operates but also its structures have changed very significantly over those 20 years.
456. The role of the Office of the IGADF is inherently linked to the continually evolving Defence environment.
457. For that reason the Review proposes that a cycle of routine reviews of the Office of the IGADF be commissioned to ensure that the Office remains fit for the important roles the appointment of a statutory Inspector General of the ADF was designed to fulfil and all further functions that have become, or may become, expected of it.
458. Given the importance of the independence of the Office the Review proposes that an external public facing Review be commissioned by the Minister on a ten year cycle.
459. It further proposes that, at the midpoint of that cycle, an internal review be commissioned jointly by Defence, the CDF, and IGADF so that any practical issues that may emerge in the interim can be identified and addressed in a timely way.

**RECOMMENDATION 47:** Having regard to the rapidly changing environment in which Defence operates there should be an internal review into the operation of the Office of the IGADF commissioned jointly by the IGADF, the Secretary and CDF after five years of the Office's operation as a Commonwealth entity, followed by an external review commissioned by the Minister for Defence after ten years of its operation and that cycle should be continued thereafter.

### **An issue beyond the scope of the Review**

460. The Review earlier has drawn attention to the One Defence doctrine and, in consequence, to the work of public servants and contractors in direct support of the work of the ADF and vice versa.

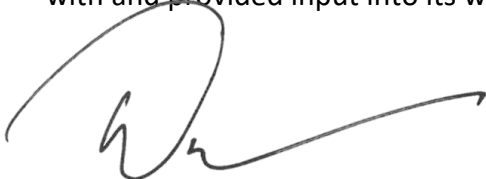
461. The Review has made specific recommendations that will permit the IGADF to inquire into a matter notwithstanding it involves others whenever the conduct or suspected conduct of an ADF member is involved. However it did not take its Terms of Reference to extend beyond that point.

462. Whether the mandate of the IGADF should ultimately extend to the general superintendence of integrity functions across Defence and become the Office of Inspector-General of Defence involves a number of complexities not examined by this Review. However, prima facie that proposition appears to have merit. If the Defence environment continues to evolve towards the greater integration of the ADF's warfighting capabilities with direct civilian support it is a question that ought to be included for attention in the cycle of routine reviews that have been proposed.

### **CONCLUSION**

463. The Review has consulted widely to ensure, as far as is capable of being anticipated, that the recommendations it has made are practical and can be implemented with the full support of the IGADF and Defence, including those holding the highest command positions in the ADF.

464. The Review again expresses its gratitude to all of the wide range of persons it consulted with and provided input into its work.



**Hon Duncan Kerr SC Chev LH**  
Former Justice Federal Court of Australia  
Reviewer

21 March 2023

### **Annexes:**

- A. Review Stakeholder Engagement
- B. Commonwealth Entity Start-up Recommendations

**Enclosures:**

1. Burchett Inquiry recommendations and outcomes
2. *Open Ruling on Undertakings* by the Right Hon Sir Charles Haddon-Cave

**REVIEW STAKEHOLDER ENGAGEMENT**

1. The Review met with and thanks the following people for their insights and input into the Review:
  - a. Mr Iain Anderson – Commonwealth Ombudsman.
  - b. Ms Joanne Beavis – Secretary, Australian Special Air Service Association – NSW and Vice President Miranda RSL Sub-Branch.
  - c. Mr Tim Begbie KC – Chief Counsel Dispute Resolution, Australian Government Solicitor.
  - d. Mr Matthew Berrisford – Acting Assistant Secretary Business Management and Governance, IGADF.
  - e. The Hon Paul Brereton AM RFD SC – National Anti-Corruption Commissioner.
  - f. LTCOL Leigh Briggs – Military Police Professional Standards.
  - g. BRIG Wayne Budd AM CSC – Post Afghanistan Inquiry Coordination Cell, IGADF.
  - h. GEN Angus Campbell AO DSC – Chief of the Defence Force.
  - i. CDRE Richard Caton – then-Chief of Staff Australian Defence Headquarters.
  - j. Ms Gwen Cherne – Veteran Family Advocate Commissioner.
  - k. AIRMSHL Robert Chipman AM CSC – Chief of Air Force.
  - l. The Hon Paul Cogley AO KC – Special Adviser to the Special Investigator, Office of the Special Investigator.
  - m. Ms Amy Cooper – Chief Executive Officer, Soldier On.
  - n. Mr Adrian D’Amico – Chief Counsel, Department of Defence.
  - o. MAJGEN Gavin Duncan DSC – Defence Act Program Advocate.
  - p. Mr Geoff Earley – former Inspector-General of the Australian Defence Force.
  - q. Mr Charlie Faulder – Senior Legal Officer, Directorate Inquiries and Investigations.
  - r. Ms Samantha Ferry – Senior Adviser, Office of the Deputy Prime Minister and Minister for Defence.
  - s. Mr Chris Fox – Office of Solicitors Assisting, Royal Commission into Defence and Veteran Suicide.
  - t. LTGEN Natasha Fox AO CSC – Chief of Personnel.

**OFFICIAL**

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- u. Mr Dale Furse – Chief Operating Officer, Australian Signals Directorate.
- v. Mr Andrew Garland – Chief of Staff, Defence Legal Service.
- w. Mr James Gaynor CSC – Inspector-General of the Australian Defence Force.
- x. Mr Ron Glew OAM – President, Air Force Association NSW.
- y. Ms Justine Greig – Deputy Secretary Defence People.
- z. GPCAPT Roger Halford – Director Legal Review, IGADF.
- aa. VADM Mark Hammond AO – Chief of Navy.
- bb. Ms Brooke Hartigan – FAS Security and Counter terrorism Division, Attorney-General’s Department.
- cc. Mr Greg Isolani – Veterans Advocate and Lawyer.
- dd. VADM David Johnstone AC – Vice-Chief of the Defence Force.
- ee. Mr Bruce Kafer AM CSC – Secretary, Naval Association NSW.
- ff. LTCOL Louise Kirkwood – Executive Committee Member, Coogee RSL Sub-Branch and Australian Army Psychology Corps Association.
- gg. Mr Glenn Kolomeitz – Veteran, Veterans Advocate and Lawyer.
- hh. Senator Jacqui Lambie – Senator for Tasmania.
- ii. GPCAPT Terry Lewis – Provost Marshal ADF.
- jj. Ms Erin Longbottom – Senior Counsel, Royal Commission into Defence and Veteran Suicide.
- kk. COL Amanda Lye – Director Military Justice Performance Review.
- ll. BRIG Phil McNamara AM – Former patron Commando Association NSW.
- mm. COL Michael Miller LVO RFD – Strategic Coordination, IGADF.
- nn. Mr Chris Moraitis PSM – Director-General Office of the Special Investigator.
- oo. Mr Greg Moriarty AO – Secretary of the Department of Defence.
- pp. Mr Garth Morrison – Adviser, Office of Senator Jacqui Lambie.
- qq. LCDR Patience Neal – then-Deputy Director Legal Review, IGADF.
- rr. Ms Rachel Noble PSM – Director-General Australian Signals Directorate.
- ss. Mr Hugh Poate – Author of ‘Failures of Command: The Death of Private Robert Poate’.

**OFFICIAL**



- tt. Ms Therese Quinn – Defence Act Project Lead and Director Legal Reform.
  - uu. COL Jeff Quirk – Assistant IGADF in the Directorate of Select Incident Review.
  - vv. Mr Dennis Richardson AC – former Secretary, Department of Defence.
  - ww. Ms Rachael Salter – Director of Policy, Royal Commission into Defence and Veteran Suicide.
  - xx. Mr Andrew Snashall – then-Director Military Redress and Review.
  - yy. CDRE Fiona Sneath – then-Deputy IGADF.
  - zz. LTCOL Damien Spendelove – then-Acting Director Select Incident Review.
  - aaa. LTGEN Simon Stuart AO DSC – Chief of Army.
  - bbb. Ms Jo Tarnawsky – Chief of Staff, Office of the Hon Richard Marles MP.
  - ccc. Mr Kim Turner – President, Royal United Service Institute of NSW.
  - ddd. MAJGEN Richard Vagg DSC – then-Acting Chief of Army.
  - eee. AIRCDRE Catherine Wallis CSM – then-Director Inquiries and Investigations, and Military Police Professional Standards.
  - fff. The Hon Mark Weinberg AO KC – Special Investigator, Office of the Special Investigator.
  - ggg. RADM Brett Wolski AM – Head Afghanistan Inquiry Task Force.
  - hhh. Mr Matt Yannopoulos PSM – Associate Secretary, Defence.
2. The Review also thanks all of those who made a written submission to the Review:
- a. The Hon Paul Brereton AM RFD SC – National Anti-Corruption Commissioner.
  - b. Mr Michael Callan.
  - c. Dr Kay Danes, OAM.
  - d. Dr Guy Duczynski
  - e. Mr Noel Edmonson.
  - f. The Hon Martin Hamilton-Smith on behalf of the Australian Special Air Service Association.
  - g. Mr Gordon Harris on behalf of the Queensland Whistleblowers.
  - h. Mrs Angela McKay.
  - i. Mr Hugh Poate.

j. Ms Chole Prendergast.

k. Ms Kathryn Rae.

l. Mr David Savage.

m. Mr Michael Thomas.

n. Mrs Patricia and Mr Michael Turner.

o. Mr Andrew Vanden Hengel.

3. The Review is especially grateful for the submissions made by ex-serving members of the ADF and those made by families of ADF members who have died. Nothing can assuage their loss.

COMMONWEALTH ENTITY START-UP CONSIDERATIONS

Category	Function	Comment
Legislative	Principal Act	<ul style="list-style-type: none"> <li>Overarching legislative reform to establish IGADF Act, and any other consequential amendments</li> </ul>
	Related legislation	<ul style="list-style-type: none"> <li>Consideration of consequential amendments – likely require outreach and engagement with affected partners</li> </ul>
	Administrative Arrangement Orders	<ul style="list-style-type: none"> <li>Necessary for establishment of the entity, can also include statutory MOG trigger</li> <li>Seek small agency Efficiency Dividend exemption</li> </ul>
Financial	Initial and Ongoing Appropriation	<ul style="list-style-type: none"> <li>New policy proposal – people (salaries, leave liabilities, individual flexibility arrangements etc), property (lease, fit out, sustainment, and security), ICT systems (MOU costs, design, build and accreditation costs for any bespoke system) and infrastructure (ICON network extension to premises, network infrastructure for each network), SES Cap, ASL Cap</li> <li>Ongoing annual budget appropriation</li> <li>Significant governance structures needed – accountable authority instructions etc</li> <li>Contract variations – movement from Defence ABN to IGADF ABN</li> </ul>
	Financial Management	<ul style="list-style-type: none"> <li>Establishment of IGADF ABN</li> <li>Establishment of IGADF bank account – recommend using reserve bank – may include establishing credit facility for agency travel and purchasing credit cards</li> <li>Training and access to CBMS otherwise MOU for treasury functions with shared services provider or portfolio department</li> <li>Financial management and accounting systems (preference is MOU for retained access to Defence system – otherwise recommend TM1)</li> </ul>
	Contracting / Procurement	<ul style="list-style-type: none"> <li>Contract renegotiation and transfer from Defence ABN to new ABN</li> <li>Establishment of contracts for new services</li> <li>If Defence shared services arrangements are not viable options – shared services arrangements with other WoAG providers i.e. CTM and AOT (travel), Winc (stationery), SSC/Hub (payroll/HR processing) etc</li> <li>Dependant on agency premises, additional contracts for subsidised parking may be necessary</li> </ul>

Category	Function	Comment
	Fleet management	<ul style="list-style-type: none"> <li>• Vehicle leasing contract (WoAG provider, likely SG Fleet) or</li> <li>• Establish MOU with Defence for ongoing fleet support</li> </ul>
Governance	Strategy/Plans	<ul style="list-style-type: none"> <li>• PGPA compliant Corporate plan</li> <li>• Internal strategic and operational level plans</li> <li>• Agency transformation guide/plan</li> <li>• Performance reporting frameworks</li> </ul>
	Compliance	<ul style="list-style-type: none"> <li>• IGADF Audit Committee</li> <li>• Development of an Internal audit program</li> <li>• Host the Auditor-General for annual performance/financial performance audits</li> <li>• Annual reporting (annual report, Harradine list, Senate continuing order on contract publications)</li> <li>• Gifting and hospitality policy and procedures</li> <li>• Asset management policy and procedures</li> <li>• Privacy policy (and/or rules) if there are any Privacy Act exemptions</li> </ul>
	Transparency	<ul style="list-style-type: none"> <li>• Freedom of information cell and obligations – depends on whether any exemptions apply to IGADF’s work</li> <li>• Requirement to participate in the information publication and disclosure scheme to achieve the intent of open government policy</li> </ul>
	Risk Management	<ul style="list-style-type: none"> <li>• Risk management framework and policy</li> <li>• Business continuity planning and management</li> </ul>
	Structures	<ul style="list-style-type: none"> <li>• Design organisational structure – highlight key management personnel and c-suite functions (COO, CHRO, CSO, CISO, CFO)</li> <li>• Implementation of operating model including delegations and authorisations (including PS Act delegations, WHS Act roles, PGPA Act delegations etc)</li> <li>• Appointment of accountable officers for specific functions</li> </ul>
	Safety	<ul style="list-style-type: none"> <li>• Implementation of WHS systems to satisfy employer’s legal obligations (policies, COMCOVER insurance)</li> <li>• Memorandum of Understanding with Portfolio Department for access to portfolio safety arrangements (WHS training, employee assistance program etc)</li> </ul>

Category	Function	Comment
	Security	<ul style="list-style-type: none"> <li>Establishment of agency-specific security management protocols</li> <li>Consideration of contracting agency-specific security resources i.e. security guards, off-site monitoring services etc</li> <li>Establishment of IGADF as a sponsoring agency within AGSVA system as opposed to Defence Civilian sponsoring entity</li> </ul>
People	Industrial Relations	<ul style="list-style-type: none"> <li>Enterprise Agreement – decision needed on whether to use an existing EA as a model, or create Greenfields agreement ahead of agency creation.</li> </ul>
	Staffing	<ul style="list-style-type: none"> <li>Machinery of Government Change (i.e. moving current Defence APS staff via s72 of the Public Service Act 1999)</li> <li>Determine whether to seek Defence assistance for payroll, HR systems access/management for IGADF employees (shared services)</li> <li>Memorandum of Understanding for any arrangements being sought for shared services</li> <li>Recruitment of staff (includes development of recruitment strategy, implementation of IGADF Integrated Development Program)</li> <li>Onboarding of new staff including vetting processes</li> <li>Return of APS employees who may do not wish to transition to the IGADF entity</li> <li>Consideration of redundancies of staff who are unable/unwilling to transfer via MOG to the IGADF entity – or those who Defence will not accept</li> <li>Salary packaging provider contract(s)</li> <li>Performance management process and L&amp;D frameworks</li> <li>Standard range of organisational HR policies, delegations and authorisations – statutory, enterprise agreement, and policy based decisions</li> <li>Establish WGEA information gathering and reporting</li> <li>Establish APSC relationship for census relationships</li> <li>Code of conduct delegations/internal investigations framework</li> </ul>
	Recruitment	<ul style="list-style-type: none"> <li>Establishment of recruitment policies and processes</li> <li>Decision on recruitment portal use/design i.e. IGADF’s own process</li> <li>Establish relationship with the APSC for gazette access</li> <li>APSC relationship needed for AGSNs</li> </ul>

Category	Function	Comment
Property	Lease	<ul style="list-style-type: none"> <li>• Identification, and contract to lease premises – single or multiple (is this the time to establish Canberra HQ and one or more offices located outside of Canberra?)</li> <li>• Consideration of facility requires proximity/access to ICON network as part of network infrastructure costs for NPP and PWC approval of costs</li> </ul>
	Fitout	<ul style="list-style-type: none"> <li>• Design, proposal (public works committee) and construction of agency premises, including SCIF</li> <li>• Consideration of staff, and witness welfare and wellbeing contracts i.e. ‘quiet’ pods, environmental sustainment contracts including ‘green office’, safe space interview/multipurpose rooms.</li> </ul>
Communications	ICT Systems	<ul style="list-style-type: none"> <li>• MOU for shared services arrangement to access Defence ICT systems – essential for ability to carry out IGADF work</li> <li>• Access to DPE – essential for IGADF’s work</li> <li>• Access to DSE – essential for IGADF’s work</li> <li>• Access to higher classified systems by establishing an arrangement with ASD for IGADF enclave</li> <li>• Decide if a bespoke standalone system is needed – design, build and accredit system</li> <li>• Mobile system access (DREAMS, mobile phones, ipads etc)</li> <li>• Establishment of IGADF Telstra account – provisioning of data point accesses etc</li> <li>• Conferencing facilities (video, telephone – multi classification)</li> <li>• Access to PDMS for parliamentary communications</li> <li>• Access to CABNET+ for cabinet communications</li> <li>• Access to ForceNet – for advertising EOI’s</li> </ul>
	Branding	<ul style="list-style-type: none"> <li>• Decision to use Commonwealth Crest or commission an IGADF logo</li> <li>• Creation of agency stationery (as needed)</li> </ul>
	Media	<ul style="list-style-type: none"> <li>• Media monitor contract or MOU with Defence</li> <li>• Establish media adviser position or MOU with Defence for continued support</li> </ul>
Information Management	Records disposal authorities	<ul style="list-style-type: none"> <li>• Establishment of IGADF-specific records disposal authorities through DG NAA</li> </ul>
	Record keeping obligations	<ul style="list-style-type: none"> <li>• Information management policies and protocols</li> <li>• Record keeping system (preference is to retain Objective via DPE/DSE through an MOU)</li> </ul>
	Existing Records	<ul style="list-style-type: none"> <li>• Consider process for managing/transferring records that are not IGADF’s property back to originator or to NAA – i.e. Commission / Board of Inquiry files and material</li> </ul>

Category	Function	Comment
Logistics	High Security Item management	<ul style="list-style-type: none"><li>MOU required with Defence for the ongoing management of High Security Items collected by IGADF Inquiries – including administration of items obo IGADF in MILIS</li></ul>

**BURCHETT INQUIRY RECOMMENDATIONS AND OUTCOMES**

1. This document provides information about actions taken in response to the *Report of an Inquiry into Military Justice in the Australian Defence Force [ADF], July 2001* (the Burchett Report). The Inspector-General of the Australian Defence Force (IGADF) Twenty-Year Review considered available information about how the Military Justice System has since evolved. Where relevant to a specific Burchett Report recommendation, this contextual information is provided.

**Training in relation to the *Defence Force Discipline Act 1982 (DFDA)*****Recommendation 1. Common legal training courses in Disciplinary Law should be produced for Australian Defence Force personnel at all levels as soon as practicable.**

2. Defence Legal established the Military Law Centre (MLC) in 2000 to oversee the ADF legal officer training continuum. In 2005, the Burchett Implementation Team proposed MLC as the single authority responsible for discipline law training across the ADF.<sup>1</sup> This recommendation was taken up by the Military Justice Implementation Team established by CDF and Secretary in response to the 2005 Senate Standing Committee on Foreign Affairs, Defence and Trade's *Report into the Effectiveness of Australia's Military Justice System*.<sup>2</sup>

3. In 2007, the Military Justice Implementation Team proposed that Director General ADF Legal Services (DGADFLS) within the Defence Legal Division be designated as 'accountable officer' for prescribing common legal training outcomes and competency standards for all administrative and disciplinary law training. It also proposed that training design and delivery remain with stakeholders such as single service training commands and the Defence College.<sup>3</sup>

4. Defence agreed this model in 2009,<sup>4</sup> and established a Military Justice Training Advisory Group chaired by DGADFLS to oversee implementation and ongoing management of common disciplinary and administrative law training across the ADF.<sup>5</sup> DGADFLS delegated associated day-to-day responsibilities to Director MLC. MLC on behalf of DGADFLS, oversaw implementation of a new competency framework for military justice training across the ADF.<sup>6</sup>

5. The governance model and training for military law and justice have evolved in the time since with various reform initiatives. DGADFLS is now called the Director General Military Legal Service (DGMLS) and is the Joint Learning Management Authority for ADF military law and justice training.

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<sup>1</sup> [BN72567227](#) The Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 1.

<sup>2</sup> [BN76257720](#) Joint Directive 18/2005, *Head Military Justice Implementation Team* of 07 October 2005

<sup>3</sup> [BN76257729](#) HMJIT R2345062, *Brief for DETC [Defence Education and Training Committee] – Common Legal Training across the ADF – Concept proposal* of 29 November 2007

<sup>4</sup> [BN763365542](#) COSC Outcome Minute, *Agendum 13/09 – Military Justice Training - Competency and Governance Framework* of 02 April 2009

<sup>5</sup> [BN76257725](#) Military Justice Training Advisory Group, *Terms of Reference* of 15 October 2009

<sup>6</sup> [BN76257736](#) Email MLC to MJTAG delegates, *Annual Military Justice Training Outcomes Framework Compliance Report* of 11 December 2013



6. DGMLS chairs and is supported by the Military Law and Justice Learning Management Group.<sup>7</sup> MLC was in 2022 renamed Military Legal Training Centre (MLTC) and sits within Military Legal Branch under DGMLS. It continues to oversee military justice training delivered to ADF personnel and currently provides the following on-line discipline law training modules:<sup>8</sup>

- a. Introduction to Laying of DFDA Charges (Course ID: 00086453)
- b. Introduction to the role of Unit Investigating Officer (Course ID: 00086009)
- c. Introduction to the role of Summary Authority (Course ID: 00086640)
- d. Introduction to the role of Clerk in Summary Authority Hearings (Course ID: 00086775)
- e. Introduction to the role of Prosecuting Officer and Defending Officer in Summary Authority Hearings (Course ID: 00086911)
- f. Introduction to the Discipline Officer and Senior Discipline Officer (Course ID: 00085822)
- g. Introduction to the role of the Infringement Officer (Course ID: 00085831)

**Recommendation 2. In particular, a course for all officers covering basic legal principles should be introduced.**

7. When it was first established, the Military Justice Training Advisory Group (MJTAG) prioritised development of a *Military Justice – Initial Awareness* course for new ADF members including officers, and issued a training management plan for the course in October 2009.<sup>9</sup> The Services and Defence College conducted a mapping exercise to ensure their initial officer training courses met this training requirement.<sup>10</sup>

8. Military Justice training continues to be delivered by the Services and Defence College on all officer ab initio training courses. These are currently Navy's New Entry Officers Course, Army's full-time officer, part-time officer, and Special Service Officer commissioning courses, Air Force's Initial Officers Course, and the Australian Defence Force Academy (ADFA) Joint Military Education program. An ADFA midshipman or cadet is normally exposed to 14 instructor-led sessions covering legal rights, administrative law and disciplinary law during a three-year tenure at ADFA.<sup>11</sup>

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<sup>7</sup> [BN76371036](#) Article of Appointment of Joint Learning Management Authority for ADF military law and justice training dated 22 October 2020; and [BN76370515](#) DGMLS BN10191803, Appointment of Training Authorities for military justice training of 30 April 2021

<sup>8</sup> [BN78630058](#) Military Legal Training Centre accessed at [Pages - Military Legal Training Centre](#) on 09 January 2023

<sup>9</sup> [BN76310509](#) DGADFLS Minute, Military Justice Training – Implementation of 04 June 2009; and [BN76308947](#) MJTAG minutes of 15 October 2009

<sup>10</sup> [BN76314688](#) MJTAG minutes of 30 March 2010

<sup>11</sup> [BN76325235](#) MJTAG minutes of 15 March 2011

**Recommendation 3. The training for officers about to assume command appointments should, for all services, include a component comparable to that presently provided in the case of the Air Force in respect of Disciplinary Law.**

9. The Burchett Report identified that Air Force routinely provided a four to five day training package on the DFDA to officers about to take up a position of command, but that this was not the case in Navy or Army.<sup>12</sup>

10. Following CDF's acceptance of the Burchett Report recommendations in 2001, MLC gradually took responsibility for the content and conduct of military justice training on pre-command courses, these being the Navy CO/XO designate course, Army's Pre-Command Course, and the Air Force Commander's Seminar.

11. The Burchett Implementation Team in 2007 confirmed that all pre-command courses covered administrative and disciplinary law to a level comparable with the previous Air Force course nominated as the benchmark by the Burchett Report.<sup>13</sup>

12. The MLTC continues to oversight military justice training to pre-command courses to meet the relevant training outcomes such as:

- a. Conduct Summary Authority Proceedings.
- b. Conduct a Fact Finding.
- c. Conduct a Defence Administrative Inquiry.
- d. Make a Defence Administrative Decision.
- e. Perform the duties of an Appointing Officer.

13. While MLTC ensures consistency of content and has an evaluation role, command legal officers within each service most often deliver this training.

**Recommendation 4. Competency Standards should be devised and introduced for personnel involved in the disciplinary process at the summary level (for example, Defending Officers might be required to complete an interactive module on pleas of mitigation and attend a summary hearing before being available to represent someone).**

14. After the Burchett Report, the then-MLC completed an analysis of military justice functions specified in military law manuals and policy documents. MLC converted most of these functions into competency units, and clustered others to create competency units. This Common Military Justice Functional Competency Framework consisted of individual competency units linked to military justice functions.

15. Defence agreed this competency framework as part of Military Justice Training – Competency and Governance Framework in 2009. CDF directed the Service and Defence

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<sup>12</sup> [BN72040788](#) Burchett Report, para 117

<sup>13</sup> [BN72567402](#) Enclosure 8 to *The Burchett Report*

College to align their courses with the framework by December 2010.<sup>14</sup> This framework has evolved over time and includes functional competency units such as:

- a. Provide advice on Service Discipline law.
- b. Conduct an Arrest.
- c. Conduct a Unit level Investigation and prefer charges.
- d. Carry out Court Orderly functions.
- e. Perform the duties of a Defending Officer.
- f. Perform the duties of a Prosecuting Officer.

16. Military justice training including on disciplinary roles and processes is conducted on career courses. For example, Army's all-corps officer and soldier training continuum adds additional military justice competencies through each of the Junior Leader, Subject One Sergeant, Subject One Warrant Officer, and Regimental Sergeant Major courses.

17. A qualified sergeant is trained to prepare the prosecution case for a service tribunal, and likewise to defend a service member at summary proceedings. A qualified Warrant Officer is trained to provide DFDA advice for the conduct of summary proceedings, and to perform court clerk duties for summary proceedings, as well as to perform the post-trial administration as court clerk.

18. This face-to-face training complements the on-line DFDA training provided by the MLTC on *Campus* (the learning portal on the Defence Protected Network).

**Recommendation 5. Steps should be taken to encourage a closer involvement of junior officers in the disciplinary process.**

19. This recommendation proposed greater use of junior officer as defending officers and prosecutors for summary proceedings.<sup>15</sup> Defence paused implementation of this recommendation because of substantially different recommendations in the 2005 Senate committee report into the effectiveness of the Australia's military justice system. At that time, summary proceedings were the most used ADF disciplinary process.

20. The Senate Committee considered that the extant system for the prosecution of summary offences suffered from a greater lack of independence than Courts Martial and Defence Force Magistrate processes. It considered that ADF personnel should have the right to access impartial and independent tribunals at all levels within the military justice system—the right should not be confined to 'serious' offences.<sup>16</sup>

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<sup>14</sup> [BN763365542](#) COSC Outcome Minute, *Agendum 13/09 – Military Justice Training - Competency and Governance Framework* of 02 April 2009

<sup>15</sup> [BN72040788](#) Burchett Report, paras 117-119.

<sup>16</sup> [BN76434389](#) The Senate Foreign Affairs, Defence and Trade References Committee, *Report into the effectiveness of Australia's military justice system* of June 2005, paras 5.101-5.106

21. The Senate Committee recommendations were not consistent with closer involvement of junior officers in disciplinary processes. Even allowing for junior officers to attend and observe summary proceedings presented a challenge as legal opinions differed on the 'open/closed' status of summary proceedings.<sup>17</sup>

22. In providing the Government's response to the Senate Committee's recommendations, then Minister for Defence Robert Hill commented:

Commanders and leaders use the military justice system on a daily basis. It is integral to their ability to lead the people for whom they are responsible in order to ensure their welfare and safety.<sup>18</sup>

23. Legislation introduced in 2008 brought into effect those recommendations of the Senate Committee accepted by Government.<sup>19</sup> That legislation did not change the role of a Subordinate Summary Authority or Commanding Officer proceedings.

24. The Summary Authority Rules expressly excluded ADF Legal officers from representing an accused person in relation to Subordinate Summary Authority proceedings. If agreed by the accused and the chain of command respectively, a junior officer may be appointed as a defending officer or a prosecuting officer in those proceedings.<sup>20</sup> In the absence of legal officers for summary proceedings at the Subordinate Summary Authority level, a junior officer was more likely to have an opportunity for direct involvement in that type of proceeding than in other discipline proceedings.

25. A later review of the summary discipline system in 2017 determined that Summary Authority procedures should be simplified and recommended removal of the Subordinate Summary Authority as a Summary Authority under the DFDA.<sup>21</sup> The *Defence Legislation Amendment (Discipline Reform) Act 2021* brought this change into effect.<sup>22</sup> Direct involvement of junior officers in Summary proceedings is now restricted to circumstances where the accused chooses to be represented by a junior officer, in lieu of seeking a legal officer as their defending officer or representing themselves.<sup>23</sup>

**Recommendation 6. The introduction of annual awareness training in military justice issues should be considered.**

26. The initial military justice training framework developed by the MJTAG included Annual Awareness training. This was developed by IGADF for delivery by non-legal officers, and made available on the IGADF website.

27. The MJTAG later formed a view that the requirement for annual awareness training had been superseded with implementation of other training within the framework. The

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<sup>17</sup> [BN72567227](#) The Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 5.

<sup>18</sup> Senate Hansard Report, Wednesday, 5 October 2005, page 118

<sup>19</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*.

<sup>20</sup> [BN78686694](#) *Summary Authority Rules* commencing 22 September 2009, Rules 4 and 12.

<sup>21</sup> [BN76445060](#) *Review of the Summary Discipline System 2017*, Recommendation 38.

<sup>22</sup> [BN78689975](#) *Defence Legislation Amendment (Discipline Reform) Act 2021*, Schedule 2.

<sup>23</sup> [BN78693222](#) *Summary Authority Rules 2019*, Rule 7.

Services had the discretion to include or not include this awareness training in the mandatory annual training requirements levied on their personnel. Although available to all ADF units, only Army included this training as part of its annual mandatory training suite.<sup>24</sup>

28. Army later removed this as a mandatory annual training requirement.<sup>25</sup>

### **Discipline Officer Scheme**

#### **Recommendation 7. Consideration should be given to making the appointment of a Discipline Officer mandatory in all units.**

29. The Discipline Officer Scheme was introduced into legislation in 1995 to provide a simplified procedure for dealing with some minor offences, avoiding any permanent record. The scheme applied to members of below non-commissioned rank who may be given an infringement notice and elect to be dealt with by a Discipline Officer, having admitted to the infringement. At that time, Commanding Officers were authorised but not required to appoint Discipline Officers in their unit. The effect of this was that the scheme was not being employed at many ADF units at the time of the Burchett inquiry in 2001.<sup>26</sup>

30. Following the Burchett inquiry, Defence updated its policy to state that certain disciplinary authorisations and appointments must be in place. Defence also updated the Discipline Officer Scheme policy to include mandatory reporting to higher headquarters on Discipline Officer Scheme appointments and proceedings. The mandatory reporting regime required a Commanding Officer to have appointed a suitable Discipline Officer from within their own unit, or from another unit or headquarters in the event they had no-one suitable internally.<sup>27</sup>

31. The Discipline Officer Scheme is now called the Disciplinary Infringement Scheme. Current Defence policy states that Commanding Officers must appoint suitable personnel to perform key roles in the Disciplinary Infringement Scheme. Commanding Officers are responsible for appointing Senior Discipline Officers, Discipline Officers, Infringement Officers and 'members authorised for the administration of minor punishments'.<sup>28</sup>

#### **Recommendation 8. The ranks subject to the Discipline Officer Scheme should be all ranks to and including Captain-equivalent.**

32. After the Burchett and other military justice reviews, Defence sought amendments to the DFDA to implement accepted recommendations. These included a change to the Discipline Officer Scheme. New legislation came into effect on 20 September 2008 that expanded the jurisdiction of Discipline Officers to deal with a matter in respect of junior officers up to and including the ranks of Lieutenant in the Navy, Captain in the Army, Flight Lieutenant in the Air force and Warrant Officer (WO) and non-commissioned officer (NCO)

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<sup>24</sup> [BN76314688](#) MJTAG minutes of 30 March 2010

<sup>25</sup> [BN76384817](#) CA Directive 41/14—*Army Force Preservation package*

<sup>26</sup> [BN72040788](#) Burchett Report, para 124

<sup>27</sup> [BN76455169](#) *Discipline Law Manual*, Volume 3, paras 3.26, 3.33, 3.54 and 3.71

<sup>28</sup> [BN76411907](#) *Disciplinary Infringement Manual*, Edition 1, Para 2.1

ranks. This was in addition to the existing rank of officer cadet and member below non-commissioned rank.<sup>29</sup>

33. The Discipline Officer Scheme is now called the Disciplinary Infringement Scheme.<sup>30</sup> The scheme has two tiers of Discipline Officers, with a Senior Discipline Officer able to deal with a wider range of conduct and impose higher punishment than a Discipline Officer.

**Recommendation 9. The record of matters dealt with under the Discipline Officer Scheme for an individual member should be discarded not, as at present, upon departure from his or her unit or after twelve months, but upon promotion to a higher rank.**

34. Defence did not accept this recommendation.<sup>31</sup>

35. On 13 December 2022, Defence replaced the requirement to destroy disciplinary infringement records after 12 months with a requirement to permanently retain records of disciplinary infringements, which may only be accessed and used for authorised purposes in accordance with the *Defence Force Discipline (Disciplinary Infringement Records) Rules 2022* issued by CDF.<sup>32</sup> These rules describe the record 'access and use' regime:

- a. Infringement records are available to the unit and career management agency until archived, and can be taken into account for all personnel management decisions including promotion.
- b. Infringement records are archived after any of the following occurs:
  - (1) the member does not elect to be dealt with under the infringement scheme;
  - (2) the disciplinary infringement is dismissed;
  - (3) the member graduates from initial recruit or officer training;
  - (4) the member is substantively promoted to a higher rank;
  - (5) the service of the member ends.
- c. Infringement records including archived infringement records are available to the Service headquarters, Joint Military Police Unit and IGADF for discrete purposes including complaint resolution, investigations and audit.<sup>33</sup>

**Recommendation 10. The period allowed for members to elect to be dealt with by a Discipline Officer should be reduced from seven days to one day, subject to a discretion in**

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<sup>29</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*, paras 23 and 125; and [BN78908711](#) *Defence Legislation Amendment Act 2008*, Schedule 6.

<sup>30</sup> [BN76411907](#) *Disciplinary Infringement Manual*, Edition 1, Para 7.1.

<sup>31</sup> [BN72567227](#) The Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 9.

<sup>32</sup> [BN77402504](#) *Defence Force Discipline (Disciplinary Infringement Records) Rules 2022*.

<sup>33</sup> [BN77402504](#) *Defence Force Discipline (Disciplinary Infringement Records) Rules 2022*, s7.

**the officer who would bring the formal charge (if one were to be brought) to extend the time up to seven days.**

36. Defence implemented this change to the Discipline Officer Scheme in 2004.<sup>34</sup>

37. The current Disciplinary Infringement Scheme requires the Infringement Officer to specify the time and date for the infringed member to make an election whether or not to be dealt with by a Discipline Officer or Senior Discipline Officer. The infringed member must have a reasonable opportunity to consider their election decision and to seek advice. The election period should normally be between 24-48 hours.<sup>35</sup>

**Recommendation 11. The offences to which the Discipline Officer Scheme relates, and also the maximum penalties, should be reviewed if the scheme is extended to higher ranks.**

38. Defence reviewed the offences and penalties for higher ranks and determined that the punishments of a fine of up to one days' pay and/or a reprimand would apply in respect of the other junior officer ranks and a WO or NCO. Defence considered other discipline officer punishments of restriction of privileges, stoppage of leave, extra duties, and extra drill to be not appropriate punishments for officers, WOs and NCOs who may exercise subordinate command responsibilities in the hierarchical command structure of an armed force.<sup>36</sup>

39. Defence again reviewed the range of offences and punishments as part of the CDF-directed review of the Summary Discipline system in 2017.<sup>37</sup>

## **Extras**

**Recommendation 12. The nature, purpose and sphere of extras should be clarified by tri-service guidelines, so as to ensure that they may be lawfully imposed.**

40. The Burchett Report observed that an important practice in the ADF was referred to variously by the expression 'extras', 'correctional training', 'motivational training', 'positive reinforcement', 'attitudinal correction', 'memory enhancement training' and 'illegal punishment'.<sup>38</sup>

41. The term 'extras' used in this context is different to 'extra duties' a service tribunal or Discipline Officer may impose under the DFDA.

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<sup>34</sup> [BN72567227](#) The Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 10.

<sup>35</sup> [BN76411907](#) *Disciplinary Infringement Manual*, Edition 1, Paras 3.29-3.30.

<sup>36</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*, para 127.

<sup>37</sup> [BN76445060](#) *Review of the Summary Discipline System 2017*

<sup>38</sup> [BN72040788](#) Burchett Report, para 134.

42. Defence formalised policy and governance arrangements for 'extras' by formally renaming such them as 'corrective training'. In 2014, Defence codified the nature, purpose and sphere of corrective training in the *Military Personnel Policy Manual*.<sup>39</sup>

**Recommendation 13. The guidelines should make it clear that, as a matter of policy, extras are to be regarded as an administrative response that may be appropriate in some cases, falling outside the disciplinary measures established by the DFDA.**

43. See Recommendation 12.

**Recommendation 14. The guidelines should address the questions who may award extras, upon whom they may be imposed, monitoring arrangements, the types of activity covered and the nature of the failure on account of which an order for extras may be made.**

44. See Recommendation 12.

**Recommendation 15. The power to award extras should not be delegated below the rank of Corporal equivalent in respect of subordinates within his or her command.**

45. Defence codified the power to award 'extras' as 'corrective training' in 2014. Only ADF members of the rank of Corporal equivalent or above can direct a member subordinate to them in rank and in their chain of command to complete corrective training.<sup>40</sup>

**Recommendation 16. All ranks up to and inclusive of Captain-equivalent should be subject to orders for extras made by a superior.**

46. In light of the Burchett recommendation, Defence sought changes to the Discipline Officer Scheme because a Discipline Officer at that time could award extra duties only to officer cadets and members below non-commissioned rank. New legislation came into effect on 20 September 2008 that expanded the jurisdiction of Discipline Officers to deal with a matter in respect of junior officers up to and including the ranks of Lieutenant in the Navy, Captain in the Army, Flight Lieutenant in the Air Force and WO and NCO ranks. This was in addition to the existing rank of officer cadet and member below non-commissioned rank.<sup>41</sup>

47. Possible punishments made available to the Discipline Officer, who was required to be at least one rank senior to the prescribed ADF member, included the award of extra duties for a period not longer than three days.<sup>42</sup>

48. The Discipline Officer Scheme is now called the Disciplinary Infringement Scheme. This scheme applies to all ranks up to and inclusive of Captain-equivalent. The scheme

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<sup>39</sup> [BN76536541](#) *Military Personnel Manual*, Part 9, Chapter 2 as at 24 June 2014; see also [BN76464593](#) *Military Personnel Manual*, Part 9, Chapter 3 as at 12 January 2024

<sup>40</sup> [BN76536541](#) *Military Personnel Manual*, Part 9, Chapter 2 as at 24 June 2014, para 2.14; and [BN76464593](#) *Military Personnel Manual*, Part 9, Chapter 3 as at 12 January 2024, para 3.12

<sup>41</sup> [BN78908711](#) *Defence Legislation Amendment Act 2008*, Schedule 6.

<sup>42</sup> [BN76455169](#) *Discipline Law Manual*, Volume 3, table 5-1



allows for the award of extra duties by a Senior Discipline Officer for a period not exceeding seven days.<sup>43</sup>

### Utility of punishment

#### Recommendation 17. Consideration should be given to reviewing:

- (1) the nature of the punishments which may be imposed under the DFDA in the light of contemporary standards;**
- (2) whether some form of Service oriented community work could usefully be made an alternative sanction;**
- (3) whether the Act should be amended to confer a power, not merely to impose no punishment, but also, for a special reason, to decline to enter a conviction.**

49. **Nature of punishments.** Defence conducted a review of punishments in 2004. ADF command representatives were asked about the difficulty and practicality of imposing existing punishments, in addition to their usefulness and relevance, given the time since the DFDA was introduced in 1986. All existing punishments were used by some units or elements of all three Services. The review found that all existing punishments warranted retention, but that the level, consequences and relevance of some offences and punishments required closer consideration.

50. A 2006 review of offences and punishments confirmed this requirement and identified a number of additional changes.<sup>44</sup>

51. DFDA punishments available to Summary Authorities were updated in 2008. These changes included introduction of an ability for a Summary Authority to partly, as well as wholly, suspend the enforcement of certain punishments.<sup>45</sup>

52. **Community work.** Defence did not implement Service oriented community work as an alternate sanction under the DFDA. The IGADF Twenty-Year Review was unable to find a record of a decision to implement or not agree this recommendation.

a. It may be that Defence considered it would be unfair to punish an ADF member with community work for an offence that would not be an offence in a civilian context. The purpose of a separate system of military justice is to allow the ADF to deal with matters that pertain directly to the discipline, efficiency and morale of the military. To maintain the ADF in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, sometimes, dealt with more severely than would be the case if a civilian engaged in such conduct.

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<sup>43</sup> [BN76411907](#) *Disciplinary Infringement Manual*, Edition 1, Paras 1.17 and annex 9F

<sup>44</sup> [BN76404060](#) MJIT MINSUB ref 2006/1137831/1 of 13 December 2007

<sup>45</sup> [BN78908711](#) *Defence Legislation Amendment Act 2008*, Schedule 5.

b. The *Review of the Summary Discipline System 2017* identified that Summary Authorities in the British armed forces can impose community service orders and a sentence to conduct community service work within a community organisation or a defence related community organisation. That review also recommended a 'contemporary punishment regime be implemented'. Specifically, that punishment options include a Defence Service Order whereby an ADF member is required to perform Defence service work within Defence (for example, weapons or vehicle cleaning as directed by the member's CO).<sup>46</sup> This recommendation is now subject to consideration by the Military Justice Steering Group.

53. **To impose no punishment and decline to enter a conviction.** The Burchett Report recommended this power because it is useful where circumstances make it undesirable to record a conviction against a person who does not deserve the stain of a conviction or some collateral or administrative consequence that it would attract.<sup>47</sup>

a. The Summary Discipline Manual provides for a Summary Authority to direct that the convicted person undertake that they will be of good behaviour for at least 12 months as condition of having no conviction recorded.<sup>48</sup> The legislative basis for this policy is not clear as the DFDA mandates recording of a conviction even when no punishment is imposed on a convicted person.<sup>49</sup>

b. Defence is considering issues of mental health in the Summary discipline system. Legislation currently deals only with circumstances in which the accused is unfit to stand trial or not responsible for an act or omission because of their mental impairment at the time of the incident.<sup>50</sup> The Military Justice Steering Group is examining broader authorities required to allow for a mental health plan proposed by the accused's mental health practitioner to trigger an adjournment or dismissal of Summary proceedings, and thereby no requirement to enter a conviction. Implementation of such arrangements would require legislative change.

**Recommendation 18. The question be examined whether a separate scale of punishments for Navy members is any longer necessary.**

54. In September 2008 the separate scale of more severe punishments in respect of Navy contained in Schedule 3 of the DFDA were aligned with those that applied in respect of Army and Air Force. It was determined that although these separate scales of punishment for Navy were previously relevant due to the isolation of long periods at sea, modern communications and the prevalence of joint units and operations no longer justified the imposition of these more severe punishments on Navy personnel for the same offences compared to other members of the ADF.<sup>51</sup>

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<sup>46</sup> [BN76445060](#) *Review of the Summary Discipline System 2017*, Part 3, paras 13-14 and Recommendation 34

<sup>47</sup> [BN72040788](#) Burchett Report, para 148.

<sup>48</sup> [BN76410534](#) *Summary Discipline Manual*, p92.

<sup>49</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s75.

<sup>50</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s145.

<sup>51</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*.

**Recommendation 19. A review be undertaken of the applicability of the present scale of punishments to Reservists who are not on full time service or undergoing periods of continuous training.**

55. The IGADF Twenty-Year Review was unable to find a record of a decision to implement or not agree this recommendation. It may be that legislating a different range of punishments for the same offence based on person's category of ADF service could be seen as divisive in the 'One Defence' environment.

56. The *Defence Force Discipline Act 1982* sets out a number of factors that Summary Authorities must take into account when imposing a sentence and orders. These include any consequential effects of the offender's proposed punishment.<sup>52</sup>

57. The *Summary Discipline Manual* and the *Commanders' Guide to Punishment* provide guidance to Summary Authorities on applying sentencing principles. A Summary Authority is entitled to apply their service knowledge, experience and common sense to the circumstances of a case.<sup>53</sup>

58. The Summary Authority must tailor the punishment to the offence and the circumstances of the member while having regard to the deterrent effects.<sup>54</sup> A Reserve member's pattern of service - where the member is not on full time service or a period of continuous training - may cause a Summary Authority to consider a different available punishment than they might otherwise have imposed.

**Time taken for Commencement and review of Summary and other Trials**

**Recommendation 20. The feasibility be investigated of securing a "readiness" undertaking from Reserve legal officers offering themselves for ADF work.**

59. In 2012, CDF commissioned a review into the delivery of legal services by ADF legal officers to the ADF and Defence.<sup>55</sup> As an outcome of that Review, the Chiefs of Service Committee directed an audit of all legal officers in the ADF including Reserve legal officers with a view to ensuring that the legal skills, expertise and experience available to Defence were being used to full advantage. The Chiefs of Service Committee mandated consideration of comprehensive Reserve legal panel reform.<sup>56</sup>

60. In early 2014, DGADFLS sought to meet this requirement by commissioning a review into the extant structure of reserve legal officers in Defence Legal and examine whether those arrangements were the best model for the provision of professional, timely legal advice to commanders and individual Defence members.<sup>57</sup> In late 2014, DGADFLS

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<sup>52</sup> DFDA s70.

<sup>53</sup> [BN76410534](#) *Summary Discipline Manual*, paras 6.48-6.67.

<sup>54</sup> [BN79098255](#) *Commanders' guide to Summary Authority punishment*, para 1.19.

<sup>55</sup> [R15418927](#) CDF, *Instrument of Appointment and Terms of Reference*, 20 December 2011.

<sup>56</sup> [R18768011](#) COSC Outcome, *Agendum 55 of 12 – Implementation of the review into the Delivery of legal services by ADF legal officers to the ADF and Defence*, 20 December 2012

<sup>57</sup> [R18767989](#) DGADFLS/OUT/2014/36, *Instrument of Appointment and Terms of Reference – Review of delivery of legal services by ADF Reserve legal officers to the ADF and Defence*, 09 April 2014.

issued an interim directive governing the tasking and employment of Reserve Legal Officers, and specifically their involvement in providing legal aid and assistance to ADF personnel.<sup>58</sup>

61. In July 2018, the Minister for Defence commissioned another review of the provision and administration of legal services and advice in Defence. This review was conducted by an external lawyer, Mr John Weber and LTGEN Mark Evans (Retd). As they observed in their report,

There is widespread dissatisfaction and frustration with the operation of the Legal Reserve amongst senior Defence leaders. The behaviour of a minority of members of the Legal Reserve has cast a shadow over the dedicated service of many. A general consensus view that up to a third of the Legal Reserve are ineffective, by availability and military readiness, is deeply concerning. The significant potential of the Legal Reserve is not being realised.<sup>59</sup>

62. In November 2019, the Defence Committee agreed in-principle the recommendations made by the Weber/Evans Report. These included wide-ranging changes to the delivery of legal services in Defence.<sup>60</sup> The key recommendation relevant to Reserve legal officer readiness was recommendation 3.13:

A common standard of effectiveness for Reserve Legal Officers to remain at or above Service Category 3 should be applied with criteria addressing such things as training, professional standing, completion of Performance Appraisal Reports, minimum service, with failure to meet criteria resulting in automatic transfer to Service Category 2.<sup>61</sup>

63. The Director General Military Legal Service (previously DGADFLS) allocates Reserve legal officers for duty in support of Chief Counsel, or seconded for duty and under technical control of specialist panels in IGADF, Director Military Prosecutions, Defence Counsel Services and the Judge Advocate General. Each of these areas manages their allocated Reserve legal officers directly, including assignment of tasks matched to the availability and competence of those officers.

**Recommendation 21. A mandatory requirement be introduced for a prosecutor to provide a statement specifying the time taken to bring a matter to trial, together with a statement of the reasons for any delay.**

64. In September 2008, DFDA legislation was amended to include a new time limit from the time a person was charged to the date of trial by Summary Authority.<sup>62</sup>

65. The Summary Authority is required to commence summary trials as soon as practicable, within three months of the accused being charged, and complete the trial as

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<sup>58</sup> [BN79353838](#) DGADFLS Directive No:1/14 (Interim) - *Legal Aid & Legal Assistance*, 08 December 2014.

<sup>59</sup> [BN78699713](#) *Report of the Review of Defence Legal Services*, 14 June 2019, para 1.6.6.

<sup>60</sup> [BN79346949](#) Ministerial Brief for Noting, *Defence Legal Services Review*, 16 January 2019.

<sup>61</sup> [BN78699713](#) *Report of the Review of Defence Legal Services*, 14 June 2019, pp 22 and 29.

<sup>62</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*.

soon as practicable, unless a longer period is allowed by a superior authority for operational or other reasons.<sup>63</sup>

66. If the trial does not commence in the time allowed then the Summary Authority must refer the charge to the Director Military Prosecutions.<sup>64</sup> This legislative change was intended to improve the timeliness of summary proceedings and prompt referrals to the Director of Military Prosecutions.<sup>65</sup>

67. Although the DFDA imposes statutory timelines, in 2016 Vice Chief of the Defence Force (VCDF) issued a policy statement, 'Update on Discipline Law reform and delay-reduction Measures'. This imposed shorter timelines to aid in the more speedy resolution of discipline matters. As the then-Accountable Officer for Military Justice, VCDF followed up with a new directive in 2021 that details performance targets for summary tribunals, including post-summary proceedings unit administration, legal review and notification to the member of the outcome.<sup>66</sup>

68. The Summary Discipline Manual otherwise contains multiple references to the need for timelines. For example:

**Date and venue for hearing.** Timely handling of charges is essential for the proper functioning of the summary discipline system. Unless there are exceptional circumstances, Summary Authorities are expected to commence hearing charges within 14 days from the date a person is charged with a service offence.<sup>67</sup>

69. The Weber/Evans Review in 2019 observed that the number of prosecutions conducted by the Office of the Director of Military Prosecutions over the previous five years was considerably less than its historical workload. It recommended greater use of the Legal reserve to increase the capacity of the office, and improve the quality of conduct of matters.<sup>68</sup> This was accepted and a dedicated Reserve legal panel has been established for the Director of Military Prosecutions.

### Training charges

### **Recommendation 22. Consideration should be given to the establishment by regulation of the concept of a training charge, and to its definition and scope.**

70. Defence did not accept this recommendation.<sup>69</sup>

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<sup>63</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s129D.

<sup>64</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s129D.

<sup>65</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*.

<sup>66</sup> [BN78696368](#), VCDF Directive 02/2021, *Military Discipline System performance and reporting Summary tribunals*, 23 November 2021.

<sup>67</sup> [BN76410534](#) *Summary Discipline Manual*, sub-para 5.21.b(2).

<sup>68</sup> [BN78699713](#) *Report of the Review of Defence Legal Services*, 14 June 2019, pp 17 and 27.

<sup>69</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, 2001 – *Burchett Inquiry Progress Report*, serial E.

## Administrative Consequences and Administrative Action in relation to Disciplinary breaches

**Recommendation 23. The policy work currently being undertaken to achieve standardisation of application and outcome of administrative sanctions, should be regarded as requiring an urgent resolution.**

71. The Burchett Report observed that each of the three Services had a different approach to administrative action. Each had some form of rebuke or censure, but a censure could take a number of forms. Also its impact on career progression varied, depending upon which Service was involved.<sup>70</sup>

72. The policy work underway at the time of the Burchett inquiry resulted in a new Defence instruction issued in 2002 that provided overarching policy and associated procedures for formal warnings and censures in the ADF. This instruction took precedence over any extant single service instructions that addressed either of these forms of administrative action.<sup>71</sup>

73. The Defence instruction has since been replaced by the *Military Personnel Manual*, Part 9 Chapter 2, 'Formal Warnings and Censures in the Australian Defence Force'.<sup>72</sup>

**Recommendation 24. Steps should be taken to improve the dissemination of information upon the true career effects of convictions under the DFDA and of various administrative sanctions.**

74. The Burchett Report said that Service career managers had indicated that the supposedly 'soft' administrative sanction may have a more prolonged and severe impact on a person's career than a conviction under the DFDA would have had. An actual conviction, according to the career managers, may not have the consequences that members of the ADF attribute to it. The Burchett Report concluded that misunderstanding of the effects of a conviction or of administrative action, combined with lack of transparency of outcome, could lead to cynical views that do not accord with the reality.<sup>73</sup>

75. The new Defence instruction issued in 2002, Defence Instruction (General) Personnel 35–6—*Formal Warnings and Censures in the Australian Defence Force* referred to the career consequences of administrative action. It also described the relationship between disciplinary and administrative actions, which in turn may have career effects.<sup>74</sup>

76. That Defence instruction has since been replaced by the *Military Personnel Manual*, Part 9 Chapter 2, 'Formal Warnings and Censures in the Australian Defence Force'.<sup>75</sup>

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<sup>70</sup> [BN72040788](#) Burchett Report, para 162.

<sup>71</sup> [BN78955140](#) DI(G) PERS 35–6 *Formal Warnings and Censures in the Australian Defence Force*, 18 October 2002.

<sup>72</sup> [BN76464593](#) *Military Personnel Manual*, Part 9, Chapter 2.

<sup>73</sup> [BN72040788](#) Burchett Report, para 163.

<sup>74</sup> [BN78955140](#) DI(G) PERS 35–6 *Formal Warnings and Censures in the Australian Defence Force*, 18 October 2002.

<sup>75</sup> [BN76464593](#) *Military Personnel Manual*, Part 9, Chapter 2.

Guidance on making decisions that may affect a person's rights, interests and expectations is now also contained in Defence's *Good Administrative Decision-Making Manual*,<sup>76</sup> the *Administrative Inquiries Manual*,<sup>77</sup> and the *Complaints and Alternative Resolutions Manual*.<sup>78</sup>

### Equity and diversity Issues

**Recommendation 25. Having regard to the repeated comments of NCOs, and particularly junior NCOs, about the influence of training in equity and diversity at initial entry institutions, consideration should be given to providing more balancing emphasis in that training on the obligations of discipline enshrined in the DFDA.**

77. Both the Burchett Implementation Team in 2006 and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that the Services had incorporated appropriate emphasis on the obligations enshrined in the *Defence Force Discipline Act 1982*, and equity and diversity.<sup>79</sup>

78. Defence has since produced a guide provided to new members of the ADF during their ab initio training, and available of the Defence Protected Network.<sup>80</sup> The document provides an introduction to military discipline and articulates why the maintenance and enforce of service discipline is critical to the ADF. The guide emphasises that it is the responsibility of every ADF member to maintain high standards of individual and collective behaviour. This guide is reviewed annually through the Military Justice Steering Group.<sup>81</sup>

**Recommendation 26. In relation to Unequal treatment and consistency of punishments: Consideration should be given to the institution of a system of traffic tickets in military bases for minor infringements of general orders and traffic regulations.**

79. The Burchett Report observed that there was a prevailing view that some ADF members were dealt with more leniently than others in the same circumstances. A specific example was a senior officer not being charged with a speeding offence on base, perhaps because they would have to be court martialled, which would be out of proportion to the minor nature of the offence. Burchett proposed introduction of legislation enabling issue of traffic tickets to ADF and civilians for minor traffic offences on base, and that in the case of ADF personnel, the ticket should not affect their military records.<sup>82</sup>

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<sup>76</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*.

<sup>77</sup> [BN78972673](#) *Administrative Inquiries Manual*.

<sup>78</sup> [BN78972675](#) *Complaints and Alternative Resolutions Manual*, Part 3.

<sup>79</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 25; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial G.

<sup>80</sup> Accessed on the Defence Protected Network, Joint Service Documents, *Australian Defence Force Joiners Guide*, 11 March 2024.

<sup>81</sup> [BN79098253](#) *The Australian Defence Force Discipline System: An introduction for new members of the Australian Defence Force*, 13 December 2022

<sup>82</sup> [BN72040788](#) Burchett Report, para 171.

80. Defence considered there were insurmountable difficulties in introducing one set of traffic offences for Defence. The Burchett Implementation Team suggested expanding the Discipline Officer scheme may address potential inequality in dealing with such matters.<sup>83</sup>

81. The Discipline Officer Scheme is now called the Disciplinary Infringement System. This scheme provides for an ADF member 'driving without due care or attention etc'. This applies to driving a Service vehicle in any place, whether a public place or not, and to driving any vehicle on Service land.<sup>84</sup> Examples of driving without due care and attention include: driving on the wrong side of the road, driving at excessive speed having regard to adverse weather, poor road conditions or visibility, mounting a kerb, hitting a telegraph pole, texting whilst driving etc. In some instances an inference may be drawn that there was a failure by the driver to exercise due care and attention, for example, reversing into a pole. Examples of driving without reasonable consideration for another person include driving too close to a formed body of troops, and failing to stop at a pedestrian crossing.<sup>85</sup>

82. The *Defence Force Discipline Act 1982* contains other driving offences applicable to both ADF and Defence civilian personnel. A person commits an offence if they drive a vehicle on Service land at a speed or in a manner dangerous to another person on that land, or drives without due care and attention or without reasonable consideration for another person on that land.<sup>86</sup> Likewise, for a person who drives while intoxicated.<sup>87</sup>

### Unequal treatment and consistency of punishments

**Recommendation 27. Consideration should be given to the issue of policy guidance on summary punishments including the dissemination of information as to the general level of punishments for particular offences while making it clear a CO's discretion would not thereby be limited.**

83. Defence did not accept this recommendation.

84. *The Commanders' Guide to Summary Authority Punishment* says:

This Guide does not provide a fixed rate of punishment, nor set a going rate or tariff, when a Summary Authority is making a punishment decision under the DFDA. Rather, its purpose is to provide guidance to Summary Authorities and those performing discipline functions, a start-point for consideration of punishment options, to assist in determining a fair and proportionate punishment, with a degree of consistency and fairness for the member, while maintaining and enforcing service discipline by command.<sup>88</sup>

**Recommendation 28. Complete and accurate statistics concerning prosecutions under the DFDA and administrative action having punitive effect be compiled on a common basis for all three services and be made available to legal and administrative agencies of the ADF.**

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<sup>83</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 26.

<sup>84</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s9DP.

<sup>85</sup> [BN76411907](#) *Disciplinary Infringement Manual*, Edition 1, para 76-77.

<sup>86</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s40A and s40D.

<sup>87</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s40A and s40.

<sup>88</sup> [BN79098255](#) *Commanders' guide to Summary Authority punishment*, para 1.8.



85. In 2002, Defence established a central monitoring agency to be supported by an electronic database to track ADF discipline processes, and mandated common procedures for data entry and report extraction. The new electronic system called the Discipline Tracking and Case Flow Management System (DTCFMS) launched on 1 January 2003. This did not change the conduct and administration of the disciplinary process but implemented the electronic recording of disciplinary action steps and target timeframes between the steps. The Registrar of Military Justice was responsible for oversight of data compliance, generating statistical reports and providing discipline case information in response to ministerial inquiries.<sup>89</sup>

86. In 2006, Defence implemented the *Australian Defence Force Administrative Inquiry Tracking System* (ADFAITS) to provide report generation and search capabilities in respect of administrative inquiries. Overall system ownership was assigned to IGADF, while Appointing Authorities and Appointing Officers were responsible to ensure appropriate data capture.<sup>90</sup> At about the same time, responsibility for oversight of DTCFMS transitioned from the Registrar of Military Justice to IGADF.<sup>91</sup>

87. In 2008, an enhanced data recording system within the ADF using Personnel Management Key Solution (PMKeyS) as the parent database was introduced. This system was called *Conduct Reporting and Tracking System* (CRTS).<sup>92</sup>

88. In 2024, Defence through its Enterprise Resource Planning Program plans to replace ADFAITS and CRTS along with 14 other case management systems with an enterprise system, called 'Case Management'.<sup>93</sup> IGADF is a user and not sponsor of the new Case Management system, and is represented on the Business Reference Group. The 'Value Chain Leader' for Case Management system is the First Assistant Secretary Defence Integrity.<sup>94</sup>

### Transparency and victim feedback

**Recommendation 29. Ways of achieving fair and effective transparency of military justice outcomes (in relation both to prosecutions and administrative actions) be investigated and appropriate steps be taken.**

89. The Burchett Report observed that an important source of complaint about the operation of military justice is the victim's and the complainant's lack of information concerning the outcome. Burchett concluded that at least some of the long running complaints might have been avoided had the complainant, as a victim, been fully

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<sup>89</sup> [BN79304298](#) Defence Instruction (General) ADMIN 10-8—*Discipline Tracking and Case Flow Management*, 27 November 2002.

<sup>90</sup> [BN79304547](#) Defence Instruction (General) ADMIN 65-1—*Administrative Inquiry Tracking*, 04 July 2006.

<sup>91</sup> [BN79305412](#) Defence Instruction (General) ADMIN 10-8—*Discipline Tracking and Case Flow Management*, 26 May 2006.

<sup>92</sup> [BN79305412](#) Defence Instruction (General) ADMIN 10-8—*Conduct Reporting and Tracking System*, 10 July 2008.

<sup>93</sup> [BN79306702](#) *Defence ERP*, Tranche 2, 11 March 2024; and [BN79306701](#) Tranche 2 Case Management, 11 March 2024.

<sup>94</sup> [BN79488046](#) *Event to Outcome(Case Management) Business Reference Group*, 16 June 2023.

enlightened about the action taken and the reasons for it. Likewise, he concluded that many of the cynical allegations of unequal treatment of officers, or of persons “in the club”, might never have been made if the true facts had been known.<sup>95</sup>

90. The Burchett Implementation Team in 2006 and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that transparency had improved by way of legislative changes made after the Burchett Report and other military justice reviews.<sup>96</sup> They did not however, directly address the issue identified in the Burchett report.

91. Publication of court martial and Defence Force Magistrate outcomes commenced on 31 March 2019 after a Chiefs of Service Committee direction for this to occur. The Registrar of Military Justice is responsible for maintaining on Defence’s public facing website a list of all upcoming court martial and Defence Force Magistrate proceedings and the outcomes of completed proceedings. If convicted of one or more charges, the outcomes will normally include the defendant’s surname, punishment and orders, in addition to a case summary.<sup>97</sup>

92. Current Defence policy for summary proceedings states that the publication of summary discipline trial results can enhance the deterrent effect of a properly functioning military discipline system and promote confidence in that system. Commanders may consider publishing the results of summary level trials held within their unit or involving a charged member who is a member of their unit, or was parading at their unit at the time.<sup>98</sup>

93. In respect of administrative investigations, Defence’s guidance to commanders is that where an incident and its aftermath, including any fact finding associated with it, may have had a significant emotional impact on a unit or team, it would be appropriate to debrief the unit or team as a whole about the outcome in general terms. If the matter relates to misconduct, this might take place as part of a broader discussion around expected behaviours or complaint avenues.<sup>99</sup>

94. In February 2024, Defence issued a policy update on the notification of outcomes after a complaints process has been conducted. The policy recognises that meaningful notification of outcomes enables all parties to understand how the complaint has been addressed, supports transparency, and builds trust in the complaint management process, the chain of command/line management and Defence more generally. It states that all parties involved in complaints can reasonably expect some of their personal information to be disclosed for the purpose of resolving the complaint. However, commanders and

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<sup>95</sup> [BN72040788](#) Burchett Report, para 177.

<sup>96</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 35; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial K.

<sup>97</sup> [BN79308445](#) JAG Practice Note 1 – *Publication of Court Martial and Defence Force magistrate lists and outcomes (version 5)*, 14 December 2021; and Webpage: [Outcomes of superior service tribunal proceedings | About | Defence](#), accessed 11 March 2024.

<sup>98</sup> [BN76410534](#) *Summary Discipline Manual*, para 2.29.

<sup>99</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*, para 8.10.

managers must be mindful of when it is lawful to disclose personal information, and how to mitigate the risk of further disclosure.<sup>100</sup>

**Recommendation 30. Guidelines be issued to commanders designed to ensure effective feedback to complainants, victims and offenders in relation to administrative action or summary proceedings.**

95. See recommendation 29.

**Access to Legal Advice**

**Recommendation 31. The policy regarding the provision of legal assistance to members be reviewed.**

96. Defence did not change its policy on the provision of legal assistance in response to the Burchett Report. The policy remained that that the provision of legal assistance to an ADF member was dependent upon the availability of legal officers.<sup>101</sup> It is not clear why this was the case because early implementation reporting suggested the policy would be amended to remove the phrase 'dependent upon the availability of legal officers'.<sup>102</sup>

97. In 2006, Defence established a Director of Defence Counsel Services (DDCS) to improve the availability and management of defence counsel services to ADF personnel. This was in response to a recommendation made in 2005 by the Senate Foreign Affairs, Defence and Trade References Committee in its report, *Inquiry into the effectiveness of Australia's military justice*. The DDCS was established as a military staff position within the Defence Legal Division to coordinate and manage the access to and availability of defence counsel services by identifying and promulgating a defence panel of legal officers, permanent and reserve.<sup>103</sup>

98. In 2019, Defence conducted a detailed review of legal support to members of the ADF and examined options for the provision of legal assistance to ADF personnel.<sup>104</sup> In 2023, Defence promulgated new legal assistance policy informed by that review. Legal assistance is now available to all ADF permanent members, and reserve members rendering continuous full-time service. Legal assistance for other reserve members and former ADF members is discretionary and determined on a case-by-case basis, normally for Service-related matters including but not limited to:

- a. Assistance to an ADF member who has received notice of proposed adverse action against them.

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<sup>100</sup> [BN78972675](#) *Complaints and Alternative Resolutions Manual*, para 4.0.0.1.

<sup>101</sup> [BN76546441](#) DI(G) PERS 12-1—*General Scope of Legal Assistance provided to Service Personnel and Leg Aid to ADF members overseas*, in force until 15 November 2012

<sup>102</sup> [BN72567402](#) Enclosure 8 to *The Burchett Report*, Burchett Recommendation 31

<sup>103</sup> [BN79182052](#) Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, *Report on The Effectiveness of Australia's Military Justice System*, October 2005, page 4.

<sup>104</sup> [BN76555236](#) *Review of Legal Support for ADF members – Stage Two Report*, 29 November 2019

- b. Assistance to an ADF member involved in, or affected by, a fact finding or inquiry process.
- c. Assistance with issues, complaints or applications arising out of an ADF member's service.
- d. Assistance to ADF members subject to disciplinary action.<sup>105</sup>

**Recommendation 32. Steps be taken to reduce the incidence of conflict of interest situations arising out of the location of a single legal officer without an alternative.**

99. In 2008, the *Defence Act 1903* was amended to reflect that a legal officer in the ADF acting in that capacity shall discharge their professional rights, duties and obligations in accordance with generally accepted rights, duties and obligations applying to legal practitioners. The purpose of this new section is to ensure that ADF legal officers are not subject to inappropriate command direction in the exercise of their professional capacity as ADF legal officers.<sup>106</sup>

100. The *Independent Review on the health of the reformed military justice system* in 2009 was satisfied that this legislative reform and new *Professional Rules for Legal Officers* being finalised by Defence Legal sufficiently addressed this recommendation.<sup>107</sup>

101. Since then, Defence has taken steps to ensure that legal officers are removed from potential conflict of interest situations. In 2012, the Chiefs of Service Committee directed that Defence Counsel Services no longer report to positions within Defence Legal but instead, report directly to the Chief Operating Officer for Defence. This direction was based on recommendations made by the *Review into the Delivery of Legal Services by ADF Legal Officers to the ADF and Defence*, which recognised a perception of a lack of independence could be drawn from the extant reporting structure.<sup>108</sup>

102. The later *Defence Legal Service Review* conducted in 2019 recommended that the framework of regional single Service panels used to manage the employment of Reserve legal officers should be reorganised into tri-Service panels and that independent officers such as the Director Military Prosecutions, Defence Counsel Services and IGADF should establish formal segregated panels to manage any perceived conflicts.<sup>109</sup> This recommendation was accepted by Defence to ensure that a legal officer is not providing advice to command at the same time as providing legal services to an ADF member.

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<sup>105</sup> [BN76464593](#) *Military Personnel Manual*, Part 11, Chapter 7, paras 7.3 and 7.18

<sup>106</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*, page 12; and [BN78908711](#) *Defence Legislation Amendment Act 2008*, Schedule 7, Part 7.

<sup>107</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, 2001 – Burchett Inquiry Progress Report, serial J.

<sup>108</sup> [BN79311175](#) *Directorate of Defence Counsel Services Annual Report 2014*.

<sup>109</sup> [BN78699713](#) *Report of the Review of Defence Legal Services*, 14 June 2019, page 22.

**Recommendation 33. The total number of legal officers and their location and organisation, required in the modern Defence Force be reviewed.**

103. In 2006, DGADFLS conducted a limited review of full time legal officer positions and sought approval for the establishment of 20 new legal officer positions.<sup>110</sup> The 2009 *Independent Review of the health of the reformed military justice system* confirmed that these positions had been created.<sup>111</sup>

104. In the time since there have been several reviews of the ADF legal capability; most significantly, the 2019 *Review of Defence Legal Services*.<sup>112</sup> This was accepted by Defence and has fundamentally changed the way in which legal services are delivered. Defence now has an integrated legal service that includes a joint military law capability.

105. The Director General Military Legal Service is now the joint workforce sponsor for military legal capabilities. The scope of the military legal workforce refers to all ADF legal officers, irrespective of Service or Service Category, but excludes officers appointed to perform statutorily independent military justice roles. As such, the Director General executes delegated joint command of the Military Legal Service in order to shape and sustain the Military Legal workforce as a joint enabling capability, supporting strategic, integrated, joint and single Service requirements across Defence.<sup>113</sup>

#### **Legal Officers at Summary Proceedings**

**Recommendation 34. The *Defence Force Discipline Rules* be amended to provide that a member who desires to be legally represented at a summary trial must first obtain from the proposed Registrar of Courts Martial a certificate that, for a special reason, legal representation is appropriate.**

106. Defence did not accept this recommendation.<sup>114</sup> In 2007, the Chiefs of Service Committee determined it should remain at a commander's discretion as to whether legal representation was permitted at a summary hearing.<sup>115</sup> It may be in part because they considered proceedings should be conducted without unnecessary delay, and that legal officers were not necessary at a proceeding in which there are no formal rules of evidence and no criminal convictions.

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<sup>110</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 33.

<sup>111</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial J.

<sup>112</sup> [BN78699713](#) *Report of the Review of Defence Legal Services*, 14 June 2019.

<sup>113</sup> [BN79364474](#) CJC Directive 05/21, *Appointment of Director-General Military Legal Service as Joint Workforce Sponsor for Military Legal*, 08 April 2021.

<sup>114</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 34.

<sup>115</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial K.

107. The *Defence Force Discipline Act 1982* states a Summary Authority must comply with the rules of natural justice, and consistently with those rules, the Summary Authority:

Must act with as little legal formality or legal technicality as possible, while ensuring fairness; and

is not bound by the rules of evidence, but must comply with the basic principle of those rules relating to relevance, reliability, weight and probative value.<sup>116</sup>

108. Current legislation provides for legal representation of an accused person as follows:

- (1) An accused person may request the services of a member of the Defence Force to act as a defending officer.
- (2) If an accused person makes a request under subrule (1), the person whose services are requested must be permitted to defend the accused person unless the services of the person are not reasonably available.
- (3) If an accused person makes a request under subrule (1) for representation by a legal officer at a hearing before a commanding officer or superior summary authority, the legal officer whose services are requested must be permitted to defend the accused if:
  - (a) approval is given by that commanding officer or superior summary authority; and
  - (b) the services of the legal officer are reasonably available.<sup>117</sup>

**Recommendation 35. Pre-command legal training of commanding officers should include guidance on the factors to be taken into account in deciding whether to grant leave for legal representation at summary trials.**

109. Both the Burchett Implementation Team in 2006 and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that the Services had incorporated into their pre-command courses guidance on the factors to be taken into account in deciding whether to grant leave for legal representation at summary trials.<sup>118</sup>

110. The presumption at the summary level is that a person will be represented by a Defence member who is not a legal officer.<sup>119</sup> The charged member must provide reasons to the Summary Authority as to why they seek to be represented by a Service Legal Officer, including special circumstances that support such a request. The Superior Summary Authority or a Commanding Officer is authorised to refuse the request as it is not typically

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<sup>116</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s146A.

<sup>117</sup> [BN78693222](#) *Summary Authority Rules 2019*, Rule 7.

<sup>118</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 35; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial K.

<sup>119</sup> [BN79256296](#) *DFDA Law Manual*, 13 December 2022, para 6.83.

appropriate, but the decision must be made in the interests of fairness, efficiency and effectiveness.<sup>120</sup>

### **Need of Commanding Officers to seek legal advice During Trial**

**Recommendation 36. Pre-command legal training of commanding officers should include clear guidance on how legal assistance during the course of a summary trial may be sought without prejudice to the rights of the parties.**

111. In response to this recommendation, Defence included specific guidance in the revised Discipline Law Manual as follows:

If, after the hearing or trial has commenced, a summary authority believes that her or she requires legal advice on a technical, evidential or procedural issue in order to make a ruling, a summary authority may seek the advice of a legal officer, subject to the following conditions:

- a. Where practicable, the legal advice must be given in the presence of the prosecutor, the defending officer and the defendant, either in person or by the use of a conference call or similar means;
- b. If this is not practicable, the legal advice can be given during an adjournment in proceedings, however, the summary authority is to relay the content of the legal advice to the prosecutor and defending officer when the hearing or trial resumes;
- c. The prosecutor and the defending officer should be permitted to make submissions on the issue on which legal advice was sought if they seek to do so; and
- d. The content of the advice, any submissions of the prosecutor and defending officer and the summary authority's ruling on the issue are to be included on the record of proceedings.<sup>121</sup>

112. Both the Burchett Implementation Team in 2006 and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that the Services had incorporated into their pre-command courses this guidance on how legal assistance in the course of a summary trial may be sought without prejudice to the rights of the parties.<sup>122</sup>

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<sup>120</sup> [BN76419534](#) *Summary Discipline Manual*, 13 December 2022, para 5.45

<sup>121</sup> [BN79061496](#) ADFP 06.1.1 *Discipline Law Manual*, volume 3, para 7.70.

<sup>122</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 36; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, 2001 – Burchett Inquiry Progress Report, serial L.

## Effects of Defence Reorganisation

**Recommendation 37. Command and line management responsibility for the discipline of personnel in joint and integrated organisations, and the dissemination of information about it, be reviewed.**

113. The Burchett Report observed that a danger exists of creating by default different disciplinary regimes for military members posted from single Service or predominantly military environments to integrated civilian workplaces, and the difficulties involved in serving two masters. The Report noted the forthcoming Sherman/Cox Review, *Review of Management and Command Arrangements in Integrated Defence Organisations* would likely address this concern.<sup>123</sup>

114. The Sherman/Cox review, conducted by Mr Tom Sherman and AVM Frank Cox (Retd), recommended that a Commanding Officer be appointed for each member posted to a non-Service group and that the Commanding Officers have responsibility for discipline, redress of grievance issues and other specified administrative matters; be located in such a way that they are reasonably accessible to the member; and be identified both to the member and the relevant manager. This and other recommendations of the Sherman/Cox review were endorsed by the Chiefs of Service Committee, which oversaw implementation of those recommendations.<sup>124</sup>

115. The Burchett Implementation Team and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that Defence's response to the Sherman/Cox Review met the requirements of this recommendation.<sup>125</sup>

116. In 2004, each Service issued revised instructions on command arrangements for their members when posted to another Service, joint or integrated unit.<sup>126</sup> Also in 2004, Defence introduced two new training courses:

- a. *Supervision in an Integrated Environment for Military Supervisors of Civilian Staff*; and
- b. *Working in an Integrated Environment for Civilian Supervisors of Military Staff*.<sup>127</sup>

117. In 2006, Defence revised the Defence Instruction, 'Authority in an Integrated Defence Organisation'.<sup>128</sup>

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<sup>123</sup> [BN72040788](#) Burchett Report, para 190.

<sup>124</sup> [BN79299004](#) CA directive 03/02, *Management and command arrangements in integrated Defence organisations*, 20 February 2002.

<sup>125</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serials 37-39; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial M.

<sup>126</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serials 37-38. These instructions were Defence Instruction (Navy) Administrative 30-3—*Instructions to the Commanding Officer*; Defence Instruction (Army)—*Command, leadership and management of Army personnel within the Non-Army Groups*; and Air Force Organisational Directive 7/01—*Revised Command and Management Structures and arrangements for Air Force Personnel*.

<sup>127</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 39.



118. Defence also in 2006 produced two new guides for commanders and managers:
- a. *Supervisors' Handbook – A guide for Supervisors of APS Employees*; and
  - b. *Decision-Makers' Handbook – Making personnel-related decisions for APS and ADF*.<sup>129</sup>

119. Defence has produced various iterations of these documents over time. The current *Decision-Maker's Handbook for Personnel-related Decisions* is available on the Defence intranet, along with information for APS supervising ADF members, and the *Supervising APS employee toolkit*.<sup>130</sup> Defence policy on Authority in an integrated Defence workplace is now resident in the extant *Defence Instruction Admin Policy (DI ADMINPOL)*.<sup>131</sup>

**Recommendation 38. Rationalisation of command and line management responsibility for the discipline of personnel in joint and integrated organisations take account so far as possible of geographic convenience.**

120. See recommendation 37.

**Recommendation 39. Common familiarisation training on military justice issues and civilian disciplinary processes be developed for use in joint and integrated organisations.**

121. See recommendation 37.

### Investigation Issues

**Recommendation 40. The level of resources available for police investigative work across the three Services be reviewed.**

122. In 2004, Defence commissioned Ernst & Young to review the Army military police investigation capability and to design an organisation comparable with best practice. That Review produced 54 recommendations that were substantially implemented or superseded by the 2006 Defence Investigative Capability Audit (DICA).<sup>132</sup> Two of the Ernst & Young recommendations were not accepted on the basis that they appeared to infringe on the individual rights of ADF members.<sup>133</sup>

123. The DICA found that the ADF's investigative capability was in decline and suggested remediation would take five years. It made 99 recommendations.<sup>134</sup> A major conclusion of

<sup>128</sup> [BN79212390](#) Defence Instruction (General) 58–1—*Authority in an Integrated Organisation*, 25 August 2006.

<sup>129</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial M.

<sup>130</sup> [BN59991079](#) *Decision-Maker's Handbook for Personnel-related Decisions*, nd. See Defence Protected Network: [Pages - Supervising APS Toolkit](#) and [Pages - APS Supervising ADF](#), accessed 7 March 2024.

<sup>131</sup> [BN79213196](#) DI ADMIN POL, 20 July 2023, People Provision 1, page 33..

<sup>132</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, para 27.

<sup>133</sup> [BN79182052](#) Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, *Report on The Effectiveness of Australia's Military Justice System*, October 2005, page 9.

<sup>134</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, para 30.

the report was that Defence should establish an investigative service to operate under joint rather than single Service command.<sup>135</sup> In response, Defence established a new unit – the ADF Investigative Service (ADFIS) as a joint unit under the command of the Provost Marshal ADF.<sup>136</sup>

124. An ADFIS Governance Board was established in 2008 for the purpose of providing higher level oversight of the development of the ADF's investigative capability. ADFIS was the operational element of the Joint Service Police Group.

125. In 2017, Defence commissioned to identify from first principles what the ADF requires of a Service Police capability and to develop options for the delivery of Service policing capabilities from a whole of ADF perspective. The Review was conducted by Providence Consulting Group and delivered its final report in November 2017.<sup>137</sup>

126. After that Review the ADFIS Governance Board changed its title to the Joint Service Police Governance Board. The Joint Service Police Group was renamed the Joint Military Police Unit (JMPU), and in May 2018 the Joint Service Police Governance Board was retitled as the Joint Military Police Governance Board (JMPGB). This board continues to provide strategic oversight of the ADF Military Police capability.<sup>138</sup>

**Recommendation 41. A register of suitable persons to act as Investigating Officers under the *Defence (Inquiry) Regulations* be developed (as to which see the Role and Functions identified for the Military Inspector General).**

127. CDF appointed the first IGADF in 2003. CDF directed the IGADF to maintain a register of persons considered suitable by training and/or experience to act as investigating officers, or members of administrative inquiries. Personnel listed in the register could be used by the IGADF for administrative investigations, but were also to be made available on request to other Appointing Authorities including Commanding Officers. The objective was to establish a pool of suitably qualified persons who understood the administrative inquiry process and the attendant legal and procedural obligations and who were capable of conducting, or taking part in, an administrative inquiry under the *Defence (Inquiry) Regulations 1985*.<sup>139</sup>

128. IGADF provided Inquiry Officer familiarisation training and maintained a register of persons who had completed that training and accordingly met the training requirement to act as investigating officers or inquiry officers.<sup>140</sup> In 2011, IGADF replaced its Inquiry Officer familiarisation training with an on-line training package on the Defence Restricted Network

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<sup>135</sup> [BN76676063](#) *Report of an Audit of the Australian Defence Force Investigative Capability*, July 2006, paras 10 and 7.1-7.36.

<sup>136</sup> [R16623598](#) CDF Directive 07/2007 *Establishment of the interim Australian Defence Force Investigative Service*, 21 March 2007.

<sup>137</sup> [BN79250227](#) Providence Consulting Group Pty Ltd, *First Principles Review of the ADF Service Police*, 7 November 2024.

<sup>138</sup> [BN79197375](#) CDF Directive 10/2021, *Governance of the Joint Military Police Capability*, 14 October 2021.

<sup>139</sup> [BN72567529](#) Defence Instruction (General) Admin 61-1—*Inspector-General of the Australian Defence Force—role, functions and responsibilities*, para 50 and annex A.

<sup>140</sup> [BN43886117](#) ADFP 06.1.4—*Administrative Inquiries Manual*, AL1, paras 5.36-5.37; and [AB27591165](#) CDF Directive 04/2010, *Interim arrangements-Quick Assessments and Administrative Inquiries*, para 23.

for Inquiry Officers, making it accessible to a larger number of people. Completion of that course was automatically recorded in PMKeyS, negating the requirement for IGADF to maintain a list of those who had completed that training.<sup>141</sup>

129. In response to the CDF-directed *Review into the system of ADF Administrative Inquiries*, commissioned in 2010, the Chiefs of Service Committee noted that while there was no need to modify the pre-requisites for appointment of an Inquiry Officer to conduct a unit-level inquiry, the professionalism of Inquiry Officers for serious and/or complex incidents should be enhanced with an emphasis on their accreditation, training and experience.<sup>142</sup>

130. In 2011, IGADF developed and delivered an Advanced Inquiry Officer Course to support the Services in generating a pool of qualified Inquiry Officers. On completion of this course officers returned to their Service for mentoring by an Inquiry Officer that had successfully completed an inquiry at the serious and/or complex level, before being considered to have the knowledge skills and experience to conduct advanced level inquired on their own.<sup>143</sup>

131. In 2015 the Advanced Inquiry Officer Course transitioned from IGADF to the Military Law Centre (now-Military Legal Training Centre) for continued development and delivery.<sup>144</sup> It may be this was considered appropriate because new legislation governing IGADF inquiries was about to be introduced, and work was under way to update the Defence Inquiry Regulations.<sup>145</sup> The Services maintain their own lists of such qualified Inquiry Officers.<sup>146</sup>

### Peer group discipline

#### **Recommendation 42. Specific guidance on the use of peer group discipline be included in pre-command training of COs and in standing orders for training institutions.**

132. The Burchett Report observed that in the ADF, teamwork is an essential ingredient of success. It said that the reliance of each member on the skill and dedication of other members engenders peer group discipline. This is healthy, and a valuable reinforcement of the wider discipline of the ADF. Good leadership will take steps to harness and direct it. However, the report went on to say that in extreme cases, peer group discipline can lead to a breakdown in the proper methods of enforcement of discipline, and to the substitution of

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<sup>141</sup> [BN79134168](#) DEFGRAM 625/2011, *Launch of the Administrative Inquiry Officer Familiarisation Training Course on Campus*, 13 September 2011.

<sup>142</sup> [R12371858](#) IGADF/OUT/2010/eR654426, *Review of Administrative Inquiries—Future action*, 14 December 2010 or COSC outcome 97/2010.

<sup>143</sup> [R12446906](#) IGADF 2011/1000942/1, *Advanced IGADF Inquiry Officer Training Course – Request for nominations*, October 2011.

<sup>144</sup> [BN79144678](#) Joint Directive 41/205, *Changes to Inquiry processes and incident reporting in Defence*, July 2015, para 30.

<sup>145</sup> [BN74860313](#) *IGADF Regulation 2016*; and [BN73902108](#) *Defence (Inquiry) Regulations 2018*.

<sup>146</sup> [BN79124636](#) *Report of the Review of the system of Australian Defence Force Administrative Inquiries*, 19 November 2010, annex B; and [R12371877](#) COSC Agendum 97/2010, *Report on the Review of Administrative Inquiries*, Recommendation 20.

improper methods. As peer group discipline is extensively used, particularly in training establishments, it is important that the potential for distortion not be overlooked.<sup>147</sup>

133. The Burchett Implementation Team in 2006 confirmed that the Services had taken steps to implement this recommendation. Navy incorporated specific guidance in Standing Orders at ab initio training units, Army included guidelines in its codes of conduct for instructors and trainees, and Air Force issued guidance to its training units.<sup>148</sup> The *Independent Review on the health of the reformed military justice system* in 2009 was satisfied that the Services had included guidance on the use of peer group discipline on pre-command courses.<sup>149</sup>

134. The *Defence Force Discipline Act 1982* does not provide for collective punishment, and as such neither does the military justice system. However, Defence policy allows for corrective training to be applied to a group of ADF members in circumstances where each member of the group has failed to perform to a satisfactory standard, the training is consistent with the unit-specific requirements of each member, and is consistent with Defence's corrective training principles. These are that the corrective training is for a proper purpose, is directed by an ADF corporal-equivalent or above, and is directly and reasonably related to the unsatisfactory performance identified. Commanders are accountable for the conduct of corrective training in their unit and must maintain a record of all corrective training.<sup>150</sup>

### Drug Policy

**Recommendation 43. Section 59 of the DFDA be reviewed in conjunction with DI(G) PERS 15-2, with a view to the amendment of the legislation to enable military tribunals to deal with charges in respect of small quantities of all appropriate illegal drugs.**

135. The Burchett Report observed that the provisions of section 59 of the *Defence Force Discipline Act 1982* were 'extremely limited' and created difficulties for enforcement of ADF policies on involvement with drugs, particularly when 'civilian police are frequently unwilling to prosecute'.<sup>151</sup> Specifically, the offences related to the use and possession in Australia of up to 25 grams of cannabis (expressly excluding cannabis resin and cannabis fibre) and to involvement with narcotics when deployed outside Australia.

136. In 2008, legislation was introduced that expanded a service tribunal's ability to deal with charges in respect of certain amounts of certain illegal drugs for offences committed both in and outside Australia by an ADF member or defence civilian. The amendments redesigned the categories of drug offences, and included any form of cannabis outside of cannabis fibre, narcotics and anabolic steroids. The legislation defined a 'prescribed quantity' for each type of drug able to be dealt with under the DFDA within Australia. For example, the prescribed quantity for a narcotic substance was set at 50 grams. Additionally,

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<sup>147</sup> [BN72040788](#) Burchett Report, paras 195-198.

<sup>148</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 42.

<sup>149</sup> [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial O.

<sup>150</sup> [BN76464593](#) *Military Personnel Manual*, Part 9, Chapter 3.

<sup>151</sup> [BN72040788](#) Burchett Report, paras 46 and 201.

the amendment made it an offence for a person to administer or cause themselves to be administered a prohibited drug.<sup>152</sup>

**Recommendation 44. In the meantime, consideration be given to prosecuting in cases involving cannabis where the civilian police regard the quantity as too small, limiting the military prosecution to the statutory quantity of 25 grams.**

137. The Burchett Implementation Team sought legal advice on the implications of this recommendation. The prevailing view was that there would be difficulty in prosecuting an offence, having regard to the intent of the legislation and abuse of process arguments. Although considered, this proposal was not advanced further.<sup>153</sup>

### Presumption of Guilt

**Recommendation 45. Greater emphasis should be placed on the concept of a prima facie case in the training of NCOs, WOs and officers in relation to summary proceedings under the DFDA.**

138. In response to this recommendation, the Services were asked to confirm that this principle was incorporated into Discipline law training, which they did. Both the Burchett Implementation Team in 2006 and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that the Services had met the intent of this recommendation.<sup>154</sup>

**Recommendation 46. The training of prosecutors in summary proceedings should emphasise the principle, which civilian prosecutors are required to observe scrupulously, that a prosecutor does not seek a conviction at any price, but with a degree of restraint so as to ensure fairness.**

139. The *Discipline Law Manual* published in 2001 described the duties of a prosecutor at a summary hearing and explicitly stated that:

He [the prosecutor] is required to question prosecution witnesses and cross-examine defence witnesses to provide evidence in support of the charge. The prosecutor has a duty to present evidence in a way which is fair to the accused; it is not his duty to obtain a conviction at all costs.<sup>155</sup>

140. In response to this Burchett Report recommendation, the Services were asked to confirm that this principle was incorporated into Discipline law training, which they did. Both the Burchett Implementation Team in 2006 and the *Independent Review on the health*

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<sup>152</sup> [BN78626852](#) The Parliament of the Commonwealth of Australia, *Defence Legislation Amendment Bill 2008 Explanatory Memorandum*, paras 111-112; and [BN78908711](#) *Defence Legislation Amendment Act 2008*, Schedule 5.

<sup>153</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 44.

<sup>154</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 45; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial Q.

<sup>155</sup> [BN79060390](#) ADFP 201—*Discipline Law Manual*, Volume 1, para 7.54.

of the reformed military justice system in 2009 were satisfied that the Services had met the intent of this recommendation.<sup>156</sup>

141. The Discipline Law Manual has since been replaced; however, policy documents have continued to emphasise the requirement for fairness. The Summary Discipline Manual states ‘the Prosecuting Officer is required to act with fairness and impartiality’ and:

The Prosecuting Officer’s primary duty as being to serve the summary authority and act in the interests of justice. It is not to obtain a conviction at all costs.<sup>157</sup>

### **Director of Military Prosecutions and Administration of Courts Martial and Defence Force Magistrate Hearings**

#### **Recommendation 47. An independent Australian Defence Force Director of Military Prosecutions, with discretion to prosecute, be established.**

142. In response to this recommendation, Defence established in 2003 an interim Director of Military Prosecutions on the basis that proposed arrangements for the Director of Military Prosecutions could not be fully implemented until legislative amendments could be made.<sup>158</sup>

143. During the interim period, the Director of Military Prosecutions was not responsible for making decisions as to whether or not a prosecution should be instituted. They were restricted to the provision of pre-trial advice, the conduct of prosecutions at courts martial and Defence Force magistrate trials and representation of the ADF at appellate tribunals and courts.<sup>159</sup>

144. The functions of the Director of Military Prosecutions are set out in the *Defence Force Discipline Act 1982*, s188GA.<sup>160</sup>

#### **Recommendation 48. A Registrar of Courts Martial be established for the Australian Defence Force.**

145. In 2005, legislation was introduced to establish the Registrar of Military Justice as a statutory appointment under the *Defence Force Discipline Act 1982*. The Registrar of Military Justice assumed responsibility for the administration of courts martial and Defence Force magistrate trials, as well as an overall case management function. The registrar also assumed responsibility for procedural and administrative powers and functions associated

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<sup>156</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 46; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial Q.

<sup>157</sup> [BN74710534](#) *Summary Discipline Manual*, para 5.34.

<sup>158</sup> [BN79053074](#) Defence Instruction (General) Personnel 45–6—*Director of Military Prosecutions—interim implementation arrangements*.

<sup>159</sup> [BN79053074](#) Defence Instruction (General) Personnel 45–6—*Director of Military Prosecutions—interim implementation arrangements*, paras 6-8.

<sup>160</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s188F-188FM.

with post trial administration of courts martial and Defence Force magistrate trials previously performed by the staff of convening authorities.<sup>161</sup>

146. The functions of the Registrar of Military Justice are set out in the *Defence Force Discipline Act 1982*, s188F-188FM.<sup>162</sup>

### Keeping things “in House”

**Recommendation 49. Guidance be included in (a) Command Directives at all levels, and (b) pre-command training courses, designed to discourage any tendency to conceal potential military justice problems from higher authority.**

147. The Burchett Report observed there was a suggestion that Commanding Officers were tempted to maintain appearances in respect of their commands by keeping matters that ought to be prosecuted ‘in house’.<sup>163</sup>

148. In late 2001, Defence promulgated policy and a new regime for the reporting and investigation of offences allegedly committed by members of the ADF. The new Defence Instruction defined ‘notifiable incidents’ to be reported, and these included incidents that raised a reasonable suspicion that an offence may have occurred.<sup>164</sup>

149. The Defence Instruction was in 2016 replaced by *the Incident Reporting and Management Manual*, which in turn was superseded in 2022 by the *Defence Incident Reporting and Management Policy*.<sup>165</sup>

150. In respect of guidance on pre-command courses, both the Burchett Implementation Team in 2006 and the *Independent Review on the health of the reformed military justice system* in 2009 were satisfied that the Services had met the intent of this recommendation.<sup>166</sup>

### Availability of avenues of complaint

**Recommendation 50. Consideration be given to reviewing what means (if any) exist for achieving closure on the cases of chronic complainants.**

151. The Burchett Report observed that there are many avenues of complaint available to ADF personnel and that the great majority of complaints have been handled responsibly by the chain of command. However, it acknowledged that a small number of serving and ex-serving personnel continue to make submissions about complaints that have been dealt

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<sup>161</sup> [BN79044016](#) *Defence Legislation Amendment Act (No.2) 2005*; and [BN75325708](#) *Defence Legislation Amendment Act (No.2) 2005 Explanatory Memorandum*.

<sup>162</sup> [BN78695648](#) *Defence Force Discipline Act 1982*, s188F-188FM.

<sup>163</sup> [BN72040788](#) Burchett Report, para 53.

<sup>164</sup> [R12390699](#) Defence Instruction (General) Admin 45–2—*Reporting and Investigation of Alleged Offences within the Australian Defence Force*.

<sup>165</sup> [BN79032544](#) Defence, *Incident Reporting and Management Policy*, 05 August 2022.

<sup>166</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 49; and [BN76257732](#) Report of the independent review of the health of the reformed military justice system, 23 January 2009, Annex I, *2001 – Burchett Inquiry Progress Report*, serial S.

with before. The Report observed that such cases might usefully be referred to the then-proposed Military Inspector General.<sup>167</sup>

152. The establishment of IGADF in 2003 provided an avenue for consideration of some of the long standing complaints.

153. The Burchett Report also observed that the 'chronic complainant' is an intractable problem. It recommended Defence seek an expert, such as professor of psychology, to furnish advice on the handling of such persons.<sup>168</sup>

154. Defence reviewed research by Professor Paul Mullens of Monash University and sought other advice on querulant behaviour including from the office of the NSW Ombudsman and the Department of Veteran Affairs.<sup>169</sup>

155. Defence policy is that if a person is not satisfied with the response to an incident of unacceptable behaviour the person, in the first instance, is to request the commander, manager or supervisor who responded to the incident to reconsider the response. If the person has sought review and is not satisfied with the response they may request further review. In the case of an ADF member, they may submit a Redress of Grievance or submit a complaint to IGADF.<sup>170</sup>

156. Likewise for any other administrative decision affecting an ADF member's service, there are multiple review options for someone dissatisfied with a Defence decision.<sup>171</sup> If a complainant is not satisfied with the outcome of Defence or IGADF consideration of their matter, it is open to them to make a submission to the Commonwealth Ombudsman and/or the Human Rights Commission.

157. Defence acknowledges that sometimes a person may be unreasonably persistent but that a complainant's conduct is not necessarily unreasonable just because it is seen as challenging or difficult to manage. Unreasonable complainant conduct only arises where the conduct of a current or former complainant raises substantial health, safety, and resource or equity issues for Defence, Defence personnel or other members of the public. The *Good Administrative Decision-Making Manual* provides guidance on management of unreasonable complainant conduct.<sup>172</sup>

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<sup>167</sup> [BN72040788](#) Burchett Report, para 243.

<sup>168</sup> [BN72040788](#) Burchett Report, para 244.

<sup>169</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 50.

<sup>170</sup> [BN78972675](#) *Complaints and Alternative Resolutions Manual*, para 3.2.0.7.

<sup>171</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*, Chapter 9.

<sup>172</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*, paras 9.26-9.28.



## Professional Reporting – The Whistleblower Scheme

**Recommendation 51. Current policy covering treatment of "Whistleblowers" be reviewed as to its applicability to deal with more general military justice issues.**

158. At the time of the Burchett inquiry, the Defence whistle-blower scheme established in 1997 was directed primarily at fraudulent activity and associated recovery.<sup>173</sup>

159. In 2002 Defence issued a new policy instruction, Defence Instruction (General) Personnel 45–5—*Defence Whistleblower Scheme*. Matters dealt with under this policy could include any activity that may breach Commonwealth legislation, including the DFDA, unethical behaviour, misuse or mismanagement of departmental resources, harassment or unlawful discrimination and any other behaviour that could jeopardise Defence's reputation. As such, the scheme was applicable to military justice issues as recommended by the Burchett Report.<sup>174</sup>

160. The Defence Whistleblower Scheme was replaced when the *Public Interest Disclosure Act 2013* established a legislative scheme to investigate allegations of wrongdoing in the Commonwealth public sector, including Defence. The Act provided for robust protections for whistleblowers who make qualifying public interest disclosures under the scheme. Examples of disclosable conduct included conduct that contravenes a law, is an abuse of public trust or position, amounts to maladministration, unreasonably results in or increases the risk of danger to health or safety, and if proven, would give grounds for disciplinary action in response to that conduct. As such, the scheme was initially able to deal with a range of military justice issues.<sup>175</sup>

161. Personal work-related grievances are no longer disclosable under the Act, unless the conduct would constitute taking a reprisal against another person, would provide reasonable grounds for termination of employment, and/or the conduct is of such significant nature it would undermine public confidence.<sup>176</sup> This means that serious military justice issues continue to be able to be dealt with under the Public Interest Disclosure Act.

### Regional DFDA Units

**Recommendation 52. Consideration be given to the usefulness of establishing a regional DFDA unit in a particular location where the ordinary arrangements are difficult to implement in practice.**

162. Defence did not accept this recommendation.<sup>177</sup>

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<sup>173</sup> [BN72040788](#) Burchett Report, para 248.

<sup>174</sup> [R12390754](#) Defence Instruction (General) Personnel 45–5—*Defence Whistleblower Scheme*, para 15.

<sup>175</sup> [BN78991087](#) Defence Instruction (General) Personnel 45–8—*Defence Public Interest Disclosure Scheme*

<sup>176</sup> [BN68295584](#) Defence Fact Sheet, *Public Interest Disclosures*.

<sup>177</sup> [BN72567227](#) Burchett Report, *Implementation Progress Report* updated 20 June 2007, serial 52.

## Medical issues

**Recommendation 53. General guidance be provided to Commanders (and included in appropriate training courses) concerning the weight to be given to medical certificates, and the course to be taken if there is reason to be doubtful about a particular certificate.**

163. In 2005, Defence issued a new instruction, Defence Instruction (General) Personnel 16–21—*Absence due to illness and absence due to convalescence*. The instruction covered the official standing of medical advice certificates and how commanders should deal with them.<sup>178</sup>

164. This instruction has since been superseded by the *Military Personnel Policy Manual*. If recommended temporary employment restrictions are in doubt and the commander believes the employment restrictions require reassessment, the commander is to contact the relevant Health Centre Manager within the Joint Health Unit. The commander and Health Centre Manager may discuss alternative duties and risk; or provide more information to clarify the member's work environment or duties that may affect the allocation of employment restrictions. This ensures the employment restrictions are accurate and uphold Defence's duty of care to the member.<sup>179</sup>

## Procedural fairness and command prerogative

**Recommendation 54. General policy guidance be developed as to the exercise of the command prerogative, and as to the extent and nature of the observance of the dictates of natural justice which is required in connection therewith.**

165. In 2003, Defence published a manual setting out the legal requirements and procedures to guide proper administrative decision making in the ADF. This included practical guidance to commanders on the requirements of procedural fairness, then also known as 'natural justice'.<sup>180</sup> After several iterations, the manual was superseded first in 2015 by a new guide, *Good Decision-Making in Defence: A guide for Decision-Makers and those who brief them*. This guide provided a full chapter on procedural fairness.<sup>181</sup> The guide was replaced in 2022 by the new *Good Administrative Decision-Making Manual*, which likewise devotes a chapter to the application of procedural fairness.<sup>182</sup>

166. The *Good Administrative Decision-Making Manual* provides specific guidance on procedural fairness in the context of command decisions:

Command or employment based decisions. Many other decisions, including decisions made under command or employment powers, are unlikely to require adherence to the hearing rule as a matter of law. For example, routine posting decisions or a decision to

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<sup>178</sup> [BN78980041](#) Defence Instruction (General) Personnel 16–21—*Absence due to illness and Absence due to Convalescence*, paras 5-6.

<sup>179</sup> [BN76464593](#) *Military Personnel Manual*, Part 3, Chapter 2.

<sup>180</sup> [BN29332471](#) ADFP 06.1.3—*Guide to Administrative Decision-Making*, Chapter 2.

<sup>181</sup> [BK817225](#) *Good Decision-Making in Defence: A guide for Decision-Makers and those who brief them*, Chapter 4.

<sup>182</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*, Chapter 5.

remove a person from an area of operations because they are wounded, even though this may affect the financial benefits that person would have otherwise received.<sup>183</sup>

In some circumstances, it may be acceptable to postpone the legislative or Defence policy requirement to observe the hearing rule for urgent decisions with a genuine operational imperative such as where a decision needs to be made quickly to ensure security, safety, efficiency or welfare of personnel. For example, an urgent temporary or interim decision to remove an ADF member from a particular unit or ship for alleged impugned conduct pending determination of an investigation or inquiry. If however, it is not proposed to return the ADF member to the unit or ship because an adverse finding is being contemplated in relation to impugned conduct, the hearing rule should be observed before the final decision is made. Administrative inconvenience or delay is not an excuse for failing to observe the hearing rule required by legislation or Defence policy.<sup>184</sup>

### **Military Inspector General**

**Recommendation 55. A Military Inspector General be appointed with the following role and functions:**

**Role: The role of the Military Inspector General is to represent the CDF in providing a constant scrutiny, independent of the ordinary chain of command, over the military justice system in the Australian Defence Force in order to ensure its health and effectiveness; and to provide an avenue by which any failure of military justice may be examined and exposed, not so as to supplant the existing processes of review by the provision of individual remedies, but in order to make sure that review and remedy are available, and that systemic causes of injustice (if they arise) are eliminated.**

**Functions: The functions of the Military Inspector General should be:**

- (a) To investigate, as directed by the CDF, or as may be requested by a Service Chief, such matters as may be referred to the Military Inspector General, or to investigate a matter of his or her own motion, concerning the operation of the military justice system;**
- (b) To provide an avenue for complaints of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process where chain of command considerations discourage recourse to normal avenues of complaint;**
- (c) To take action as may be necessary to investigate such complaints, or refer them to an appropriate authority for investigation, including the military police, civil police, Service or departmental commanders or authorities; and, following any referral, to receive and, if necessary, to report to CDF upon, the response of the authority to whom the matter was referred;**

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<sup>183</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*, para 5.19.

<sup>184</sup> [BN78972670](#) *Good Administrative Decision-Making Manual*, para 5.20.

- (d) To act as an Appointing Authority for investigations (not including Boards or Courts of Inquiry) under *Defence (Inquiry) Regulations*;**
- (e) To maintain a register of persons who would be suitable to act as members of inquiries or as Investigating Officers;**
- (f) To advise Appointing Authorities under the *Defence (Inquiry) Regulations* on the conduct and appointment of inquiries;**
- (g) To monitor key indicators of the military justice system for trends, procedural legality, compliance and outcomes, including:
  - (1) Service Police investigation reports;**
  - (2) Significant administrative inquiries and investigations;**
  - (3) Service discipline statistics;**
  - (4) Records of significant administrative action taken for disciplinary purposes;**
  - (5) Records of Grievances;**
  - (6) Reports of unacceptable behaviour, including victimisation, abuse of authority, and avoidance of due process;****
- (h) To conduct a rolling audit by means of spot checks of Unit disciplinary records, procedures, processes, training and competencies relevant to military justice;**
- (i) To promote compliance with the requirements of military justice in the ADF;**
- (j) To liaise with other agencies and authorities with interest in the military justice system in order to promote understanding and co-operation for the common good;**
- (k) To consult with overseas agencies and authorities having similar or related functions;**
- (l) To make to the CDF such reports as may seem desirable or as the CDF may call for;**
- (m) To receive documents which were submitted to this Inquiry and finalise complaints brought to the attention of this Inquiry which may require further action.**

167. In January 2003, CDF appointed the inaugural IGADF. The Office of the IGADF opened in September 2003. Broadly, the Office of the IGADF was intended to provide a mechanism whereby the military justice system is reviewed and audited, independently of the chain of command. The IGADF reported directly to the CDF and could investigate

matters arising from both the discipline and administrative systems. The IGADF became a statutory appointment in 2005.

168. The IGADF was to identify systemic causes of injustice within the military justice system, rather than supplant existing avenues of recourse available to individuals. Any persons may make a submission to the IGADF, including current and former ADF members, Defence personnel, family members and friends, and members of the public. The IGADF does not have the power to implement measures arising out of their investigations. The IGADF's only power is to make recommendation to other authorities who may remedy the matter.

169. The Office of the IGADF has since attracted additional functions including oversight of the Redress of Grievance system and inquiries into the deaths of ADF members. The legislative basis and functions of the Office of the IGADF are the subject of the IGADF Twenty-Year Review.

**OPEN RULING**  
**ON**  
**UNDERTAKINGS**

**The Rt. Hon. Sir Charles Haddon-Cave:**

**Introduction**

1. At the hearing on the 6<sup>th</sup> July 2023, the Core Participants were invited to make their submissions by 18<sup>th</sup> August 2023 as to whether or not undertakings should be sought from the Attorney General (“AG”) and/or from the Ministry of Defence (“MOD”).
2. The Inquiry received written submissions on the question of undertakings from the Afghan Families on 17<sup>th</sup> August 2023, from the MOD on 18<sup>th</sup> August 2023, and a letter from the representatives of the Royal Military Police (“RMP”) also dated 18<sup>th</sup> August 2023 supporting the MOD’s position. These submissions, together with a detailed Note prepared by Counsel to the Inquiry, have been posted on the Inquiry website (<https://www.iiia.independent-inquiry.uk/>). I am grateful to all counsel for their detailed and comprehensive submissions.

*Rationale for seeking undertakings*

3. The primary obligation of the Inquiry is to conduct a full and thorough investigation and fulfil the Terms of Reference (“TOR”). The TOR focus on serious allegations of wrongdoing by UK Special Forces in Afghanistan, notably, allegations of unlawful killings and cover-up.<sup>1</sup> The TOR also expressly require the Inquiry to determine whether any, and if so what, further investigations are necessary arising out of the allegations.<sup>2</sup>
4. It is possible that a witness’s willingness to co-operate with the work of the Inquiry may be tempered by concerns that, by coming forward to give or produce evidence to the Inquiry, they might thereby expose themselves to the possibility of criminal prosecution or disciplinary proceedings. Such concerns might also make witnesses more likely to invoke their privilege against self-incrimination and refuse to answer questions put by the Inquiry, thereby further hampering the work of the Inquiry. It is for this reason that Inquiries seek undertakings from relevant authorities, when appropriate, to assuage such concerns.
5. As Sir Christopher Pitchford explained in the Undercover Policing Inquiry (“UCPI”):  
  
“It is commonplace that witnesses are more likely to be frank and honest with their inquisitor if there will be no adverse consequences to them arising from their evidence such as the use of their evidence in a criminal prosecution or disciplinary proceedings... [T]he Inquiry can, in the public interest, invite the Attorney General or an employer to consider

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<sup>1</sup> See <https://iiaweb-prod.s3.eu-west-2.amazonaws.com/X6xHy1uT-2022Dec-TERMS-OF-REFERENCE-for-Independent-Inquiry-relating-to-Afghanistan.pdf>

<sup>2</sup> See paragraph 5 of the TOR.

whether it would be appropriate to grant an undertaking giving some measure of protection to witnesses.”<sup>3</sup>

### **Legal Framework**

6. There are a number of legislative provisions which should be borne in mind in this context.

#### *Official Secrets Act 1989*

7. Section 2 of the Official Secrets Act 1989 (“OSA”) provides in the context of Defence generally:

##### **“2. Defence**

*(1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he makes a damaging disclosure of any information, document or other article relating to defence which is or has been in his possession by virtue of his position as such.”*

8. Section 4 of the OSA provides in the context of military policing in similar terms:

##### **“4. Crime and special investigation powers**

*(1) A person who is or has been a Crown servant or government contractor is guilty of an offence if without lawful authority he discloses any information, document or other article to which this section applies [e.g. which impedes the prevention or detection of offences etc.] which is or has been in his possession by virtue of his position as such.”*

9. Section 8 of the OSA provides:

##### **“8. Safeguarding of information**

*(1) Where a Crown servant... has in his possession or under his control any document... which it would be an offence under any of the foregoing provision of this Act for him to disclose without lawful authority he is guilty of an offence if ... he retains the document... contrary to his official duty.”*

#### *Armed Forces Act 2006*

10. Offences created by the Armed Forces Act 2006 (“AFA”) apply to people subject to Service Law and can only be tried by a Court-Martial or other Service proceedings.
11. Of potential relevance are the following provisions:
  - Section 12 relates to disobedience to lawful commands;
  - Section 13 relating to the contravention of standing orders (which include the duty of a commanding officer to report serious misconduct to the RMP);<sup>4</sup>
  - Section 18 relating to the making of false records;
  - Section 19 relating to conduct prejudicial to good order and discipline;
  - Section 42 is a general provision which makes a breach of the general criminal law also a service offence;
  - Section 113 relating to the duty of a commanding officer to ensure the service police are aware of the possibility of a serious offence having been committed.

<sup>3</sup> Paragraph 4, Undertakings Rulings dated 26<sup>th</sup> May 2016 [160526-ruling-undertakings.pdf \(ucpi.org.uk\)](https://www.ucpi.org.uk/160526-ruling-undertakings.pdf)

<sup>4</sup> ACSO3203 (and also see the King’s Regulations).

12. Standing orders include the King's Regulations which provide:

*"PART 8 - THE LAW OF ARMED CONFLICT Prevention, Reporting and Investigation of Breaches of the Law of Armed Conflict*

*J7.201.*

*a. It is the duty of all ranks to:*

*(1) Abide by the law of armed conflict.*

*(2) Do all in their power to prevent any breaches taking place.*

*(3) Upon becoming aware of an allegation of any breach of the law of armed conflict, report the circumstances to their commanding officer.*

*b. The commanding officer, upon receipt of any such allegation of a breach of the law of armed conflict, is to report it to their higher authority and ensure that it is thoroughly investigated without delay. Normally the Royal Military Police are to be tasked to conduct the investigation."*

*Inquiries Act 2005*

13. Section 21 of the Inquiries Act 2005 ("the 2005 Act") provides that individuals may be compelled to give evidence, produce documents, or produce written evidence to the Inquiry. Failure to comply with a section 21 notice without reasonable excuse is punishable with up to 51 weeks' imprisonment, pursuant to section 35 of the 2005 Act.

14. Section 22(1) of the 2005 Act provides, however, that a person may not be required under section 21 to provide any evidence or document if they could not be required to do so in civil proceedings or the requirement would be incompatible with a retained EU obligation.

*Privilege against self-incrimination*

15. A person giving evidence in civil proceedings is protected by the rule against self-incrimination. This rule exists as a matter of English civil procedure<sup>5</sup>, and under the ECHR in the concept of fairness in Article 6.<sup>6</sup> In effect, therefore, section 22(1) gives a witness before an Inquiry the right to refuse to provide evidence (whether by answering any question or producing any document or thing) by relying on the privilege against self-incrimination.<sup>7</sup>

16. The classic statement of the rule (or principle) against self-incrimination is by Lord Goddard in *Blunt v. Park Lane Hotel* [1942] 2 KB 253 at 257:

*"...no one is bound to answer any question if the answer thereto would in the opinion of the judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the judge regards as reasonably likely to be preferred or sued for."*

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<sup>5</sup> See section 14 of the Civil Evidence Act 1968.

<sup>6</sup> See *Saunders v UK* (1997) 23 EHRR 313.

<sup>7</sup> See the Explanatory Notes to the Inquiries Act 2005, at paragraph 54.



17. The privilege is re-stated in section 14 of the Civil Evidence Act 1968:

*“Privilege against incrimination of self or spouse or civil partner*

*14(1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty—*

*(a) shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law; ...”*

### **Core Participant’s submissions**

#### *The MOD’s position*

18. The MOD recognise, and endorse, the need for the Inquiry to seek suitable undertakings in order to progress the work of the Inquiry and discharge the Inquiry’s TOR, and in particular, to seek undertakings which encourage witnesses to come forward and to give their evidence freely. The MOD make it clear, however, that *“...it does not invite the Chair to grant any measure of protection to individuals who may be found to be responsible for serious wrongdoing or to take any step that might frustrate the further possible investigations envisaged in the terms of reference”*.<sup>8</sup>

19. The MOD make three main submissions:

(1) First, as regards to **AG’s undertakings**: the MOD adopts a neutral position as regards to whether undertakings should be sought from the AG precluding a witness’s evidence being used against them in any subsequent criminal proceedings and acknowledge that this is a matter for the Chair. The MOD recognise the advantage of undertakings, particularly those incorporating the ‘derivative use’ element.<sup>9</sup> However, “given the seriousness of the matters under investigation by the Inquiry, as well as the fact that the terms of reference expressly contemplate further investigation” the MOD acknowledge “there are clear difficulties inherent in seeking undertakings in respect of homicide offences or offences relating to the alleged cover-up which the Inquiry is also required to investigate”.

(2) Second, as regards the **‘moratorium’ issue**<sup>10</sup>: the MOD is willing to grant an undertaking that possession of information of potential relevance to the Inquiry which is classified “*below SECRET*” will not result in any disciplinary or administrative action, but not material classified at “*SECRET or above*”, and UK Security Vetting (“UKSV”) would still be free to review the individual’s security clearance, should it be deemed necessary. The MOD intends to continue to engage with other government departments and UKSV to explore whether it can be extended to include information of potential relevance to the Inquiry which is classified at ‘*Secret*’. The MOD adopts a neutral position as to whether the Inquiry should seek an undertaking from the AG to the effect that no evidence or document provided to the Inquiry will result in, or

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<sup>8</sup> MOD written submissions, paragraph 5.

<sup>9</sup> An undertaking that a witness’s evidence to an inquiry will not be used to identify lines of inquiry or further evidence which is subsequently relied upon against them in any later criminal proceedings (see paragraph 44 below).

<sup>10</sup> *I.e.* the grant of a moratorium in respect of persons in possession of material relevant to the Inquiry’s work, in circumstances which constitute a security breach.

be used in, any prosecution under the Official Secrets Act or any prosecution for unlawful possession of the material in question.

- (3) Third, as regards **other MOD / Armed Forces undertakings**: The MOD confirms that the Permanent Under Secretary (“PUS”) and Heads of Services are willing to offer undertakings to the same effect as were provided in the *Baha Mousa Inquiry* and *Al-Sweady Inquiry*, the intended purpose of which is to facilitate cooperation with the Inquiry. The composite effect of those undertakings would be that:

*“If written or oral evidence given to the Inquiry by a witness who is a former or current [civil servant or member of that Armed Force] may tend to indicate that: (1) the same witness previously failed to disclose misconduct by himself or some other person, or (2) the same witness gave false information on a previous occasion in relation to such misconduct, then [the PUS and Heads of Service] undertake that the [relevant body] will not use the evidence of that witness to the Inquiry in any disciplinary proceedings against that witness where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on that previous occasion.”*

#### *Afghan Families’ position*

20. The Afghan Families also recognise and endorse the need for the Inquiry to seek suitable undertakings in order to encourage witnesses to come forward and to give their evidence freely. The Afghan Families ‘principal hope’ is that the Inquiry will uncover the truth. In this regard, they support the seeking of ‘full use’ and ‘derivative use’ undertakings to enable witnesses to speak freely and without fear of self-incrimination and cite Major General Brereton in the Australian Afghanistan Inquiry Report (at pages 39-40); but go on to submit that such undertakings should not (i) provide any immunity from prosecution, (ii) prevent prosecution of the witness for the giving of false evidence to the Inquiry, (iii) prevent the use of evidence from the witness against another person, or (iv) prevent a criminal investigation pursuing lines of inquiry against the witness on an independent basis, because they were also referred to by the witness. The Afghan Families support the seeking of those undertakings from the AG to cover criminal proceedings and the MOD to cover disciplinary proceedings against either members of the armed forces or MOD civil servants and, if necessary, the Civil Service. They express the hope that the provision of such undertakings will equip the Inquiry to break the ‘wall of silence’.

#### *RMP’s position*

21. As mentioned, the RMP support the MOD’s submissions.

#### **The approach**

22. The approach to be taken by an Inquiry Chair when deciding whether, and if so what, precise undertakings to seek was neatly encapsulated in Sir Christopher Pitchford’s ruling on undertakings in the UCPI as follows: “...any positive effect on establishing the truth falls to be balanced against any negative effect on the administration of justice.”<sup>11</sup>

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<sup>11</sup> Sir Christopher Pitchford directly quoting Counsel to the Inquiry’s Supplementary Note at paragraph 35 of the Undertakings Ruling dated 26<sup>th</sup> May 2016 [160526-ruling-undertakings.pdf \(ucpi.org.uk\)](https://www.uci.org.uk/160526-ruling-undertakings.pdf).



23. In the *Manchester Arena Inquiry*,<sup>12</sup> Sir John Saunders explained the ‘test’ or approach in terms of balancing the benefit to the Inquiry of an undertaking (including what information the Inquiry was likely to get with an undertaking which it would not get without such an undertaking) and the potential negative effect on the administration of public justice.<sup>13</sup> He explained that the test had a strong “*subjective element*”<sup>14</sup> and was also inherently “*fact sensitive*”.<sup>15</sup> In the event, given the serious nature of the offences which were being investigated, Sir John Saunders declined to seek any undertaking from the Attorney General on the basis that “...*the potential effect on the administration of justice considerably outweighs the potential benefits of allowing the applicant to give evidence without the risk of criminal proceedings*”.<sup>16</sup>

#### *Previous inquiries*

24. I am grateful to all counsel for their detailed research into the approach taken with regard to undertakings in previous inquiries in England and Wales over the past 25 years. In summary:

(1) A variety of undertakings were provided by the A-G and other authorities in:

- The Stephen Lawrence Inquiry (1998)
- The Bloody Sunday Inquiry (1998)
- The Ladbroke Grove Inquiry (2000)
- The Rosemary Nelson Inquiry (2005)
- The Baha Mousa Inquiry (2009)
- The Al-Sweady Inquiry (2010)
- The Independent Inquiry into Child Sexual Abuse Inquiry (2015)
- The Undercover Policing Inquiry (2016)
- The Grenfell Inquiry (2020)

(2) No undertakings from the A-G were provided in:

- The Hutton Inquiry (2003)
- The Iraq Inquiry (2009)
- The Leveson Inquiry (2011)
- The Litvinenko Inquiry (2014)
- The Manchester Arena Inquiry (2021)

25. However, as Sir John Saunders emphasised, the test is inherently fact sensitive and the requirements of each inquiry must be tailored according to its own particular facts and features. I share the Afghan Families’ axiom which is that the aim of the Inquiry is to establish the truth.<sup>17</sup> But I also agree with MOD’s counsel that “*this Inquiry’s Terms of Reference give rise to unique complexities in this sphere*”.<sup>18</sup>

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<sup>12</sup> “*Ruling on the application by Ben Romdhan for an application to be made to the Attorney General to give an undertaking*” dated 10 June 2021 (“the Manchester Ruling”).

<sup>13</sup> (Manchester Ruling at paragraphs 14 and 17)

<sup>14</sup> (Manchester Ruling at paragraph 7)

<sup>15</sup> (Manchester Ruling at paragraph 11)

<sup>16</sup> (Manchester Ruling at paragraph 19)

<sup>17</sup> Paragraph 12 of the Afghan Families’ written submissions dated 17<sup>th</sup> August 2023.

<sup>18</sup> Paragraph 4 of the MOD’s written submissions dated 18<sup>th</sup> August 2023.

### **Measures in respect of those who are willing to assist the Inquiry**

26. A growing number of people are already providing information to this Inquiry, either directly or *via* their legal representatives. Some are coming forward in response to the call for information; others are responding to the Inquiry's Rule 9 requests.
27. However, two particular issues have arisen in respect of those who are willing to provide information to the inquiry:
  - (1) Some witnesses are concerned that speaking to the Inquiry about matters within the Terms of Reference would amount to a breach, in particular, of the terms of the OSA .
  - (2) Some witnesses who have retained documents which they would like to hand over to the Inquiry are concerned that they may become liable to (a) lengthy investigation by the MOD with corresponding uncertainty as to what action, if any, might be taken, and/or (b) disciplinary action, and/or (c) loss of security clearance, and/or (d) prosecution under the OSA and/ or the AFA.
28. It is important that these concerns are addressed, in so far as possible and appropriate, by requisite undertakings being sought. I deal with them in turn.

#### ***(1) Consequence of witnesses speaking to the Inquiry***

29. The main focus of the Inquiry relates to the activities of Special Forces in Afghanistan. Accordingly, the provisions of the OSA are likely to apply to the disclosure of information in respect of such matters.
30. The Secretary of State for Defence, the Chief of the Defence Staff, the PUS and others in senior positions of responsibility have issued messages requesting all military and non-military personnel to "*co-operate proactively*" with the Inquiry and encouraging all those with information to come forward to the Inquiry as soon as possible. It is apparent, however, that despite such exhortations, some witnesses who would otherwise be willing to come forward and speak freely remain concerned as to the consequences of doing so and may be reluctant to come forward, or to share information with the Inquiry.
31. Whilst the public statements made by the Secretary of State for Defence arguably already amount to "*lawful authority*" or an official authorisation, I am minded to put the matter beyond doubt and invite the Secretary of State for Defence formally to grant an official authorisation to all those in possession of relevant information to disclose it to the Inquiry Legal Team as soon as possible.

#### ***(2) Provision of Documents etc***

32. A clear statement by the Secretary of State granting lawful authority should apply equally to documents or material retained by witnesses that are handed over to the Inquiry in good faith.
33. Other considerations also arise in relation to documents retained by witnesses. Given the Inquiry concerns Special Forces, it is likely that relevant documents are likely to be

classified at ‘SECRET’ or above. Retention of those documents may constitute an offence under *e.g.* section 8 of the OSA.

34. As mentioned, the MOD’s ‘settled’ position is that it is willing to grant an undertaking that retention of material classified “*below SECRET*” will not result in any disciplinary or administrative action but is not prepared to give any such undertaking in relation to material classified at “SECRET or above”. The MOD also state that the UKSV would remain free to review the individual’s security clearance. The MOD is neutral as to whether an undertaking should be sought from the A-G to cover the position.

#### *General considerations*

35. I agree with Counsel to the Inquiry that:

- (1) First, the obtaining contemporaneous documents and material (at *whatever* level of classification) is extremely important and has the potential to significantly assist the work of the Inquiry in fulfilling its Terms of Reference, particularly in relation to what occurred during operations, and in relation to issues such as allegations of deletion of data and cover-up.
- (2) Second, as emphasised above, it would have a significant chilling effect on witnesses coming forward if investigations, disciplinary action, or prosecutions were threatened or took place in respect of witnesses who have volunteered information or documents to the Inquiry in good faith.
- (3) Third, if and in so far as the MOD or other bodies institute investigations of individuals whenever material was provided to the Inquiry, this might have the effect of significantly delaying the work of the Inquiry.
- (4) Fourth, given the independent, prospective, ongoing basis of assessment of risk that UKSV are required to undertake. Whilst desirable, a comprehensive undertaking from the Cabinet Office may not be possible.
- (5) Fifth, in the absence of appropriate assurances from the State, it may be necessary to restrict from State participants disclosure of documents provided to the Inquiry in confidence.

#### *Decision*

36. For the above reasons, I am minded to invite the AG to grant an undertaking in the same terms as was given to the Independent Panel Inquiry into Child Sexual Abuse (“ICSA”):

**“No evidence that a person may give to the Inquiry will be used in evidence against that person in any criminal proceedings under the Official Secrets Acts or relied upon for the purpose of deciding whether to bring such proceedings against that person.**

**Where the evidence a person gives includes the production to the Inquiry of any document, film, image or any other physical item which does not lawfully belong to him, then his production of that item shall not be used as evidence against him in**

**any criminal proceedings in respect of his unlawful possession of it or relied upon for the purpose of deciding whether to bring such proceedings against that person.”**

37. I am also minded to invite the Secretary of State for Defence to:

- (1) formally grant an official authorisation to all those in possession of potentially relevant information to disclose it to the Inquiry Legal Team as soon as possible;
- (2) directly give the following express undertaking:

**“If a witness who is a former or current civil servant or member of the Armed Forces has retained, in breach of Security Operating Procedures, documentation classified below SECRET, and supplied that documentation to the Inquiry, no investigation will be undertaken and there will be no disciplinary or administrative action in respect of that breach.**

**If a witness who is a former or current civil servant or member of the Armed Forces has retained, in breach of Security Operating Procedures, documentation classified at SECRET or above, and supplied that documentation to the Inquiry, an investigation will be undertaken only if proportionate and reasonably necessary, and then only to ascertain whether the information has been shared with any unauthorised person. If that has not taken place, there will be no disciplinary or administrative action in respect of that breach.”**

38. I am also minded to invite an assurance from the Minister for the Cabinet Office and the Chief Executive of UK Security Vetting in the following terms:

**“Where an individual has retained classified documents which they have supplied to the Inquiry in good faith, and there is no information to suggest any unauthorised disclosure or the individual now retains any classified documents, this in itself would not be treated as the basis to refuse, decline to renew, or downgrade a security clearance.”**

### **Undertakings regarding self-incrimination**

39. I turn to the second main topic, namely undertakings relating to self-incrimination in regard to written and oral evidence.
40. It is open, in principle, to Inquiries to seek undertakings from the AG to the effect that individuals will not be subject to criminal prosecution based on the answers or documents they give to an Inquiry, *i.e.* in relation to self-incrimination. This is in order to allay concerns of those thinking of coming forward to give evidence to the Inquiry and/or make it more difficult for a witnesses to refuse to answer certain questions or provide documents on the basis of the privilege against self-incrimination.<sup>19</sup>

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<sup>19</sup> See the Explanatory Notes to the Inquiries Act 2005, at paragraph 56.



41. I agree, however, with Counsel to the Inquiry that the question as to the desirability of seeking undertakings in relation to self-incrimination in the present context is far from straightforward. On one hand, an undertaking in relation to self-incrimination might be said to encourage witnesses to come forward; on the other, however, such undertakings may cause significant complications in relation to any future investigations – in circumstances where further investigations are *explicitly* contemplated by the TOR of the Inquiry (see further below).
42. Accordingly, it is sensible to consider this question in relation to two different cohorts:
  - (1) People who witnessed or become aware of wrong-doing but have failed to disclose or report the same.
  - (2) People who themselves committed or participated in wrongdoing.
43. Before doing so, I set out below some of the general considerations to be taken into account.

*Broad categories of undertakings in relation ‘self-incrimination’*

44. The scope of potential AG ‘use’ undertakings in relation to self-incrimination varies, but in my view can be broadly categorised as comprising four general types, or *species*, set out below:
  - (1) **Direct Use:** An undertaking that a witness’s evidence to an inquiry will not be used *directly* against them in any subsequent criminal proceedings. This covers *directly* incriminating evidence and is described as ‘the essence of the privilege itself’.<sup>20</sup>
  - (2) **Indirect Use:** An undertaking that a witness’s evidence to an inquiry will not be used *indirectly* against them in any subsequent criminal proceedings, *i.e.* in a manner which would *tend* indirectly to incriminate them. This *indirectly* incriminating evidence, *i.e.* answers which not only *would* incriminate a person, but those which also *tend* to do so (see *e.g.* *Den Norsk Bank v. Antonatos* [1999] QB 271, at 289A). As the ECtHR explained in *Saunders v. United Kingdom* (1996) 23 EHRR 331 at [71]:

“Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature... may later be deployed in criminal proceedings in support of the prosecution case, for example, to contradict or cast doubt upon other statements of the accused... or to otherwise undermine his credibility.”
  - (3) **Derivative Use:** An undertaking that a witness’s evidence to an inquiry will not be used *derivatively* against them in any subsequent criminal proceedings, *i.e.* to identify lines of inquiry or further evidence which is subsequently relied upon against them (see *e.g.* *Rank Film Distributors v Video Information Centre* [1982] AC 380. As Lord Wilberforce explained at *ibid* page 443C-E:

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<sup>20</sup> *Public Inquiries* (2011 edition), paragraph 5.87

“...[I]nformation given, or material disclosed, under the compulsory process of the court, ...may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character”.

- (4) **Prosecutorial Decision-Making:** An undertaking that a witness’s evidence to an inquiry will not be used to *inform the decision* whether to commence criminal proceedings against them in the first place (see e.g. *Sociedade Nacional de Combustiveis de Angola UEE v Lundqvist* [1991] 2 QB 310). This covers evidence which tends to increase the chances of a prosecutor deciding to bring charges against a witness. This arises because the definition of privilege against self-incrimination in section 14 of the Civil Evidence Act 1968 includes the words “...would tend to expose... to proceedings for an offence”. As Waller LJ explained in *Den Norske Bank v Anonatas* [1999] QB 271:

“[I]t is not simply the risk of prosecution. [I]t also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not.”<sup>21</sup>

45. In addition, there is the separate question of **Immunity from Prosecution or Disciplinary Proceedings**. An undertaking not to prosecute the witness for any offence arising from a witness’s evidence or confession, or pursue disciplinary proceedings.
46. It should be emphasised, however, that the above categories of undertakings can overlap considerably and can be difficult logically to disentangle, as the cases illustrated.

#### *Consequences of ‘Use and Derivative Use’ undertakings*

47. As the Core Participants correctly observe, for an AG undertaking to be fully co-extensive with the privilege against self-incrimination requires inclusion of ‘use’ and ‘derivative use’ components to the undertaking (e.g. as in *The Baha Mousa Inquiry*, *The Al-Sweady Inquiry* and *The Undercover Policing Inquiry*). Reference is also made to the *Brereton Inquiry* where witnesses had the benefit of broad statutory ‘use and derivative use’ immunities.<sup>22</sup>
48. Whilst the rationale for such undertakings is well understood, I do not believe that the *practical* consequences of the grant of broad use and derivative use undertakings has been fully appreciated, or tested, in this jurisdiction. We are fortunate, however, to be able to learn from the recent experience in Australia.

#### *The Australian experience*

49. In Australia, full ‘use and derivative use’ immunities are granted *automatically* by operation of statute to all witnesses, thereby precluding any evidence, or information obtained, as a direct or indirect consequence of compelled testimony from being used in any way against the witness in question.<sup>23</sup> The effect of these provisions has been that

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<sup>21</sup> See also *Sociedade Nacional de Combustiveis de Angola UEE v. Lundqvist* [1991] 2 QB 310 *per* Lord Justice Beldam.

<sup>22</sup> See paragraph 6 of the Afghan Families’ Submissions dated 17<sup>th</sup> August 2023 and paragraph 32(e) of the MOD Submissions dated 18<sup>th</sup> August 2023

<sup>23</sup> See section 124(2CA) of the Defence Act 1903 (Cth) and rule 31 of the Inspector-General of the Australian Defence Force Regulation 2016 (Cth).



nothing said, or produced, to the *Brereton Inquiry* under compulsion could be used in any criminal proceedings against the person who was required to answer questions or provide material.

50. This has caused significant difficulties for the subsequent criminal investigation set up in the wake of the *Brereton Inquiry*. As Justice Weinberg AO KC, the Special Investigator at the Office of the Special Investigator (“OSI”), explained in a public lecture delivered in July 2022<sup>24</sup>:

“...[A]ny investigative step taken as a result of compelled testimony may have the effect of tainting the entire evidence gathering process thereafter... [T]he burden that these statutory rights imposes upon the investigative (and prosecution) process should not be underestimated. Great efforts have had to be taken by the OSI to ensure that no use at all, whether direct or indirect, is made of any evidence given, under compulsion, to the *Brereton Inquiry*. This has turned out to be a massive task, and is ongoing.”

51. He also explained that the effect of ‘use and derivative use’ immunities meant, in particular, that: (i) no OSI investigator has had access to any of the material in the unredacted *Brereton Report*; and (ii) in order to deal with on-going risk of taint, the OSI had to establish an entirely separate team with the task of filtering all information that could lawfully be received by OSI investigators.
52. In my view, the lesson learned from the Australian experience is clear: the practical effect of the grant of ‘use and derivative use’ immunity to witnesses in this Inquiry on any subsequent criminal investigation is likely to be stark and two-fold:
- (1) First, any subsequent criminal investigators would be denied access to much of the material gathered by the Inquiry and might have to start their investigation effectively from scratch; and
  - (2) Second, elaborate and complex mechanisms would have to be established to ensure that no ‘tainted’ material reached the criminal investigating team (*i.e.* that itself was, or could arguably be said to be, the product of ‘use or derivative use’).

*Further factors militating against seeking general AG undertakings*

53. In my view, the MOD point to a number of further powerful factors militating against seeking general ‘use and derivative use’ undertakings from the AG in the present case:
- (1) First, the nature and scale of the allegations which this Inquiry is tasked with investigating are very grave indeed and encompass murder and war crimes on a systemic level and the widespread cover-up of the commission of such crimes.
  - (2) Second, the potential scope of criminality is much broader in the present Inquiry than that under consideration in the *Baha Mousa* and *Al-Sweady* Inquiries.

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<sup>24</sup> THE INVESTIGATION AND PROSECUTION OF ALLEGED WAR CRIMES: LESSONS FROM THE PAST, The Hon Mark Weinberg AO QC, Special Investigator, Office of the Special Investigator – lecture delivered to the Hellenic Australian Lawyers Association (Victorian Chapter), 21 July 2022. Madgwicks Lawyers, Melbourne.

- (3) Third, paragraph 5 of the TOR specifically require the Inquiry: “*To determine whether any, and if so what, further investigations are necessary arising out of the above, what form such investigations should take and, so far as is appropriate, to carry out such investigations or recommend others to do so.*” Whilst no explicit reference is made to future *criminal* investigations, this is clearly implicit given the grave nature and scale of the allegations which the Inquiry is investigating.
- (4) Fourth, to seek and obtain undertakings which would preclude reliance on evidence given to the Inquiry in any prosecution for serious offences would arguably deprive the Inquiry of the ability to discharge the above significant aspect of its TOR. It is noteworthy, in this regard, that the terms of reference for the *Baha Mousa* and *Al-Sweady* Inquiries did not expressly contemplate further investigations in the way that the TOR for this Inquiry do.
- (5) Fifth, as MOD counsel also point out, the grant of wide-ranging undertakings by the AG might give rise to complexities in the domestic sphere in the event that the authorities contemplate prosecutions for the offence of the commission of war crimes under Part 5 of the International Criminal Court Act 2001 the consent of the AG is required for such prosecutions.<sup>25</sup> Further, it may also give rise to questions in the international sphere as regards the operation of the ‘complementarity’ principle under the Rome Statute of the International Criminal Court.<sup>26</sup>

### **Decision**

54. In the light of the above considerations, I turn to address the two categories:

(1) *Witnesses who failed to report wrong-doing*

55. In my view, there are obvious and strong reasons to encourage people to come forward who witnessed wrong-doing or became aware of wrong-doing, but failed to disclose or report the same.
56. In that regard, the undertaking which the Heads of the Services and PUS have offered to promulgate is welcome.<sup>27</sup> I am minded to accept their offer of an undertaking (but would suggest a minor amendment for clarity):

**“If written or oral evidence given to the Inquiry by a witness who is a former or current [civil servant or member of that Armed Force] may tend to indicate that: (1) the same witness previously failed to disclose misconduct by himself or another person, or (2) the same witness gave false information on a previous occasion in relation to such misconduct, then I undertake that the [relevant body] will not use the evidence of that witness to the Inquiry in any disciplinary or administrative**

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<sup>25</sup> Section 53(3) of the International Criminal Court Act 2001 provides that, “*Proceedings for an offence shall not be instituted except by or with the consent of the Attorney General*”.

<sup>26</sup> The principle is enshrined in Preamble and Art.1 of the Rome Statute of the ICC, which provides that the ICC shall be “*complementary to national criminal jurisdictions*”, and is given effect to by Article 17 (admissibility) and Article 20 (double jeopardy). In essence, the principle is that the ICC will not investigate or prosecute a case within its jurisdiction that is, or has been, the subject of investigation or prosecution by a state of competent jurisdiction, “*unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*”.

<sup>27</sup> At paragraph 44 of the Ministry of Defence submissions.



**proceedings against that witness, where the nature of the misconduct alleged is the failure to give a full, proper or truthful account on a previous occasion.”** (*italics added*)

57. As Counsel to the Inquiry point out, however, such an undertaking could not bind the Director of Service Prosecutions in relation to proceedings before a Court-Martial for identical conduct. In those circumstances, to cover this eventuality, I am minded also to seek an undertaking from the AG (who superintends the Service Prosecution Authority) in similar terms:

**“If written or oral evidence given to the Inquiry by a witness who is a former or current [civil servant or member of that Armed Force] may tend to indicate that: (1) the same witness previously failed to disclose misconduct by himself or another person, or (2) the same witness gave false information on a previous occasion in relation to such misconduct, then I undertake that no evidence given to the inquiry will be used in evidence against that person in any criminal proceedings, where the conduct alleged to amount to an offence is failing to give a full, proper or truthful account on a previous occasion.”**

*(2) Participants in wrong-doing*

58. In my view, different considerations apply to actual *participants* to wrong-doing, *i.e.* participants in the commission of serious crimes such as those which are the subject-matter of this Inquiry.
59. In my judgment, for the reasons set out in paragraphs 50 to 53 above, any positive effect which ‘use and derivative use’ undertakings might have in establishing the truth is outweighed by the negative effect on the administration of justice, in particular because of the gravity of the alleged offences and because of the problems such undertakings might have for any subsequent investigation or prosecution.
60. Accordingly, I am not currently minded to ask the AG for undertakings to address potential issues of self-incrimination by alleged participants to wrong-doing.
61. Core participants, or other bodies mentioned in this ‘minded to’ note, are permitted to make any further submissions in writing that they wish on the matters set out, and the views I express on them, in the note. Any such submissions should be received by the Inquiry by not later than **4pm on Tuesday 3<sup>rd</sup> October 2023.**