



Inspector General Australian Defence Force

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Doctor Kathleen Dermody

Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House
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Dear Dr Dermody

1. Thank you for your letter of 19 October 2012 inviting me to make a submission to the Committee regarding Terms of Reference (TOR) for the Inquiry into DLA Piper's Report (the Report) of the review of allegations of sexual and other abuse in Defence, and the Government's response to the Report.

2. I welcome the opportunity to make a submission regarding these issues. The following comments refer, of course, only to those parts of the Report that have been publicly released. I should like to make some observations of a more general nature and then address some particular aspects of the Report that have relevance to your TORs from my perspective as the Inspector General of the Australian Defence Force (IGADF).

3. Before doing so however, it may be useful for those members of the Committee who may not be familiar with the role of the IGADF if I briefly refer to my role and functions to provide a context for my remarks.

IGADF ROLE

4. The position of IGADF was first established in January 2003 to implement one of the major recommendations of the report of an inquiry into the Australian Defence Force (ADF) military justice system undertaken in 2001 by Mr James Burchett, QC. In 2005 the position became a statutory appointment under Part VIIIB of the *Defence Act 1903* to formalise its role and functions and to better support the intention that the operations of the IGADF be performed in an independent manner.

5. Under Section 110A of the Defence Act, there are two main limbs to my role; one is to provide the Chief of the Defence Force with a mechanism for internal review and audit of the military justice system independently of the ordinary chain of command, and the other is to provide an avenue whereby failures and flaws in the system can be examined and remedies recommended. This role is supported by functions that include conducting inquiries, performance reviews, providing advice, training, and promoting military justice values across the Defence Force. For the purposes of IGADF jurisdiction, the elements of the military justice system include disciplinary matters, adverse administrative action, the conduct of inquiries and investigations, the right to make a complaint and issues incidental to these elements.

6. In undertaking these functions, the Office of the IGADF has developed considerable experience in undertaking inquiries, conducting military justice performance reviews of ADF units and producing statistical information and analysis of the military justice system.

GENERAL OBSERVATIONS

7. The first point I would like to make is that the serious nature of the allegations raised in the Report, and the need for people affected by such abuse in the past and in the present to receive an appropriate acknowledgment and response is strongly supported. It is however important that the Report be kept in perspective. By this, I mean that it would be wrong, in my view, for the allegations chronicled by DLA Piper to be taken to be generally representative of the service experience of most of the many tens of thousands of ADF members who served in their respective Services over the 60 odd years covered by the Report.

8. I make this point up front because I suspect that the disturbing nature of the matters addressed in the Report, as well as some of the commentary by the authors, might well have the effect of painting in the minds of many readers a picture of a toxic ADF culture which is widespread and of longstanding. Whether or not this was the intent, I would find such a picture difficult to reconcile with my own experience as the IGADF over the past decade or as a former ADF member. In so saying I do not mean to diminish the seriousness of the individual allegations contained in the Report or the need for them to be properly dealt with.

9. DLA Piper's brief was to receive submissions from current and former members of the Australian Defence Force (ADF) who believe they were the victims of sexual and other abuse, and the Report deals comprehensively with those issues. Given its TORs, the Report is therefore clearly (and quite properly) very much victim focussed. It does not purport to, and nor was it required to, present a broader view of the matters reported to its authors. This is an aspect that is particularly noticeable to those (such as this office) whose responsibilities include having to deal, not only with complainants, but with alleged respondents and perpetrators whose interests must also be considered as part of any holistic response or remedy.

10. Managing these aspects in a way that is not unduly damaging to those against whom allegations are made but remain unproven, is likely to be a particularly challenging task for the ADF, especially where the parties involved may still be serving members. More broadly, the reputational damage to Services, units and other uninvolved members arising simply by association, may also become an issue if not sensitively managed. In this respect it is reassuring to note that such issues, including the need for privacy where appropriate and procedural fairness, are well recognised by the Hon Len Roberts-Smith in his task of responding to the Report.

11. I would now like to address some more particular aspects of your TOR.

12. TOR (a): the accessibility and adequacy of current mechanisms to provide support to victims of sexual and other abuse in Defence.

13. In 2011 I conducted a *Review of the Management of Incidents and Complaints in Defence including Civilian and Military Jurisdiction* as part of the suite of cultural reviews directed by the Minister for Defence following the so-called Australian Defence Force Academy (ADFA) 'Skype' incident. The report of that review included consideration of issues relevant to TOR(a). A copy of the report is attached at Enclosure 1 and I draw attention particularly to the sections on Grievance Management pp10-23, Unacceptable Behaviour and

Unacceptable Sexual Behaviour pp25-28 and Support to Sexual Offence Complainants and Respondents pp29-32.

14. The DLA Piper task was focussed at looking at victims of abuse over a long period of time. Not surprisingly, the structures, processes and support for complainants have undergone considerable change for the better over the 60 year period covered by the Report. This temporal aspect is something that needs to be continually kept in mind before making any generalised assessments about allegations, prevailing cultural attitudes, and response mechanisms, over the period covered by the Report. For instance, it is now well accepted that implicit in the concept of military justice within which systemic responses to complaints of abuse usually occur, is an understanding that the maintenance of discipline must be tempered by a corresponding obligation that this be done with a due regard for individual rights.

15. In my observation the ADF as an organisation is today very mindful of its responsibilities to ensure it has processes in place to deal with complaints of abuse. The avenues available for aggrieved ADF members to be heard compare favourably with similar organisations in Australia and overseas. While the basic structures and associated policy guidance are sound, there is, as was pointed out in the IGADF *Review of the Management of Incidents and Complaints in Defence including Civilian and Military Jurisdiction*, room for improvement in reducing the complexity and multiplicity of guidance on these matters and making access to the guidance more user-friendly. Good policy intentions can easily be let down by poor implementation which may itself be a product of too complex policy guidance or insufficient training. In the experience of this office poor implementation of policy is more often likely to be the reason for an unsatisfactory response to complaints of abuse than for want of sufficient complaint avenues, appropriate response structures or comprehensive policy guidance.

16. For example, the ADF's Military Justice Survey this year found that 82 per cent of ADF members know where to get advice or information about unacceptable behaviour, 74 per cent of personnel were aware of avenues of complaint available to them and 60 per cent knew how to actually lodge a redress of grievance application. It can therefore be said, with a reasonable degree of confidence, that members of the ADF are generally aware of the means available of bringing their concerns to attention. In the experience of this office actual examples of deliberate cover-up in today's ADF are relatively rare. While some members may still be reluctant to take matters of concern outside their chain of command, this attitude is much less prevalent now than in former times, particularly in cases where the chain of command is perceived to be part of the problem.

17. My office continually monitors knowledge of the complaints system through focus groups conducted as part of the military justice performance audit program at the unit level. The need for members who believe they have been mistreated to report their concerns is an important message that requires continuous reinforcement as part of an ongoing ADF wide educative process. It is an aspect that is routinely emphasised by my office in its unit military justice audit program.

18. Because of their nature, complaints of sexual misconduct may fall into a different category to complaints of a more general kind and may therefore be more susceptible to under-reporting. In relation to supporting victims of sexual abuse, the Report recommended that Defence consider using a restricted reporting scheme. The Minister recently announced that Defence will introduce such a scheme for complaints of sexual assault, sexual abuse and sexual harassment. My office has been consulted with respect to policy development in this area and will be a keen observer of policy implementation. Clearly, a restricted reporting

system has potential to encourage reporting of abuse that might otherwise go unreported. Implementation of such a system for the ADF however will need to address a number of challenges which are likely to include the following:

- a. The ADF does not have automatic jurisdiction¹ to deal with sexual offences in Australia, unlike for example, the United States military, which does have such domestic jurisdiction. Care will be required to ensure that any restricted reporting system will not be inconsistent with State criminal laws dealing with the obligation to report offences.
- b. The ADF has stringent obligations in relation to the *Work Health and Safety Act*. In a restricted reporting system, alleged perpetrators of sexual offences, abuse or harassment are not dealt with, or even known to command. The obligation to maintain a safe workplace may be harder to achieve if restricted reports become mainstream rather than exceptional.
- c. Restricted reporting systems are primarily designed for the benefit of victims, the aim being to encourage reporting in the first place and then to facilitate appropriate ongoing support. A consequence of maintaining the confidentiality of the restricted report is that alleged perpetrators may remain at large and no investigation will usually be commenced until the victim agrees for the report to become unrestricted. As mentioned above, this can create a number of legal and management issues. Not the least of these is the prospect of an alleged perpetrator continuing to offend, noting that criminology studies have found that sexual offenders in particular have a high incidence of reoffending. The need to take into account the balance to be achieved between confidential support to the victim and the requirement to bring perpetrators of sexual misconduct to account will no doubt be a difficult consideration in the design of a restricted reporting scheme for the ADF.

19. Victims of sexual offences must receive whatever support they need, and this should be handled swiftly, sensitively and respectfully. This office is aware that Defence has taken up that view in its response document, *Pathways to Change* and welcomes the decision to establish a Sexual Misconduct Prevention and Response Office (SeMPRO)². A good example of this type of approach, developed at HMAS *Cerberus* some years ago, is known as the *Sexual Offence Support Person Network*. This initiative, although not a restricted reporting scheme as such, is intended to provide immediate practical and, where necessary, medical support to victims together with assistance in reporting the offence to police and guidance in dealing with other legal matters that flow from a sexual offence.

TOR (b): whether an alternative expedited and streamlined system for the resolution of disputes relating to support, rehabilitation, treatment and compensation of victims in Defence be considered and established, and the constitutionality of such an alternative system.

20. I only wish to make two comments in relation to this TOR. First, in my view it is important for Defence to retain and continue to develop an organic capability for alternative dispute resolution that possesses a deep understanding of the nature of ADF service and is able to offer a viable and credible alternative to resolution of disputes through formal legal

¹ See Defence Force Discipline Act 1982 s.63 and Defence Instruction (General) PERS 45-1 *Jurisdiction Under Defence Force Discipline Act – Guidance for Military Commanders*

² http://intranet.defence.gov.au/People/sites/PathwayToChange/docs/Fact_sheet_complaint_resolution.pdf

processes, including those involving sexual harassment or discrimination. Second, the only 'in-house' avenues for victim compensation presently available to ADF members are through the Compensation for Detriment caused by Defective Administration (CDDA) scheme and mechanisms for *ex gratia* payments under the *Chief Executive Instructions*. In my experience, these schemes do not meet requirements for compensating an ADF member in relation to sexual and other abuse in Defence, as the CDDA scheme in particular relies on administrative error as a prerequisite for the scheme to apply.

21. The focus on administrative error as a pre-requisite for access to the CDDA scheme is not well suited to the military environment, where substantial compensable detriment can result to a member from a wide range of causes which cannot easily or conveniently be defined as administrative error. The difficulties associated with the utility of this scheme in the military environment have been recognised for some time and have been the subject of criticism in some of the submissions I received when conducting my *Review of the Management of Incidents and Complaints in Defence including Civilian and Military Jurisdiction* last year.

22. A recommendation to introduce a new avenue, specific to the military environment, by which compensation could be awarded, was recommended by Street-Fisher³. The Street-Fisher review found that:

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

23. To date this recommendation has not been implemented. I agree with the recommendation made by the Street-Fisher Review and supported its implementation in my 2011 *Review of the Management of Incidents and Complaints in Defence including Civilian and Military Jurisdiction*. The present situation whereby the Service Chiefs and the Chief of the Defence Force are unable to award any form of 'merit' compensation to aggrieved members outside of the CDDA scheme, even though they may personally recognise the validity of the case and support the claim, detracts from the effectiveness of the complaint handling process and should be remedied. It has been suggested that this issue could be addressed through the application of Section 58B of the Defence Act 1903 which provides the Minister with discretion to determine payments to members of the ADF. It is understood such payments could apply to both serving and former members, and even deceased members. However, even if this is possible, the better option would be to establish a purpose-designed compensation scheme for the ADF which clearly sets out the circumstances in which it would have application.

24. Such a scheme, if implemented on a permanent basis, could offer a means of dealing with many of the types of matters reported to DLA Piper more expeditiously than was possible in the past. It is noted that the financial compensation arrangement announced as part of the government response to the Report is in some respects similar in concept to the discretionary compensation delegation recommended by the Street-Fisher Report and this office. Perhaps this special to purpose arrangement could be adapted for ongoing use.

³ Recommendation 48 of the Independent Report by Sir Laurence Street and Air Marshal Les Fisher (Retd) into Reforms to the ADF Military Justice System 2009

25. TOR (c): the effectiveness and timeliness of the government's processes for assessing, investigating and responding to allegations of sexual or other forms of abuse, including:

- i. whether a dedicated victims advocacy service ought to be established,**
- ii. systemic and cultural issues in reporting and investigating sexual and other forms of abuse, and**
- iii. whether data and information collection and dissemination of data and information in relation to sexual and other forms of abuse in Defence is adequately maintained and appropriately acted upon and, if not, any alternative mechanisms that could be established;**

26. In relation to TOR (c) i, the establishment of the SeMPRO might well meet any need for a victim's advocacy service in cases of sexual misconduct. It is understood that the intention is for SeMPRO to provide victims of sexual misconduct with a means to access immediate support and advice. While the needs of victims are paramount, and the current focus is properly on their support arrangements, it will be important that the interests of alleged respondents are not overlooked. False or mistaken accusations of sexual misconduct also create victims.

27. In relation to TOR (c) ii, I suspect the systemic or cultural issues in reporting (or not reporting) sexual or other forms of abuse in the ADF may not be very different from those in the wider community except, perhaps, in one respect. In the more closed environment of the ADF, victim concerns about possible recrimination or impact on career *may* act as a stronger disincentive to report sexual abuse than in the community at large. The establishment of SeMPRO together with a renewed emphasis by the ADF on taking swift action against those who attempt to dissuade victims from reporting or who otherwise take recriminatory action against them for making a report should help to minimise cultural issues arising specifically from reporting in the military environment.

28. In relation to TOR (c) iii, my Office collects and monitors data about the disciplinary system, the administrative inquiries system, and the military justice system generally by statistics gathered through the IGADF performance review function. This information is analysed and summarised by my office annually in the IGADF *Catalogue of Military Justice Statistics*. A copy of the latest catalogue can be made available to the Committee for information if required. Statistics in relation to unacceptable behaviour are collected through the ADF's Values Behaviours and Resolutions Branch.

29. Conduct which discloses sexual offences, abuse or harassment would constitute a 'notifiable incident' under Defence's policy mandating the reporting of suspected disciplinary and criminal activity, as well as other serious, sensitive or urgent matters. Defence's policy on the reporting of notifiable incidents has recently been formally reviewed by my Office. While it was found that the Services and other Defence agencies generally have satisfactory means of reporting and case managing such incidents, there is no universal means of doing this that would provide easier access to a Defence-wide data base of notifiable incidents that are reported. One of the recommendations of my review report was that the feasibility of a Defence-wide universal reporting and case management system be studied to determine if such a system might be technically viable and cost effective.

30. In relation to acting upon reported incidents, apart from those matters requiring an investigative response by the civil or Service Police, the ADF has a comprehensive system by which incidents can be examined by means of administrative inquiry. Various reviews, including by my Office, have examined the ADF administrative inquiry system in recent years. Structurally, the ADF inquiry system appears to be sound, offers a range of options to suit the type of incident or complaint to be investigated, and compares favourably with inquiry practice followed in similar Defence Forces.

31. Where the ADF system has been subject to criticism in the past, this has usually been to do with failure or error on the part of those implementing inquiry guidance rather than any systemic issues with the policy guidance itself. Concerted efforts have been made in recent years to address this problem with more emphasis on training and oversight. My office has taken the lead in developing and conducting familiarisation training courses and packages for potential inquiry officers, appointing authorities, and legal review officers. To date, well over one hundred such courses have been conducted and attended by in excess of three thousand ADF and Australian Public Service (APS) personnel. These interventions have been well received and are showing positive results.

CONCLUSION

32. The task of dealing with many hundreds of individual allegations and the prospect of there being more as yet unreported, will clearly be a difficult, lengthy and challenging undertaking for the Report Task Force. The process is also likely to raise difficult issues for the ADF and many members past and present. It is to be hoped that, however difficult, the process will be able to bring a satisfactory level of closure to those who have suffered abuse and that this can be done with due regard to procedural fairness to all parties involved.

33. Finally, since it is conceivable that my Office could become involved in the further resolution of some of the matters to be addressed by the DLA Piper Task Force, I wish to make it quite clear that I take my statutory obligation to act independently very seriously. I have no reservations whatsoever about the ability of my staff, whether current or former ADF members, or APS staff, to undertake their IGADF duties in an impartial manner. That said, my office stands ready to assist the Report Task Force in any way that it can.

Yours sincerely

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Inspector General ADF

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Enclosure:

1. *IGADF Review of the Management of Incidents and Complaints in Defence including Civilian and Military Jurisdiction* dated 6 September 2011.