

**INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE SUBMISSION
TO THE SENATE FOREIGN AFFAIRS DEFENCE AND TRADE REFERENCES
COMMITTEE INQUIRY INTO THE MATTERS RAISED BY THE NSW POLICE
STRIKE FORCE CIVET ('THE SENATE INQUIRY')**

Overview

1. The Inspector-General of the Australian Defence Force (IGADF), Mr James Gaynor, CSC, makes this submission in response to matters raised before the Senate Inquiry. In doing so the IGADF notes the document referred to in the Senate Inquiry Terms of Reference, which is described as being a confidential 'Post Operational Assessment by Strike Force CIVET'. That document (the 'SF CIVET document') was apparently prepared by a New South Wales (NSW) Police Officer at Kings Cross Police Station.

2. The SF CIVET document appears to be an internal NSW Police document. The IGADF became aware of its existence last year although he was not afforded an opportunity to respond to the criticism of IGADF reports contained within the SF CIVET document. The version of the SF CIVET document that the IGADF has is unsigned by the apparent author or their Superintendent. The SF CIVET document which the IGADF has variously bears each of the dates of 24 June 2013, 20 April 2014, 16 April 2015 and 20 April 2015. These matters cast doubt as to its provenance and status. This is unfortunate, given the gravity of the allegations contained in the SF CIVET document and the paucity of evidence within the document to support its many serious allegations.

3. What is clear is that the SF CIVET document discloses its author's significant misunderstanding and misrepresentation of Defence and IGADF processes. The author of the SF CIVET document appears to have quoted selectively from the two IGADF inquiry reports to support opinions which do not reasonably follow when each report is read as a whole.

IGADF approach to its submission to the Senate Inquiry

4. The IGADF notes that the Department of Defence has made a separate, detailed submission to the Senate Inquiry. The IGADF limits his submission to matters specific to IGADF arising from the SF CIVET document and relevant to the Senate Inquiry.

IGADF function

5. It is important to understand the function of the IGADF. The IGADF is an independent, statutory office established under the Defence Act¹ and outside the ADF chain of command. The IGADF can, among other things, investigate the effectiveness of the military justice system and matters which are referred for specific inquiry. The IGADF's functions include inquiring into the military justice system (including investigating the professional conduct of Service Police), conducting performance reviews of the military justice system, inquiring into deaths of Defence Force members and conducting specific inquiries at the request of the Minister for Defence or Chief of the Defence Force.

6. Importantly, however, the IGADF is not a prosecuting body (such as the Commonwealth Director of Public Prosecutions) nor a law enforcement or policing body (such as the Federal Police or NSW Police).

¹ Section 110B of the *Defence Act 1903*

7. Under the relevant legislation that applied at the time the SF CIVET matters were being investigated, IGADF inquiries were coercive inquiries conducted in private. At all material times the wider dissemination of IGADF inquiry reports and material was subject to legislation, and such dissemination was not common practice beyond those with an immediate, relevant interest.

8. IGADF staff exercise their powers as Assistants IGADF pursuant to legislation. As the IGADF inquiry reports relevant to the Senate Inquiry make clear, ultimately, once considered and adopted by the IGADF, any assessments, findings or recommendations of an IGADF inquiry report are those of the IGADF.

Relevant IGADF inquiries into management of unacceptable behaviour within the ADF

9. The IGADF conducted two inquiries in 2013 as to the management of unacceptable behaviour within the ADF which are relevant to the Senate Inquiry. The first IGADF inquiry, *Inquiry 28/13*, inquired into whether Defence's investigation and management of the incidents of unacceptable behaviour in Army were timely and appropriate. The second IGADF inquiry, *Inquiry 31/13*, was a comprehensive professional standards review of the original Australian Defence Force Investigative Service (ADFIS) investigation into the unacceptable behaviour. That original ADFIS investigation was completed in August 2011.

10. The first IGADF inquiry report of 01 July 2013 examined the investigation and management of the 'Jedi Council' allegations, including:

- (a) the appropriateness of a referral made from the Defence Security Authority (DSA) to ADFIS;
- (b) the appropriateness of ADFIS' referral of the allegations against a Defence contractor's employee, who was also an Army Reservist, to the Victoria Police for consideration of possible breaches of Victorian criminal law;
- (c) the appropriateness of data capture by ADFIS from seized computer equipment;
- (d) the approach of DSA in dealing with the Defence contractor's employee/Army Reservist's security clearance;
- (e) the briefing and knowledge of the then-Chief of Army as to the existence of a group of ADF members who became known as the 'Jedi Council';
- (f) the appropriateness of Army's decision to suspend Army personnel on suspicion of Service Offences; and
- (g) the appropriateness of the timing of then-Chief of Army's public comments on investigations concerning the 'Jedi Council'.

11. The second IGADF inquiry report of 15 November 2013 was a larger and more complex inquiry. It was a professional standards review of ADFIS' handling of matters connected with the 'Jedi Council' investigation and allegations from September 2010 to August 2011, when ADFIS referred the initial allegation to the Victoria Police.

12. The second IGADF inquiry was directed to inquiring into why the ADFIS investigation had concluded that no evidence of Service offences had been found when

subsequent investigation by the NSW Police had identified the existence of multiple potential Service offences. It looked at matters including:

- (a) the appropriateness of ADFIS' investigation plan;
- (b) the ADFIS approach to evidence gathering and, in particular, information communication and technology and data collection;
- (c) whether the evidence gathered disclosed Service offences;
- (d) the reasonableness of ADFIS' earlier determination that no Service offences had been identified; and
- (e) whether there was any evidence available or other lines of inquiry which in accordance with ADFIS' guidelines should have been pursued.

13. Both the first IGADF inquiry and the second IGADF inquiry are rigorous and detailed inquiries conducted according to law. They are evidence-based work, the reports of which speak for themselves. In both instances their conclusions are logical and supportable. Both inquiries made findings of shortcomings on the part of ADFIS. The second IGADF inquiry contains recommendations where appropriate to address identified shortcomings.

Summary of relevant assessments of the first IGADF inquiry

14. Consistent with the Acting Chief of the Defence Force's written request that the IGADF conduct an assessment as a matter of the highest priority, the first IGADF inquiry was completed in 17 days and focused on Departmental awareness and management of the unacceptable behaviour allegations. It concentrated particularly on when Defence and the then-Chief of Army had first become aware of the 'Jedi Council' allegations.

15. The inquiry found that Defence's first awareness of allegations of unsatisfactory behaviour occurred when a Defence contractor reported anomalous behaviour to the DSA in connection with the security clearance of one of its employees, who was also an Army Reservist. There was no reference to the 'Jedi Council' in that email. The inquiry found the allegation was referred to ADFIS, which ultimately failed to identify evidence in its possession which may have implicated more broadly ADF personnel in the commission of Service offences involving ICT misuse. There was no evidence that ADFIS staff had separately briefed the then-Chief of Army on the allegation that had been referred by DSA.

16. The inquiry found that ADFIS staff subsequently consulted with the Victoria Police Sex Crimes Squad, and were informed that the Victoria Police would investigate the allegations against the contractor's employee/Army Reservist. In examining the circumstances of this referral, the IGADF inquiry found that the internal ADFIS legal advice which had informed ADFIS' consultation with Victoria Police may have been unsound in that it appeared to misinterpret an aspect of Victorian crimes legislation. This issue is addressed in detail in the first IGADF inquiry report.

17. In relation to when the then-Chief of Army had first become aware of the 'Jedi Council', the first IGADF inquiry found Army Headquarters had remained unaware of the broader allegations until the NSW Police spoke with the then-Chief of Army's Military Adviser on 23 July 2012. The evidence obtained by the first IGADF inquiry was that the Military Adviser was then informed of the NSW Police investigation into the contractor's employee/Army Reservist's conduct. The 'Jedi Council' was mentioned in that telephone

conversation, however, the Military Adviser gave evidence that the “Jedi Council’s” purpose was not known to him at that time. The evidence obtained by the first IGADF inquiry was that, subsequently, neither the Military Adviser, nor other Army Headquarters personnel, had briefed the then-Chief of Army about the ‘Jedi Council’. This issue is also addressed in detail in the first IGADF inquiry report.

Summary of relevant findings and recommendations of the second IGADF inquiry

18. The second IGADF inquiry was a Service Police professional standards inquiry to determine whether the ADFIS investigation into the email sent by the contractor’s employee/Army Reservist had been conducted in compliance with relevant investigative practices and procedures and, in particular, whether the evidence gathered disclosed potential Service offences by ADF members. That ADFIS investigation was conducted between September 2010 and August 2011.

19. The inquiry found that, while there had been no breaches of the Service Police Code of Conduct by the ADFIS investigator, and the investigation was generally conducted in compliance with ADFIS investigative practices and procedures at the time, there had been two exceptions to this. First, there was a delay in referring a possible civilian criminal offence by the contractor’s employee/Army Reservist to the civilian police for investigation. Second, a more significant exception concerning ADFIS’ identification of service offences, namely, to properly deal with, and finalise, incidents of potential Service offences (ICT misuse) of which the ADFIS investigator had become aware.

20. In respect of the first exception concerning referral to the civilian police, the inquiry’s detailed findings included the following:

- (a) The delay in referring the matter concerning the contractor’s employee/Army Reservist to the civilian police for investigation was not good investigative practice (‘best practice’).
- (b) In the absence of Service discipline jurisdiction, the most appropriate course of action would have been to refer the identified potential civilian criminal offence committed by an Army Reserve member, not performing duty, to the civilian police as soon as possible.
- (c) The referral should have occurred as soon as the victim was identified, rather than after five months had elapsed. The ADFIS investigator should not have searched for other potential victims prior to referring the matter to the civilian police and this added to the delay.
- (d) The causes of the delay had been investigator inexperience, lack of supervision, an increasing caseload and other investigative priorities.

21. The inquiry’s findings, concerning ADFIS’ identification of Service offences, encompassed more significant failings of compliance with ADFIS investigative practices and procedures in existence at the time, and included the following:

- (a) The final ADFIS report of 29 August 2011 failed to properly deal with, and finalise, the incidents of potential ICT misuse of which the ADFIS investigator had become aware.

- (b) The determination in ADFIS' final report of 29 August 2011 that '*no evidence was located that implicates an ADF member in any Service offence*' was factually incorrect and potentially misleading.
- (c) The investigator's failure to document and properly brief his superiors on his investigative actions, assessments and proposed future actions concerning his discovery of 'poor taste' emails (potential ICT misuse) by ADF members, and to ensure sufficient detail was included in a final report, did not reflect best investigative practice.
- (d) There was no evidence that this factually incorrect and potentially misleading determination was intended to 'cover up' suspected Service offences. Rather, it had been caused by a failure to adequately detail in the August 2011 ADFIS report what the investigator had uncovered.
- (e) The ADFIS investigator's assessment that the emails were low level cases of inappropriate use of the Defence email system, which would best be dealt with administratively by the members' units, was not unreasonable in the circumstances and probably reflected the manner in which ADFIS investigated such matters at that time.
- (f) If the details of the ADFIS investigator's assessment—that inappropriate emails of 'poor taste' found on the DRN email accounts were not serious disciplinary matters—had been included and discussed in the final report, then the confusion over whether there were identified Service offences and any claims of negligence or 'cover up' may have been avoided.
- (g) If the final report had disclosed that these emails of 'poor taste' between the contractor's employee/Army Reservist and the other nine ADF members involved a group who referred to themselves as the 'Jedi Council', then perhaps their activities may have been subjected to further scrutiny by ADFIS higher command or at unit level.

22. The second IGADF inquiry report included a series of recommendations about measures to enhance the ADF's understanding and investigation of cybercrime and ICT misuse.

Allegations against the IGADF (or IGADF staff) in the SF CIVET document relevant to the Senate Inquiry

23. The SF CIVET document is lengthy and contains very serious allegations. Some allegations are quite specific and made personally against the IGADF and IGADF staff. These allegations are addressed below.

24. Other allegations are generic in nature and extraordinarily serious. Remarkably however, none of these serious allegations is supported by evidence, nor are the allegations properly particularised. Those alleged responsible are not identified beyond '*ADFIS staff*' and '*other sections of the ADF*'.

25. A specific example of this is the allegation contained within the Senate Inquiry Terms of Reference which record the SF CIVET document allegation that:

'... other sections of the ADF... deliberately lie, withhold evidence, fabricate information and support the conduct of criminal and serious internal offences without any identification let alone sanction...'

26. This has resulted in the airing of irrelevant and unfounded allegations that concern internal ADF matters that appear to have little or no significance to the criminal investigation that was conducted by the NSW Police. For example, neither ADFIS' professional standards, nor the immediate administrative arrangements for the handling of unacceptable behaviour in the ADF, are a NSW Police concern.

27. The IGADF refutes absolutely that he, his predecessor or any of IGADF staff have deliberately lied, withheld evidence, fabricated information or supported the conduct of criminal and serious internal offences.

28. The SF CIVET document, notwithstanding its 117 pages, does not prove or support those most serious allegations against any person or group of persons. In the circumstances, the IGADF submits that the Senate Inquiry ought to reject those allegations in the clearest possible terms.

Other allegations against the IGADF (and IGADF staff) in the SF CIVET document

29. The SF CIVET document contains a series of other broad allegations against the IGADF, all of which are refuted by the IGADF. The Terms of Reference of the Senate Inquiry do not call for each of those allegations to be addressed. Nonetheless short responses to the grouped allegations are set out below, lest it be thought those allegations are correct or uncontested.

(a) That IGADF did not in a timely way provide documents requested by Strike Force CIVET under search warrant

30. The SF CIVET document asserts that the then-IGADF was unable or unwilling to comply with a search warrant issued to obtain documents. This assertion is untrue. The then-IGADF did comply with the warrant. That the then-IGADF and the NSW Police detective had different views on the documents required to be produced under the warrant is unremarkable. Given the matters addressed by the IGADF had no obvious bearing on the criminal matter being investigated by the NSW Police, it was not unreasonable for the then-IGADF to question the need for access to some of those documents. After discussions about the intended scope of documents sought, the then-IGADF provided all requested documents in answer to the warrant.

(b) That the IGADF shifted the blame for ADFIS failures away from ADFIS to the Victoria Police

31. The allegation of an attempt to shift blame to the Victoria Police is without foundation. It also discloses the SF CIVET document author's lack of understanding of the legal and policy issues affecting matters of criminal behaviour committed in a civilian context by those connected with the ADF.

32. There are two relevant considerations:

- (a) The first IGADF inquiry (page 6 of which is said to be the source of the blame-shifting allegation) is not in any way critical of the Victoria Police, nor does it seek to shift any blame for any matter to the Victoria Police.

- (b) While the first IGADF inquiry identified a potential legal anomaly in the basis for ADFIS' consultation with Victoria Police, the IGADF assessment was that, having consulted with the Victoria Police Sex Crimes Unit who said they would investigate, ADFIS' subsequent referral of the matter was appropriate in the circumstances. This action of ADFIS, to consult with and then to refer potential criminal conduct committed by an off-duty ADF Reservist in a civilian context to the relevant State police for investigation, was consistent with the standard course of conduct adopted by the ADF in such circumstances. It was also consistent with legal principles of the primacy of the civilian criminal jurisdiction when resolving jurisdiction between the ADF and the civilian criminal justice system.

(c) That the IGADF's assessment of the timing of the then-Chief of Army learning of the 'Jedi Council' was partly or deliberately misleading

33. This allegation concerns the first IGADF report being intentionally misleading as to the question of when the then-Chief of Army learnt of the 'Jedi Council'. This allegation is rejected by the IGADF. It is clear that the allegation is not made out from the matters traversed in the SF CIVET document, which appear to go well beyond the remit of the criminal investigation being conducted by the NSW Police. This allegation, in short, is based on simple speculation on the part of the SF CIVET document's author, and contrary to the direct evidence and findings of the first IGADF inquiry report. The first IGADF inquiry report adduces both oral and documentary evidence that neither ADFIS nor any member of the then-Chief of Army's staff informed him of the 'Jedi Council' before April 2013.

(d) That the IGADF reports contain serious errors and failures. Further that they are the result of poor investigative methodology

34. The IGADF refutes that the various IGADF reports referred to in the SF CIVET document are in error. As noted above, IGADF inquiries are coercive inquiries conducted in private and according to law. The inquiry reports are evidence based, they speak for themselves, are prepared independently of the ADF and represent standard practice in the conduct of administrative inquiries. That the IGADF reports include different views and conclusions on matters from those in the SF CIVET document does not lead to a conclusion that the IGADF findings are in error or are misleading.

35. The allegations in the SF CIVET document highlight that the functions of a police investigator and the IGADF are fundamentally different. Specifically, the IGADF makes the following observations:

- (a) That the SF CIVET document attributes assessments, findings or recommendations to named Assistants IGADF, rather than to the IGADF who signed the reports, demonstrates a lack of understanding of the difference between a criminal investigation conducted by an investigator in accordance with criminal law and an administrative inquiry conducted by a statutory office holder in accordance with statute and administrative law.
- (b) Many of the criticisms contained in the SF CIVET document about the original ADFIS investigation and ADFIS' investigative processes have been overstated and made with the considerable benefit of hindsight. That the original ADFIS investigation could have been better conducted was identified and always acknowledged by the second IGADF inquiry.

- (c) The SF CIVET document's criticism of the second IGADF inquiry finding—that there may have been a lack of knowledge by ADFIS about certain cyber offences law prior to the ADFA Skype matter and the subsequent reviews that were undertaken—is overly simplistic. In order to support this criticism, the SF CIVET document attributes specialised knowledge of cyber offences law to an ADFIS investigator at a particular point in time without providing any evidence to demonstrate that the ADFIS investigator actually knew of those offence provisions. The inference in the SF CIVET document—that as the Skype case was open on 29 August 2011 when the final ADFIS report was signed, the investigator, and ADFIS more generally, must have been aware of Commonwealth cyber offences law—is contradicted by the referral of the matter to the Victoria Police in October 2011, as a suspected offence against Victorian law rather than the relevant Commonwealth cyber offences law. The second IGADF inquiry report identified an actual shortfall in ADFIS' knowledge of cyber offences law and this was the subject of one of the inquiry report's recommendations.
- (d) The SF CIVET document's criticism of the second IGADF inquiry in relation to media reporting overlooks that the inquiry report referred always to *reported* criticism by NSW Police and no findings were made on this aspect.
- (e) The SF CIVET document's criticism that the second IGADF inquiry report did not find that ADFIS had failed to identify Service offences is unfounded. As is stated above, the second IGADF inquiry report did find that ADFIS' determination that '*no evidence was located that implicates an ADF member in any Service offence*' was factually incorrect and potentially misleading.
- (f) The SF CIVET document's general conclusions that the second IGADF inquiry failed to identify significant faults in the original ADFIS investigation are also unfounded. The general finding of the second IGADF inquiry report, supported by other, more specific findings, was that there were two clear faults in the ADFIS investigation. These two faults were identified at the very beginning of the second IGADF inquiry report to emphasise their importance.

(e) That the first IGADF inquiry findings about the then-Chief of Army's knowledge of the 'Jedi Council' are either indicative of an extremely poor quality review or willingness to reach a 'predetermined' or 'pre conceived' outcome

36. The IGADF refutes this assertion in the strongest possible terms. The SF CIVET document selectively quotes this assessment out of the proper context of the purpose of the IGADF inquiry and the evidence gathered as part of that inquiry.

37. Criticism that the IGADF was in some way trying to 'shift blame' to the NSW Police, further demonstrates its author's misapprehension of the purpose of the first IGADF inquiry and selective interpretation of the relevant assessment in the first IGADF inquiry report. Importantly, the IGADF was asked to assess when the then-Chief of Army first became aware of the 'Jedi Council'.

38. The IGADF assessment that '*... NSW Police did not appear to have explained the significance of the Jedi Council... [emphasis added]*' is neither a conclusion of fact nor blame

shifting. It is an observation of circumstances leading up to the factual conclusion, based on probative evidence, that the then-Chief of Army was not briefed on the ‘Jedi Council’ at that time.

39. The IGADF does not agree with the SF CIVET document author’s apparent assertion that evidence of an intention to brief the then-Chief of Army was evidence that the then-Chief of Army was actually briefed on precise detail. There is simply no evidence to support this assertion. The objective evidence—such as the written brief provided to the then-Chief of Army by his staff—specifically contradicts such an assertion.

40. The assertion that these evidence-based assessments are indicative of poor methodology or a preconceived outcome is without any foundation.

(f) That it was somehow improper for the then-IGADF to ask a witness if they knew the NSW Police detective was a former Army Reservist.

41. This allegation is part of a broader complaint (again without any proper basis) that an unknown person in the ADF interrogated Commonwealth or State data bases as to the backgrounds of serving NSW Police Officers.

42. As to these matters, first, the IGADF submits that it was relevant and proper that a question be put to a witness about the NSW police detective’s past Army Reserve status, given its relevance to the detective’s understanding of ADF disciplinary processes. Second, neither the former IGADF, nor the current IGADF—who was the Deputy IGADF and participated in the inquiry—have any knowledge of the interrogation by Defence of any databases about the background of any NSW Police officer, including the NSW Police detective. The fact that the NSW Police detective was a member of the Army Reserve was disclosed to IGADF by ADFIS in the course of the first IGADF inquiry. It would not be unusual or surprising for ADFIS to be aware of Reservists whose civilian occupation was policing.

Conclusion

43. The IGADF as an independent statutory officer takes very seriously the execution of his statutory functions at the highest professional standard. The serious and unfounded allegations contained in the SF CIVET document threaten the reputation and standing of the Office of the IGADF, and confidence in the important work undertaken impartially by that office.

44. The suggestions of impropriety of any sort as made against the IGADF (and his predecessor) in the SF CIVET document are without foundation, are rejected by the IGADF and ought be rejected by the Senate Inquiry.

Consultation

45. The former IGADF, Mr Geoff Earley, AM, was consulted during the preparation of this submission.