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**SUBMISSION TO THE SENATE STANDING COMMITTEE ON FOREIGN
AFFAIRS, DEFENCE AND TRADE: INQUIRY INTO THE DEFENCE
LEGISLATION AMENDMENT (MILITARY JUSTICE ENHANCEMENTS –
INSPECTOR GENERAL-ADF) BILL 2014**

1. We refer to your letter dated 10 December 2014 in which you provided an invitation to make a written submission to the Foreign Affairs, Defence and Trade Legislation Committee Inquiry into the Defence Legislation Amendment (Military Justice Enhancements – Inspector General-ADF) Bill 2014 ('the Bill'). The Centre for Military and Security Law, ANU College of Law, greatly appreciates the opportunity to provide this submission.
2. The role of the Inspector General Australian Defence Force (IGADF) has progressively grown in terms of both the functions performed by the office, and the importance of those functions for a modern ADF, since the office of the IGADF was established as an agency within Defence in January 2003. Although the position of IGADF has an independent statutory basis under amendments that were made to the Defence Act 1903 through the insertion of Part VIIIB in December 2005, shortfalls in the clarity of this independence have existed. This Bill seeks to address many of those shortfalls.
3. Accordingly, the Bill forms an important part of the progressive changes that the Australian Defence Force is making to the way in which it deals with issues affecting its members. These changes include simplifying the manner in which complaints by military personnel regarding matters affecting their service are made, as well as accompanying reforms to the ways in which such complaints are investigated and dealt with by military commanders and civilian superiors. In the vast majority of cases, complaints and inquiries in Defence are dealt with in an appropriate way; there are, however, occasions when this is not the case and the need for an independent mechanism for dealing with such occasions has been proven over the past decade or more. It is the IGADF, and those that work in the Office of IGADF, that perform this role.

4. Equally important are the audit and review functions that are carried out by the IGADF. The ADF's senior commanders benefit enormously from the rolling military justice audit and performance review program which is conducted by the office of IGADF, and the independence of this program from the ordinary chain of command is one of the key facets that underpins its usefulness. Therefore, we welcome the changes to the *Defence Act* that are proposed in the Bill and will provide substantive comment on three discrete issues.

5. The first issue that we note is that the term 'military justice system' is used in the Bill, and indeed the term appears in the Defence Act s110A, yet there is no definition provided to explain precisely what is encompassed by the term 'military justice system'. Although there have been numerous inquiries into aspects of 'military justice' in the past two decades¹ there does not appear to be commonality regarding precisely what is meant by this term. We have noted that Defence describes the military justice system as:

"... a generic term which covers functions such as discipline in the Australian Defence Force, administrative action to support ADF policy, inquiries to establish facts relevant to operation and command of the ADF, and the provisions for review and management of complaints."²

We are also aware that this description is used by Defence to describe the role, functions and responsibilities of the IGADF³. However, we are also aware that recent criticism of the width of the term 'military justice system' has been made⁴ and we consider that there is merit in ensuring that a solid legislative basis for the role, functions and responsibilities of the IGADF is provided. While the Bill goes a long way towards rectifying identified shortfalls that affect the IGADF's operations, it seems to us that one key aspect that is missing is a clear statutory definition of what is encompassed by the term 'military justice system'. Providing clarity on this point would further enhance the IGADF's statutory independence.

6. The second issue that we note is that one of the driving forces behind the need for change in the way that inquiries into issues affecting the ADF are conducted is the increasingly 'joint' nature of ADF operations and military service. It is now quite normal for personnel from all three Services to be working together in circumstances where there are also public servants and civilian contractors performing similar functions and/or working in the same workplace. For example, a Defence medical centre will now routinely contain a mixture of permanent and reserve force ADF medical personnel, public servants employed by Defence, and medical staff employed pursuant to a contract to provide medical and related services to Defence. In such a workplace, it is entirely conceivable that a complaint might be lodged (for example) by a member of the ADF that involves an allegation against another

¹ A summary of these inquiries and reports can be found in the Hon. Roger Gyles AO QC, '*HMAS Success* Commission of Inquiry, Allegations of Unacceptable Behaviour and Management Thereof, Part Three: Further Recommendations', Appendix D, at pg 107 – 119 available at:

<http://www.defence.gov.au/Publications/COI/Success/docs/part3/Full%20report%20Part%203%20HMAS%20Success%20with%20Black%20redactions%20.pdf>; see also Inspector General ADF, 'Review of the Management of Incidents and Complaints in Defence including Civilian and Military Jurisdiction' at pg 11 – 13 available at: http://www.defence.gov.au/pathwaytochange/Docs/IncidentsComplaints/Review%20of%20the%20Management%20of%20Incidents%20and%20Complaints%20in%20Defence_complete%20report.pdf

² <http://www.defence.gov.au/mjs/mjs.htm>

³ DI(G) ADMIN 61-1, Inspector General of the Australian Defence Force-Role, Functions and Responsibilities

⁴ In particular, see the criticism raised by The Hon. Roger Gyles AO QC, above n 1 at 113 – 115

member of the ADF with evidence potentially being provided by permanent and reserve force ADF members, public servants and contractors. Unless the legislative changes that are in the Bill occur, the IGADF and persons appointed by the IGADF under *Defence Act* section 110P, could only compel the cooperation of ADF members serving on a full-time basis in any inquiry that was undertaken into such a complaint. This situation is clearly unsatisfactory as it is an obvious hindrance on obtaining information that would be relevant to the satisfactory completion of an inquiry by IGADF.

7. An ability to comprehensively investigate such a complaint in a manner that is as efficient as possible is essential for efficient operation of the Defence Force and the Bill proposes changes to the powers available to the IGADF, and those that work for IGADF, which will make this possible. Notwithstanding the different employment arrangements that exist for personnel that now routinely can be found working at Defence worksites, it is not appropriate for IGADF as an independent statutory office to be hampered in its ability to inquire into an issue because of these differences. The amendments proposed for insertion after subsection 124(2A) which provide for compellability in answering questions put to that person by the IGADF, or a person appointed under *Defence Act* section 110P, are not unique when considered alongside other ADF inquiry powers. The power to compel ‘a person’ to provide evidence already exists under the Defence (Inquiry) Regulations⁵ with the result that currently a military officer delegated the power to appoint a board of inquiry by the CDF or a Service Chief has greater powers in relation to compellability of witnesses than those available to the statutory appointment of IGADF⁶. The amendments in the Bill will rectify that situation and bring the powers of the IGADF in relation to compellability of witnesses into line with those that already exist for a board of inquiry. These amendments are therefore strongly supported.

8. Finally, the amendment in the Bill which provides for the preparation of an annual report by the IGADF for the Minister that will be subsequently tabled in the Parliament is a significant step in enhancing the transparency of the operation of the ADF’s military justice system. This part of the Bill is also strongly supported.

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⁵ See Defence (Inquiry) Regulations 30 – 32

⁶ Ibid Regulation 24

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