



## Appendix D – Summary of Ombudsman’s Recommendations

*The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976 Ms P Smith, January 1998<sup>1</sup>*

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2.67<sup>2</sup> Investigating officers conducting administrative investigations under Defence (Inquiry) Regulations should not be entitled to find that a criminal offence has been committed, although it may be necessary to inquire into the circumstances of the criminal allegation in order to deal with a matter appropriately. Accordingly the ADF should consider:

- amending Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* to the effect that it is not appropriate for Investigating Officers, Boards or Courts of Inquiry to make a finding that a criminal offence has been committed, and where there is sufficient evidence to suggest that an offence has been committed, the matter should be referred to the appropriate authority for investigation under the DFDA and/or the civil criminal law; and

**ADF Response** - This recommendation has been incorporated, for BOI and Investigating Officers in the draft manual *Administrative Inquiries in the ADF*.<sup>3</sup>

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1 ADF responses are drawn from Department of Defence, Submission, pp. 1275 – 1283.

2 Note that paragraph numbers refer to the relevant paragraph number in the original report *The ADF, Own motion investigation into how the ADF responds to allegations of serious incidents and offences, Review of Practices and Procedures. Report of the Commonwealth Defence Force Ombudsman under section 35A of the Ombudsman Act 1976 Ms P Smith, January 1998*

3 Department of Defence, Submission, pp. 1275-1276.

- amending the sample Terms of Reference in Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* (and in single Service instructions where they exist) to the same effect.

**ADF Response** - This recommendation has been incorporated **in part** in the draft manual *Administrative Inquiries in the ADF*. Model Terms of Reference for BOI and Investigating Officers advise that recommendations may be made 'whether the conduct of any person warrants further investigation by service or civilian police.'<sup>4</sup>

2.68 The ADF consider whether amendments are necessary to the guidance on when to choose a BOI rather than an Investigating Officer, in order to encourage consistency and to minimise any perceptions that complaints are not being treated sufficiently seriously.

**ADF Response** - Specific guidance, both in descriptive and tabular form is provided in the draft manual *Administrative Inquiries in the ADF*.<sup>5</sup>

2.70 The ADF:

- consider the adequacy of the training in the use and value of alternative dispute resolution techniques;
- review the Defence Instructions on the management of complaints to HREOC of sexual and racial discrimination, or under Redress of Grievance procedures to ensure that a consistent emphasis is placed on resolving complaints by alternative dispute resolution mechanisms;
- collect data (in a format similar to that for unacceptable sexual behaviour) for all complaints of discrimination and harassment, and when reported, require units to indicate whether resolution of the complaint by alternative dispute resolution mechanisms was considered, and if not, why not; and
- expand the reporting requirements for incidents of unacceptable sexual behaviour to require the same data for incidents of that nature.

**ADF Response** - The ADF has agreed that a greater emphasis should be placed on alternative dispute resolution techniques in general and on mediation in particular. The issue of alternative dispute resolution is addressed in the draft manual *Administrative Inquiries in the ADF*.<sup>6</sup> Advice on various types of alternative dispute resolution, including mediation, has been included in the latest amendment<sup>7</sup> of Defence Instruction (General)

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4 Department of Defence, Submission, p. 1276.

5 *ibid.*

6 Department of Defence, Submission, p. 1277.

7 Amendment Number 4 (Complete Revision).

Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.<sup>8</sup>

3.31 To ensure that the preliminary inquiry processes are managed properly in the future, the ADF should:

- consider removing all reference to 'informal investigations' in the guidance;

**ADF Response** - This recommendation has been incorporated in the draft manual *Administrative Inquiries in the ADF*. Such investigations are now called 'Routine Inquiries'. 'Situations will occur when this level of inquiry will resolve the matter without the need to initiate a further, formal inquiry under D(I)R.'<sup>9</sup>

- amend the Defence Instructions to provide clear guidance on the purpose of preliminary inquiries and the extent to which they can be used; and

**ADF Response** - Clear guidance on the use of 'Routine Inquiries' is provided in the draft manual *Administrative Inquiries in the ADF*.<sup>10</sup>

- amend the Defence Instructions to provide clear guidance on accountability requirements for preliminary inquiries.

**ADF Response** - Accountability requirements for 'Routine Inquiries' have been incorporated in the draft manual *Administrative Inquiries in the ADF*.<sup>11</sup>

4.51 The ADF revise its Instructions:

- on the handling of complaints and grievances, and on the conduct of investigations to include reminders of the factors to be considered when selecting or appointing an Investigating Officer. Where particular expertise may be required, the Commanding Officer should be advised to ensure that the Investigating Officer has the appropriate expertise, or that the Investigating Officer consults with individuals with the relevant expertise (preferably before commencing the investigation);

**ADF Response** - The draft manual *Administrative Inquiries in the ADF* provides detailed guidance on the selection of appropriate Investigating Officers and members of BOI.<sup>12</sup>

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8 DI(G) Personnel 35-3, p. 21 – 23.

9 Department of Defence, Submission, p. 1277.

10 *ibid.*

11 *ibid.*

12 *ibid.*, p. 1278.

- to require that all Investigating Officers, under both the DFDA and Defence (Inquiry) Regulations (and members of Board or Courts of Inquiry), declare any actual or potential conflict of interest before commencing an investigation; and

**ADF Response** - Advice on conflict of interest and prior involvement in matters under inquiry is detailed in the draft manual *Administrative Inquiries in the ADF*.<sup>13</sup>

- to ensure that Commanding Officers are provided with guidance on how to develop terms of reference, and in particular, the requirement for terms of reference to be outcome focussed and to address context management issues.

**ADF Response** - Context management issues are explained and general advice is provided in the draft manual *Administrative Inquiries in the ADF*.<sup>14</sup>

5.57(a) The ADF should develop a training strategy for officers who conduct investigations under the Defence (Inquiry) Regulations.

**ADF Response** - A study of the needs and requirements for the training of Investigating Officers under D(I)R has been completed by an ADF joint training needs analysis team. Pilot courses were scheduled for the period March – June 1999 with the initial courses planned for September – October 1999. The four levels of training which have been identified are:

- General awareness for all Service personnel;
- Training for Investigating Officers who will conduct ‘simple inquiries’;
- Training for Investigating Officers who will conduct ‘complex inquiries’; and
- Training for Appointing Authorities.<sup>15</sup>

5.57(b) Officers should not be appointed to conduct investigations under the Defence (Inquiry) Regulations unless they have received training or have other experience or expertise which makes them suitably qualified to do so.

**ADF Response** - The draft manual *Administrative Inquiries in the ADF* provides detailed guidance on the selection of appropriate Investigating Officers including requirements for qualification, experience, competence and other qualities.<sup>16</sup>

5.58 Guidance on investigations under Defence (Inquiry) Regulations should be revised to provide advice to Commanding Officers and Investigating Officers on how to plan and conduct investigations.

13 *ibid.*

14 *ibid.*

15 *ibid.*, pp. 1278-1279.

16 *ibid.*, p. 1279.

**ADF Response** - The draft manual *Administrative Inquiries in the ADF* provides advice on scoping and planning inquiries.

5.61 Defence Instruction (General) Administration 34-1 *Inquiries into Matters Affecting the Defence Force* (and in single Service instructions where they exist) should be amended to clearly indicate that an Investigating Officer investigating under Defence (Inquiry) Regulations cannot compel a witness to answer questions where the answer may tend to incriminate them for a criminal or Service offence, and to indicate that assistants to an Investigating Officer do not have the power to question witnesses.

**ADF Response** - The draft manual *Administrative Inquiries in the ADF* provides detailed guidance on the rights of a witness before an Investigating Officer regarding excuse provisions for not answering questions. Self incrimination is one reasonable excuse. The draft manual also includes advice for Investigating Officers should a witness decline to answer a question. The ADF no longer appoint assistants to Investigating Officers.<sup>17</sup>

6.36 The ADF should:

- implement a process whereby investigating bodies report periodically on the progress of the investigation (if the investigation is to take more than one month), and which allows for an assessment of whether the investigation is being conducted appropriately; and

**ADF Response** - Detailed requirements for the monitoring and reporting of inquiries have been incorporated in the draft manual *Administrative Inquiries in the ADF*.<sup>18</sup>

- amend the present guidance to investigators to provide advice on the development of investigation reports and recommendations, and the limitations to their authority in this respect.

**ADF Response** - Detailed guidance on the development of reports and recommendations has been incorporated in the draft manual *Administrative Inquiries in the ADF*.<sup>19</sup>

7.68 The ADF amend relevant Instructions to:

- provide Commanding Officers with information regarding the particular support requirements of survivors of sexual incidents or offences and a list of contact points or organisations where the necessary specialist help can be obtained;

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17 *ibid.*

18 *ibid.*, p. 1280.

19 *ibid.*

**ADF Response** - The ADF provides personnel with support services, such as counsellors and psychologists in their normal professional capacity. In addition the draft manual *Administrative Inquiries in the ADF* provides for the provision of such services, including to the next of kin of deceased members. The issue has also been addressed in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.<sup>20</sup>

- advise Commanding Officers that, in relation to sexual incidents or offences, evidence can be collected up to 72 hours after the event, and within that time frame the survivor (and the alleged offender, if appropriate) should be referred to the authorities immediately so that forensic evidence can be collected;

**ADF Response** - This recommendation has been incorporated in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.<sup>21</sup>

- clearly state the ADF's policy on compassionate travel for members (and their partners or next of kin) where serious offences occur;

**ADF Response** - This recommendation has been incorporated, **in part**, in the latest amendment (complete revision) of Defence Instruction (General) Personnel 35-3 'Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force'<sup>22</sup> which refers to ADF policy INDMAN 2603 – 'Leave for Special Purposes'. Entitlement to compassionate leave where serious sexual offences occur is not clearly articulated in INDMAN 2603 – 'Leave for Special Purposes'.<sup>23</sup>

- advise Commanding Officers of the need to allow survivors of sexual incidents or offences to make their own decisions whenever possible, and particularly in relation to their movement after an offence has occurred; and

**ADF Response** - There is no evidence to suggest that this recommendation has been addressed in either in the draft manual *Administrative Inquiries in the ADF* or Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*.

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20 DI(G) Personnel 35-3, p. 18.

21 *ibid*, Annex C.

22 *ibid*, p. 19 and Annex C.

23 See INDMAN 2603, p. 5.

- provide a critical incident stress management checklist for managers and supervisors to assist with observing personnel after an incident to ensure they are receiving adequate support.

**ADF Response** - In her 1998 report,<sup>24</sup> the Ombudsman noted that the *Operational Stress Management Manual* issued in 1997 incorporates appropriate stress management procedures.

8.69 The ADF should:

- extend its monitoring of trends in the incidence of sexual harassment and offences to include comparisons among the Services;
- undertake regular trend analysis of DFDA and Defence (Inquiry) Regulations investigations;
- consider analysing any correlation between alcohol and/or drug abuse and serious incidents; and
- ensure that information and expertise can be readily shared between the Services.

**ADF Response** - In her 1998 report,<sup>25</sup> the Ombudsman acknowledged that the trend monitoring and analysis mechanisms in place for DFDA matters were adequate.<sup>26</sup> Trend monitoring of D(I)R inquiries have been established in the draft manual *Administrative Inquiries in the ADF*. This will allow the Defence Legal Office to monitor trends and provide advice on an ADF wide basis.<sup>27</sup> For discrimination, harassment, sexual offences, fraternisation and other unacceptable behaviour reporting mechanisms are detailed in Defence Instruction (General) Personnel 35-3 *Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behaviour in the Australian Defence Force*. The Defence Equity Organisation is responsible for maintaining statistical data and identifying trends within the ADF.

8.69 The ADF should:

- spell out in Defence (Inquiry) Regulations and Instruction, and particularly for Investigating Officers, the principles of procedural fairness and rights of review; and

**ADF Response** - Issues of procedural fairness and review within the inquiry system have been addressed in the draft manual *Administrative Inquiries in the ADF*.<sup>28</sup>

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24 Smith, P., op cit, p. 17.

25 ibid.

26 ibid, p. 82.

27 Department of Defence, Submission, p. 1281.

28 ibid.

- ensure that members are advised of the outcome of any DFDA proceedings which affects them.

**ADF Response** - Amendments to the Discipline Law Manual ADFP 201 have been drafted to include a requirement that members be advised of any DFDA proceedings that affect them.<sup>29</sup>

8.69 The ADF should consider including in the guidance advice about the desirability of forewarning a member of any public statement which may affect him/her personally.

**ADF Response** - As noted in the Ombudsman's 1998 report<sup>30</sup> it is standard practice not to mention the names of individuals in statements to the press. Where the media requests information about an individual, that person is contacted and advised by the Directorate of Public Information. With respect to Boards of Inquiry, the draft manual *Administrative Inquiries in the ADF* requires all persons, including the next of kin of deceased members who may be affected by the outcome of the inquiry, to be advised of all matters relevant to them as soon as possible after decisions have been made.<sup>31</sup>

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29 *ibid*, p. 1282.

30 Ms P Smith, *op cit*.

31 Department of Defence, Submission, p. 1282.