

## NOTICE OF FILING

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### Details of Filing

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| Document Lodged: | Affidavit - Form 59 - Rule 29.02(1)   |
| File Number:     | NSD1485/2018  |
| File Title:      | BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD<br>(ACN 003 357 720) & ORS |
| Registry:        | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF<br>AUSTRALIA                          |



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 7/08/2020 4:40:51 PM AEST

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 59  
Rule 29.02(1)

OPEN AFFIDAVIT OF FIONA SNEATH

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD1485 OF 2018  
NO NSD1486 OF 2018  
NO NSD1487 OF 2018

**BEN ROBERTS-SMITH**

Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

Affidavit of: Fiona Peta Sneath

Address: Level 4, Building 25 Brindabella Park, Canberra Airport, Australian  
Capital Territory, 2609

Occupation: Deputy Inspector-General of the Australian Defence Force

Date sworn or affirmed: 7 August 2020

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Filed on behalf of the Inspector General of the Australian  
Defence Force

File ref: 20202919

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1903

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I, Fiona Peta Sneath, of Level 4, Building 25 Brindabella Park, Canberra Airport, Australian Capital Territory, 2609, say on oath:

#### PART 1: ABOUT THE DEPONENT

1. I joined the Australian Defence Force (**ADF**) (specifically, the Royal Australian Navy (**RAN**)) in 1994.
2. I am currently the Deputy Inspector-General of the Australian Defence Force (**Deputy IGADF**). I assumed this position in January 2020, on promotion to Commodore. My primary role is to support the Inspector-General of the Australian Defence Force (**IGADF**) in the discharge of his statutory functions under the *Defence Act 1903* (Cth) (**Defence Act**) and the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) (**IGADF Regulation**), and to assist the IGADF in the management of the Office of the IGADF.
3. Prior to taking up the position of Deputy IGADF, I have served in a variety of roles within the ADF. Most recently, from December 2016 to December 2019, I was the Commanding Officer of HMAS *Albatross* near Nowra in NSW. HMAS *Albatross* is the naval air station for the Fleet Air Arm, and the main base from which the RAN helicopter squadrons operate. From 2015 to 2016, I was the Director Military Law



Centre/Deputy Director Asia Pacific Centre for Military Law, where I was responsible for managing specialist training for ADF Legal Officers and military justice training for general officers. From 2011 to 2014, I was the Staff Legal Advisor to the Chief of the Defence Force.

4. I have also worked as an ADF Legal Officer, including at training institutions such as HMAS *Cerberus* and the Australian Defence Force Academy; as the Deputy Registrar of the former Australian Military Court; as the Chief Legal Advisor Navy Headquarters; and at Defence Legal, Canberra. In the course of these roles, I have been seconded to the NSW Police Prosecutors Branch and the Office of the Commonwealth Defence Force Ombudsman.
5. I have deployed on operations in the Middle East.
6. My tertiary qualifications include Master of Laws (University of Sydney); Master of Studies in International Human Rights Law (University of Oxford); Australian Command and Staff College (PSC(J)); Graduate Diploma of Management in Defence Studies (ACSC); Graduate Certificate in Maritime Studies (University of Wollongong); and Graduate Certificate in Dispute Resolution (Charles Sturt University).

## **PART 2: ABOUT THIS AFFIDAVIT**

### **Basis of this affidavit**

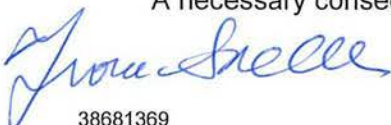
7. Unless otherwise indicated, this affidavit is based on my personal knowledge and my review of material that is either held by the Office of the IGADF or has been provided to me for the purposes of making this affidavit.
8. Where I express an opinion in this affidavit, the opinion is based on my experience and expertise as described above. While I have consulted with staff members of and other persons working in the Office of the IGADF, including the IGADF, to obtain information relevant to my opinions, the opinions expressed are my own.

### **Purpose of this affidavit**

9. The purpose of this affidavit is to explain, to the extent possible in an open and unclassified form, the basis of public interest immunity (PII) claims made by the IGADF in respect of separate compulsory processes issued by or on behalf of the Respondents, namely:
  - a. A notice to produce served on the Applicant on 3 July 2020.
  - b. An order for discovery made on 2 August 2019, in respect of which the Applicant has filed an Amended List of Documents dated 13 July 2020.
  - c. A subpoena issued to the Australian War Memorial on 5 March 2020.

### **Sensitivity of this affidavit and confidential affidavit**

10. I have prepared this affidavit on the basis that it may be made available to the parties. A necessary consequence is that I have described the basis of the PII claims made by



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the IGADF in relatively general terms. In my opinion, to describe the basis of the PII claims in any greater detail would undermine the confidentiality of the information that is the subject of the claims.

11. However, I have also sworn a confidential affidavit that may be made available to the judge of the Court who hears and determines the PII claims made by the IGADF, if the judge so requires. The confidential affidavit describes the basis of the PII claims in more specific terms and contains information that is the same as, or that would undermine the confidentiality of, the information that is the subject of the claims.

### **PART 3: BACKGROUND MATTERS**

#### **The IGADF**

12. The IGADF is a statutory office-holder whose functions and powers are set out in Part VIIIB of the Defence Act and the IGADF Regulation. The IGADF is an "integrity officer", in the sense that his role is to provide the Chief of the Defence Force (CDF) with an avenue, independent of the chain of command, by which failures and flaws in the military justice system, or in the operations of the ADF more broadly, can be exposed, examined and ultimately remedied. The independence of the IGADF is secured by the administrative provisions in Div 2 of Pt VIIIB of the Defence Act, including, in s 110L, a provision limiting the circumstances in which the IGADF's appointment may be terminated.
13. Under s 110C(1)(f) of the Defence Act, one of the functions of the IGADF is, if directed by the CDF, to inquire into or investigate any matter concerning the ADF.
14. Under s 110P of the Defence Act and s 10(2) of the IGADF Regulation, the IGADF may appoint a person, including a judicial officer, as an Assistant IGADF and direct that person to inquire into a matter.
15. Part 4 of the IGADF Regulation sets out the procedures, powers and reporting obligations of the IGADF – and any Assistant IGADF – in respect of the conduct of an inquiry. Division 4A of Part 4 contains specific provisions relating to the conduct of an inquiry by an Assistant IGADF who is a judicial officer.
16. The current legislative regime governing the IGADF commenced in 2016, but a similar legislative regime existed prior to that time.

#### **The Afghanistan Inquiry**

17. Following the events of 11 September 2001, the ADF initiated Operation Slipper, which was Australia's contribution to the international coalition undertaking action to combat the threat posed by terrorism in Afghanistan. As part of Operation Slipper, and subsequently Operation Highroad, the ADF deployed Special Forces personnel to Afghanistan, from around October 2001 to December 2003 and then again for most of the period from 2005 to 2016. A small number of Special Forces personnel remain deployed in Afghanistan as part of Australia's ongoing commitment.



18. In May 2016, at the request of the Chief of Army, the IGADF commenced an inquiry to ascertain whether there is any substance to rumours and allegations of breaches of the Laws of Armed Conflict by elements of the ADF's Special Forces in Afghanistan (**the Inquiry**). As a result of amendments to the legislative regime governing the IGADF made in 2016 (mentioned in paragraph [16] above), the Inquiry has continued to the present date pursuant to a direction given by the CDF to the IGADF on 14 December 2016 under s 110C(1)(f) of the Defence Act. The temporal focus of the Inquiry was initially the period 2007 to 2016, but that period was subsequently extended, by way of a further direction given by the CDF, to 2005 to 2016.
19. Since its inception, and to the present time, the Inquiry has been conducted by Major General the Honourable Paul Brereton AM RFD, a judge of the Court of Appeal of the Supreme Court of New South Wales, whom the IGADF appointed an Assistant IGADF and directed to conduct the Inquiry (**the Assistant IGADF**). The IGADF has also appointed a number of other Assistants IGADF, as well as a number of inquiry assistants, and directed them to help the Assistant IGADF to conduct the Inquiry.
20. Under the provisions of the IGADF Regulation (ss 27(3), 28F and 28G(1)), the Assistant IGADF must prepare a report which sets out his findings in relation to the Inquiry and any recommendations that he thinks appropriate to make because of those findings. The Assistant IGADF must give this report to the IGADF, who must in turn make a record of the findings in relation to the Inquiry and give the report to the CDF.
21. Consistently with the provisions of the Defence Act and the IGADF Regulation, and with the directions made by the CDF and IGADF respectively under the Act and the Regulation, the Inquiry is not a criminal investigation. It is an administrative process, akin to a Royal Commission, the purpose of which is to determine the truth or falsity of the rumours and allegations that are the subject of the Inquiry. However, as with other Royal Commissions and administrative inquiries into allegations of criminal conduct, misconduct and so forth, it is within the scope of the Inquiry to make findings with respect to whether there is credible information that particular persons have committed criminal offences and/or recommendations with respect to whether particular persons should be referred to a law enforcement body for criminal investigation.
22. Neither the IGADF, nor I as the Deputy IGADF, are directly or personally involved in the day-to-day conduct of the Inquiry. However, the IGADF and I receive updates as to the progress of the Inquiry, to the extent necessary and appropriate, from the Assistant IGADF or the persons appointed to help him. Further, as noted in [7] above, I have reviewed certain material held by the Office of the IGADF in relation to the Inquiry for the purposes of making this affidavit.

#### **The progress of the Afghanistan Inquiry**

23. The Inquiry is being conducted in five overlapping phases:
  - a. **Phase 1 – familiarisation:** identification of the operational, structural, cultural and historical environment that existed during the period under inquiry and which potentially contributed to the occurrence of the rumoured and alleged incidents.





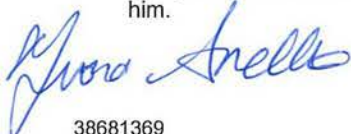
- b. **Phase 2 – evidence and information gathering:** gathering details of specific rumours and allegations, and surrounding and associated information and evidence, including via extensive documentary searches and the conduct of many hundreds of witness interviews.
  - c. **Phase 3 – consideration of alleged incidents:** consideration of each of the rumours and allegations in order to establish their veracity or otherwise.
  - d. **Phase 4 – consideration of cultural, psychological, operational and organisational factors:** consideration of cultural, psychological, operational and organisational factors to determine if and how they may have contributed to the rumoured and alleged incidents.
  - e. **Phase 5 – report preparation and finalisation:** preparation of a report by the Assistant IGADF for provision to the IGADF and the CDF.
24. The five phases of the Inquiry are outlined in more detail in the annual reports of the IGADF for the period 1 July 2017 to 30 June 2018 (**2017-18 Annual Report**) and the period 1 July 2018 to 30 June 2019 (**2018-19 Annual Report**). **Annexure FPS-1** to this affidavit is a copy of the 2017-18 Annual Report and **Annexure FPS-2** to this affidavit is a copy of the 2018-19 Annual Report.
25. Both the 2017-18 Annual Report and the 2018-19 Annual Report point out that the five phases of the Inquiry have been and continue to be carried out in an overlapping, rather than sequential, fashion. Thus, while preparation of the Inquiry report (Phase 5) is currently underway, it is also the case that evidence and information-gathering (Phase 2) is continuing. This reflects the fact that lines of inquiry have continued to emerge as the Inquiry has progressed, including in recent times. In addition, in the course of report writing, it is common for information gaps to be identified which require further evidence. The Inquiry is, in a very real sense, an ongoing inquiry.
26. I am informed by the Assistant IGADF that he cannot at present state with certainty when he will be in a position to provide his report to the IGADF, but at present he anticipates that this may be in the next few months. I am further informed by him that a key influence in the timing of the provision of the report to the IGADF is the process put in place by the Inquiry to ensure procedural fairness (mentioned in paragraph [27]ff below).

#### **Process to ensure procedural fairness**

27. Since its inception, the Inquiry<sup>1</sup> has taken a number of steps to ensure that persons who might be adversely affected by the Inquiry's findings and recommendations are afforded procedural fairness.

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<sup>1</sup> In the balance of this affidavit, I will use the term "the Inquiry" as a shorthand expression for both the Inquiry as defined in paragraph [18] above and the persons who have been appointed to conduct it; being the Assistant IGADF and the other Assistants IGADF and inquiry assistants appointed to help him.



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28. Relevantly for present purposes, the Inquiry is currently in the process of issuing notices (**Potentially Affected Person notices** or **PAP notices**) to persons who might be adversely affected by the Inquiry's findings and recommendations. The process is an ongoing one. To date, not every person who will receive, or who is likely to receive, a PAP notice has been issued with the notice.
29. A PAP notice is not a pro forma document; each notice is tailored to the circumstances of the individual recipient. However, generally speaking, PAP notices contain the following information:
- a. **Potential findings or recommendations:** PAP notices identify each finding or recommendation that the Inquiry is considering whether to make. While various types of potential findings and recommendations are included in PAP notices, some are of a serious nature. For instance, some PAP notices contain potential findings to the effect that there is credible evidence that a named person committed a criminal offence and/or that there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge a named person with a criminal offence. Further, some PAP notices contain potential recommendations to the effect that the CDF should refer a named person to a law enforcement body for criminal investigation.
  - b. **Factual background:** PAP notices summarise the factual background relevant to each finding or recommendation that the Inquiry is considering whether to make. Ordinarily, this summary describes in narrative form the incident or incidents giving rise to the potential finding or recommendation. Because of the subject matter of the Inquiry, these incidents are ordinarily incidents which occurred in Afghanistan during operations carried out by the ADF's Special Forces.
  - c. **Evidence:** PAP notices summarise the evidence relevant to each finding or recommendation that the Inquiry is considering whether to make. In many cases, this summary of the evidence is lengthy and highly specific. The summary ordinarily contains the following: (i) a summary of relevant documentary evidence (whether sourced from the ADF, the Department of Defence, a partner military force or otherwise, and including documentary evidence that is operationally sensitive and/or security classified); (ii) a summary of relevant oral evidence given by witnesses in their interviews with the Inquiry (including, in many cases, extensive extracts from the transcripts of those interviews and also including oral evidence that is operationally sensitive and/or security classified); and (iii) a summary of relevant oral evidence given by the recipient of the PAP notice in his or her interviews with the Inquiry (including, again, extensive extracts from the transcripts of those interviews and oral evidence that is operationally sensitive and/or security classified). Some PAP notices also contain, at least to some extent, observations about the evidence that has been gathered, including consideration of issues such as the reliability of particular evidence and/or the credibility of particular witnesses.
30. The Inquiry has not disclosed how many PAP notices it has issued or is likely to issue. Nor has the Inquiry disclosed the identity of any person who has received or is likely to



receive a PAP notice (or, for that matter, any person who has not received or is likely not to receive a notice).

31. The Inquiry has received responses from some of the persons who have been issued with PAP notices, but not all such persons. In addition, because not every person who will receive, or who is likely to receive, a PAP notice has been issued with the notice, there are necessarily further responses to be received. It has not been uncommon for a recipient of a PAP notice to request an extension of time for a response, and such extensions have usually been granted.

### **The confidentiality of the Afghanistan Inquiry**

32. Since its inception, and to the present time, the Inquiry has been conducted in circumstances of strict confidentiality.
33. The main reasons why the Inquiry has been conducted confidentially are as follows:
  - a. To encourage all persons who have information regarding the subject matter of the Inquiry (including, in particular, members of the ADF's Special Forces) to come forward and speak the truth.
  - b. To protect the integrity of the Inquiry's evidence-gathering processes and methods and, in particular, to protect from premature disclosure the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry, on the basis that any such premature disclosure, especially to persons of interest, might permit witnesses to be harmed, intimidated or prevailed upon or evidence to be otherwise destroyed, concealed or fabricated (including by persons of interest or witnesses colluding with one another).
  - c. To avoid potential prejudice to any criminal investigation that may be occurring in parallel to the Inquiry, or that may flow from the Inquiry (noting that it is a matter of public record that the Australian Federal Police are conducting a criminal investigation that overlaps in part with the subject matter of the Inquiry), and to avoid prejudice to any criminal prosecution to which any such investigation may lead.
  - d. To protect information that is operationally sensitive and/or security classified, including: (i) information relating to the tactics, techniques and procedures (TTPs) of the ADF's Special Forces; (ii) information identifying Special Forces personnel, including the names of Special Forces personnel; (iii) information obtained confidentially from allied and partner forces with whom Australia maintains ongoing military relations; (iv) information relating to the rules of engagement (ROE) used by the ADF's Special Forces in the conduct of its military operations and activities; (v) information relating to Defence intelligence operations, including capabilities, sources, processes, analysis and advice; (vi) information relating to the manner in which the ADF conducts detention operations; and (vii) information relating to the technical and equipment capabilities of Special Forces.

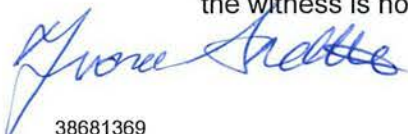




- e. To protect the reputations of persons who may be unfairly harmed by disclosure or publication of rumours or allegations that may be found to be unfounded or unsubstantiated.

#### **Steps taken to preserve the confidentiality of the Afghanistan Inquiry**

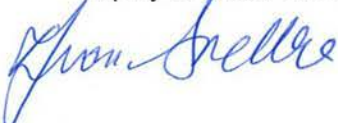
- 34. In light of the matters mentioned in paragraph [33] above, the Office of the IGADF and the Inquiry have taken a number of steps to preserve the confidentiality of the Inquiry. Without being exhaustive, these steps have included the following measures.
- 35. First, when the IGADF first directed the Inquiry in May 2016, reg 94 of the *Defence (Inquiry) Regulations 1985* (Cth) mandated that the Inquiry be conducted in private. Subsequently, following the commencement of the IGADF Regulation, the IGADF made a direction in 2017, under s 19 of the Regulation, that the Inquiry is to be conducted in private. Further, since the amendment of the IGADF Regulation in October 2018, the Assistant IGADF has proceeded on the basis that the Inquiry should be conducted in private under s 28C(1), which gives an Assistant IGADF who is a judicial officer power to conduct an inquiry in such manner as he or she considers appropriate having regard to the subject matter of the inquiry, and he routinely makes a statement to that effect at the commencement of each hearing.
- 36. Secondly, since its inception, the size of the Inquiry team has been kept deliberately small. The number of persons helping the Assistant IGADF to conduct the Inquiry has never been more than 17, and steps have been taken to ensure that only those persons within the Inquiry team who have a demonstrated "need to know" are privy to the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry. Thus, for example, while the Inquiry has engaged a number of "witness liaison officers" to support witnesses who have given evidence to the Inquiry, these persons have played a support role only and they have had no exposure to the more sensitive aspects of the Inquiry's activities.
- 37. Thirdly, early in the life of the Inquiry, refurbishment works were carried out within the Office of the IGADF to ensure that the activities of the Inquiry could be carried out with the degree of confidentiality appropriate to the subject matter of the Inquiry and the sensitivity (and security classified nature) of the information being handled in the course of the Inquiry.
- 38. Fourthly, the Inquiry has adopted a range of measures in respect of the witnesses who have given evidence to the Inquiry, including the following:
  - a. The fact of each witness interview, and the date, time and place of the interview, have been kept strictly confidential.
  - b. To ensure discretion, witness interviews are typically conducted away from the usual places of employment of serving members. Where desirable, other arrangements have been put in place to ensure a discreet entry and exit from the building where the witness interview is scheduled to take place.
  - c. As a matter of practice, prior to the commencement of each witness interview, the witness is notified that he or she will be given a non-disclosure direction





under s 21 of the IGADF Regulation at the conclusion of the interview. Section 21 authorises the IGADF to give a direction to a person restricting disclosure of particular information, including information contained in oral evidence given during the inquiry and all or part of any document received during the course of the inquiry. This power may be exercised by the Assistant IGADF under s 28E. Contravention of non-disclosure direction is a criminal offence under s 21(3).

- d. At the conclusion of each witness interview, and consistently with the notification given at the start of the interview, each witness is given a non-disclosure direction under s 21 of the IGADF Regulation. This restricts him or her from discussing with or disclosing to any person any of the questions which have asked, answers which have been given, statements which have been made, or documents which have been produced or displayed, in the course of the witness interview or hearing. Each witness is then asked to acknowledge having received the s 21 direction and whether he or she has any questions about it. Ordinarily, the s 21 direction contains an exception that the witness may disclose information contained in his or her evidence with a lawyer for the purpose of obtaining legal advice, and/or a medical practitioner, a registered counsellor or a minister of religion, provided that such consultation occurs on a strictly confidential basis.
  - e. In the event that a witness has sought a copy of the transcript of his or her witness interview, the practice of the Inquiry has been to provide the transcript only on the basis that the same non-disclosure direction under s 21 of the IGADF Regulation applies to it.
39. Fifthly, each person who has been issued with a PAP notice has also been issued with a non-disclosure direction under s 21 of the IGADF Regulation. This non-disclosure direction prohibits the recipient of the PAP notice from disclosing the whole or any part of the notice, or any information contained therein, to any person (other than a lawyer, medical practitioner, registered counsellor or minister of religion on a strictly confidential basis), or using it for any purpose other than making submissions in response to it. The non-disclosure direction also requires the recipient of the PAP notice to return the notice on request and to inform the Inquiry immediately if the whole or any part of the notice, or any of the information contained therein, becomes the subject of any process which compels disclosure to any other person or body.
40. Sixthly, aside from updates of a general nature about the progress and timing of the Inquiry, and the nature, number and timeframe of incidents under inquiry, the Inquiry has not provided any information about its activities (and, in particular, any information about the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry) to the ADF chain of command, the Secretary of the Department or the Minister of Defence.
41. Seventhly, the Office of the IGADF and the Inquiry have adopted a strict "no comment" policy in relation to requests for information about the Inquiry from the media or members of the public. So far as I am aware, the only information that has been officially disclosed or published (whether directly by the Office of the IGADF or the Inquiry or under the authority of the Office or the Inquiry) is the following:



- a. Information contained in a "public call for information" published on the website of the Office of the IGADF (and also in certain Afghan newspapers) requesting that "anyone who has information regarding possible breaches of the Laws of Armed Conflict by Australian forces in Afghanistan, or rumours of them, to contact the Inquiry" (**Public Call for Information**). **Annexure FPS-3** to this affidavit is a copy of the Public Call for Information.
  - b. Information contained in the annual reports of the IGADF. In addition to the 2017-18 Annual Report and the 2018-19 Annual Report (mentioned in paragraph [24] above), information about the Inquiry was contained in the annual report of the IGADF for the period 1 July 2016 to 30 June 2017 (**2016-17 Annual Report**). **Annexure FPS-4** to this affidavit is a copy of the 2016-17 Annual Report.
  - c. Information contained in reasons for a ruling made by the Assistant IGADF during the course of the Inquiry (**the ruling**). The ruling concerned a complaint made by the Applicant about the conduct of a lawyer alleged to be working for the Inquiry. As is made clear in paragraph [9] of the ruling, the ruling was made public only because details of the Applicant's complaint had been aired in public (in separate proceedings between the Applicant and the Respondents and in media reporting concerning those proceedings) and because of the need to ensure public confidence in the integrity of the Inquiry. **Annexure FPS-5** to this affidavit is a copy of the ruling.
  - d. Information contained in a letter from the Assistant IGADF to the Returned Services League of Australia and the Australian SAS Association concerning the welfare of persons who may be affected by the conduct of the Inquiry. **Annexure FPS-6** to this affidavit is a copy of the letter.
42. I am aware that certain media organisations have made various publications about the ongoing work of the Inquiry. The Inquiry has taken the approach of not confirming, denying or otherwise commenting upon the contents of the publications. Occasionally when there has been a report of an incident within its terms of reference, the Inquiry has stated that it was already aware of it.
43. Finally, I am informed that, at this stage, the Assistant IGADF does not propose to give a copy of his report to any person other than the IGADF (notwithstanding that this is something that he is authorised to do under s 28G(2) of the IGADF Regulation) or to publicly release all or part of the report (notwithstanding that this is something that he is authorised to do under s 28H(2) of the Regulation, following consultation with the CDF). As noted in paragraph [20] above, the IGADF must give a copy of the report to the CDF. However, under s 28(2) of the IGADF Regulation, the question whether all or part of the report will be publicly released is a matter for the CDF, albeit in consultation with the IGADF (s 28(2)).






#### PART 4: NOTICE TO PRODUCE

##### Introduction

44. I am informed that the Respondents have served a notice to produce on the Applicant dated 3 July 2020 (**Notice to Produce**). The Notice to Produce requires the Applicant to produce:
- a. Any PAP notice received from the IGADF.
  - b. All documents accompanying the PAP notice.
  - c. Any response to the PAP notice by the Applicant.
45. **Annexure FPS-7** to this affidavit is a copy of the Notice to Produce.

##### Public interest immunity claim over the Applicant's response to the Notice to Produce

46. The IGADF claims PII over the Applicant's response to the Notice to Produce. In so doing, the IGADF does not confirm or deny whether the Applicant has been issued with a PAP notice and contends that any response to the Notice to Produce by the Applicant (whether by the production of documents, an objection to production of documents or a nil return) is capable of revealing this very fact.
47. In my opinion, it would be contrary to the public interest for the Applicant to respond to the Notice to Produce and thereby confirm or deny whether he has received a PAP notice, because it would give rise to the effects and/or risks described in the following paragraphs. For the avoidance of doubt, I consider that these effects and/or risks would arise irrespective of what the Applicant's response to the Notice to Produce is or may be.
48. First, if the Applicant's response to the Notice to Produce were to be disclosed, it would have the effect of undermining the directions that the IGADF and the Assistant IGADF have made under the IGADF Regulation to preserve the confidentiality of the Inquiry, and thereby tend to impair the operation of the regime for the conduct of inquiries set out in Divs 4 and 4A of Pt 4 of the Regulation. As mentioned in paragraphs [35], [38] and [39] above, the IGADF and the Assistant IGADF have made various directions under ss 19 and 21 of the IGADF Regulation to preserve the confidentiality of the Inquiry, including non-disclosure directions which have accompanied, and applied to, each PAP notice issued by the Inquiry.
49. Secondly, if the Applicant's response to the Notice to Produce were to be disclosed, there is a very real risk that it would discourage persons who have information regarding the subject matter of the Inquiry (including, in particular, members of the ADF's Special Forces) from communicating freely with the Inquiry, and thereby prejudice the ongoing conduct and ultimate resolution of the Inquiry.
50. In saying this, I note that when the Chief of Army first referred the matter to the IGADF, he specifically raised the concern that a "culture of silence" within the ADF's Special Forces may have permitted or contributed to the occurrence of conduct of the sort





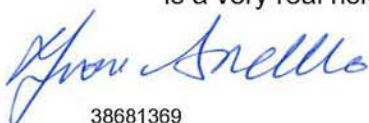
being investigated by the Inquiry (breaches of the Laws of Armed Conflict). Understanding and breaking down this culture of silence has been a difficult and long-running challenge for the Inquiry. As observed in the 2018-19 Annual Report at pages 8-9:

It has ... taken some years for members of the Special Forces community—both those who continue to serve and former members—to develop sufficient confidence in the Inquiry and the genuineness of Defence senior leadership's desire to find out if the rumours are true, to be prepared to make disclosures to the Inquiry.

Gaining the confidence and trust of some of these witnesses, whose ADF careers have been spent in an environment in which secrecy is treated as fundamental, has required considerable effort and time. As this has been progressively achieved, more witnesses have been prepared to make disclosures, and new evidence has continued to emerge, some resulting in new lines of inquiry, and some reinforcing or corroborating existing lines of inquiry.

During the reporting period and even now, some witnesses are only just becoming willing to make disclosures.

51. The process of gaining the confidence and trust of members of the ADF's Special Forces, and of other persons with information regarding the subject matter of the Inquiry, has been greatly assisted by the strict confidentiality with which the Inquiry has been conducted. To be more specific, the fact that the Inquiry has been conducted confidentially, and that the Inquiry has been able to give witnesses and potential witnesses assurances that communications going to and from the Inquiry will be kept confidential, has helped many persons to raise with frankness and candour matters that they may otherwise have kept to themselves. I note that some of the persons who have provided information to the Inquiry have in essence acted as "informers" by making allegations of the utmost seriousness against colleagues, former colleagues and friends.
52. In my opinion, if the Applicant's response to the Notice to Produce were to be disclosed, the "message" that would be sent to the ADF's Special Forces, and to other persons with information regarding the subject matter of the Inquiry, is that the Office of the IGADF and the Inquiry are either unable or unwilling to maintain the confidentiality of the Inquiry and/or to uphold the assurances of confidentiality that have been given. This in turn would create a very real risk that persons who have already provided information to the Inquiry may be unwilling to continue to do so or that new and emerging witnesses may decide that approaching the Inquiry is simply "not worth it".
53. In expressing the above opinion, I consider it to be significant that the Inquiry is ongoing, and that evidence-gathering has not been completed. It is also significant that further evidence-gathering may be driven in part by the responses that are provided to the Inquiry by recipients of PAP notices. That is, recipients of PAP notices may raise matters that must in turn be put to persons who have provided information to the Inquiry on a confidential basis (including persons who have made particular allegations), whether in further witness interviews or by other means. In my opinion, it is critical that the capacity of the Inquiry to undertake this exercise, if considered necessary, is not put at risk.
54. Thirdly, if the Applicant's response to the Notice to Produce were to be disclosed, there is a very real risk that it would discourage persons who wish to raise *other* sensitive



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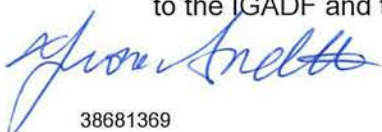
matters (ie, matters not related to the Inquiry) with the IGADF from doing so, and thereby prejudice the performance of the IGADF's statutory functions.

55. The IGADF, by virtue of being an "integrity officer" for the military justice system and the ADF more broadly, conducts many inquiries and investigations into matters of high sensitivity (including inquiries and investigations in the nature of internal audits). The Inquiry is by no means the only difficult or delicate matter for which the IGADF is (or will in the future be) responsible. In my experience, it is extremely important that members of the ADF (and others) know that they may raise allegations, complaints or concerns with the IGADF on a confidential basis and independent of the chain of command. Confidentiality is frequently requested by persons who approach the IGADF for assistance and assurances of confidentiality are given whenever appropriate. Members of the ADF have high confidence in the integrity of the IGADF's processes.
56. In my opinion, if the Applicant's response to the Notice to Produce were to be disclosed, there is a very real risk that it would damage the confidence which members of the ADF and other persons currently have that communications to and from the Office of the IGADF can and will be kept confidential. The likelihood of damage of this kind is all the greater because of the Applicant's high public profile and the high public interest in the Applicant's response to the Notice to Produce. Whatever the Applicant's response to the Notice to Produce, wide publication in the media – and ensuing wide dissemination to the members the ADF and the Defence community more broadly – is certain.
57. In addition to the matters raised above, and without in any way confirming or denying whether the Applicant has been issued with a PAP notice, I consider that the disclosure of *any* PAP notice issued by the Inquiry, and *any* response to such a notice, would be contrary to the public interest, at least at this stage in the Inquiry's progress.
58. *In relation to PAP notices:* as explained in paragraph [29] above, the PAP notices issued by the Inquiry do more than simply outline potential findings and recommendations. Rather, they contain a detailed summary of the factual background of, and the evidence relevant to, each potential finding and recommendation, including (in many cases) extensive extracts from the documentary and oral evidence gathered by the Inquiry. Accordingly, in my opinion, disclosure of any PAP notice at this point in time would be injurious to the public interest for the following reasons (in addition to those already mentioned):
  - a. Such disclosure would reveal the Inquiry's evidence-gathering processes and methods and, more particularly, prematurely reveal the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry, thereby leading to a risk that further evidence-gathering may be frustrated or impeded or that evidence may be contaminated. As already mentioned, the Inquiry is an ongoing process and evidence-gathering is not yet complete. The possibility of further witness interviews has not been excluded.
  - b. Such disclosure would potentially prejudice criminal investigations of the rumours and allegations that are the subject of the Inquiry (whether current or future investigations) and criminal prosecutions to which such investigations may lead. As already mentioned, it is within the remit of the Inquiry to make findings with



respect to whether there is credible evidence that particular persons have committed criminal offences and/or recommendations with respect to whether particular persons should be referred to a law enforcement body for criminal investigation.

- c. Further to paragraph [58(b)], under ss 32(1) and (3) of the IGADF Regulation, the privilege against self-incrimination is not available before the Inquiry, unless a person has actually been charged with an offence. In other words, witnesses may be compelled to incriminate themselves. However, under s 124(2CA) of the Defence Act and s 32(2) of the IGADF Regulation, a witness has use and derivative use immunity in respect of evidence given to the Inquiry. If evidence to which derivative use immunity attached were to get into the public domain, then it could be argued that any criminal prosecution against the witness involved at least an indirect use of the evidence to which immunity attached. This could lead to applications to stay the criminal prosecution.
  - d. Such disclosure *may* reveal information that is operationally sensitive and/or security classified, depending on the nature of the evidence summarised in the particular PAP notice.
  - e. Such disclosure *may* unfairly harm the reputation of a person named in the PAP notice. The essential purpose of issuing a PAP notice to a person is to provide the person with an opportunity to say why a potential finding or recommendation should not be made. It is of course possible that a recipient of a PAP notice may persuade the Inquiry not to make a potential finding or recommendation contained in the notice. The premature disclosure of a PAP notice, and the wide publication that would no doubt follow such disclosure, could do immense harm to the reputation of the recipient of a notice if the Inquiry did not in fact proceed to make the potential finding or recommendation contained in the notice. This would be especially so if there were a long delay between the disclosure and publication of the PAP notice and the public release (if any) of the report of the Inquiry. This would defeat one of the purposes for which the Inquiry has been conducted in private from the outset.
59. *In relation to responses to PAP notices:* in my opinion, the disclosure of any response to a PAP notice at this time would be contrary to the public interest for the same reasons that disclosure of a notice itself would be contrary to the public interest. A response to a PAP notice is, by its very nature, a responsive document; that is, it provides the recipient's answer to the findings and recommendations contained in the PAP notice and the evidence underlying them. Any disclosure of a response to a PAP notice would thus reveal, or tend to reveal, the same information contained in the notice.
60. *Finally:* in expressing the opinions in paragraphs [58]-[59] above, I have focussed on the harm to the public interest that would result if disclosure of any PAP notice issued by the Inquiry, and any response to such a notice, occurred at the present time, while the Inquiry remains on foot. However, in my view, such disclosure may remain injurious to the public interest even after the Inquiry is complete and the Assistant IGADF has provided his report to the CDF. As already mentioned, the report will be provided first to the IGADF and then to the CDF and it will be a matter for the CDF, in consultation



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with government, to decide what to do in relation to the findings and recommendations contained in the report, including whether to refer any person to a law enforcement agency for criminal investigation. In the event that such referrals occur, and criminal prosecutions are ultimately commenced, there may be real and ongoing risks associated with the disclosure of a PAP notice or a response to a PAP notice until such time as the prosecutions are concluded.

## **PART 5: DOCUMENTS REFERRED TO IN APPLICANT'S AMENDED LIST OF DOCUMENTS**

### **Introduction**

61. I am informed that the Court made an order for discovery on 2 August 2019, which required the parties to agree to categories of documents for discovery. I am also informed that the parties subsequently agreed to categories of documents for discovery, which are stated in a letter from the Respondents' solicitor to the Applicant's solicitor dated 24 September 2019. **Annexure FPS-8** to this affidavit is a copy of the letter.
62. I am informed that, on 13 July 2020, the Applicant filed an affidavit and Amended List of Documents in response to the order for discovery. Item 67 of the Applicant's Amended List of Documents refers to the following category of documents:  
"Documents to which the *Inspector-General of the Australian Defence Force Regulation 2016* applies".
63. **Annexure FPS-9** to this affidavit is a copy of the Applicant's affidavit and Amended List of Documents.

### **Public interest immunity claim over documents referred to in Applicant's Amended List of Documents / Applicant's response to order for discovery**

64. The IGADF claims PII over the Applicant's response to the order for discovery to the extent that it would reveal, or tend to reveal, any matters about which the Applicant may have been examined by the Inquiry, and whether the Applicant has been issued with a PAP notice. The disclosure of the Applicant's response (to that extent) would be contrary to the public interest, for the reasons mentioned in paragraphs [46] to [59] above.

## **PART 6: SUBPOENA TO AUSTRALIAN WAR MEMORIAL**

### **Introduction**

65. I am informed that the Court, on the application of the Respondents, issued a subpoena to the Australian War Memorial (**AWM**) on 5 March 2020 (**AWM subpoena**). The AWM subpoena requires the AWM to produce:
  - a. Copies of all documents referring to and/or evidencing an interview between the Applicant and Peter Pederson in 2011.
  - b. Copies of all correspondence between the Applicant and AWM Director Dr Brendan Nelson in or around March to August 2017 in relation to the Applicant's interview with Peter Pederson.



66. **Annexure FPS-10** is a copy of the AWM subpoena.
67. I am informed that the AWM produced documents to the Court in satisfaction of the AWM subpoena on 18 March 2020, 1 April 2020, 6 May 2020 and 27 May 2020. I am aware that a small number of the documents produced on 6 May 2020 and 27 May 2020 were partially redacted in accordance with PII claims made by the IGADF. I am also aware that the redactions to some of the documents produced on 6 May 2020 were subsequently refined or narrowed.

**Public interest immunity claim over information in documents responsive to the AWM subpoena**

68. For the purposes of making this affidavit, I have personally reviewed the information in the documents responsive to the AWM subpoena over which the IGADF has claimed PII (**redacted information**).
69. In my opinion, it would be contrary to the public interest for there to be any disclosure of the redacted information because such disclosure would prematurely reveal, or tend to reveal, one of the Inquiry's lines of inquiry and the evidence gathered in respect of that line of inquiry. This would in turn lead to a risk that further evidence-gathering by the Inquiry may be frustrated or hindered or that the evidence that it collects may be contaminated. In this respect, I note again that the Inquiry is ongoing and that further documentary or oral evidence may be gathered.
70. In expressing the above opinion, I accept that, because the redacted information comprises only a small portion of the material produced by the AWM, a person reviewing the material as a whole may be able to draw reasonable inferences as to the likely content of the redacted information. However, in my view, it would nevertheless be contrary to the public interest for the redacted information to be disclosed, for this would amount to official confirmation of information previously only the subject of speculation or guesswork.





Sworn by the deponent

at CANBERRA

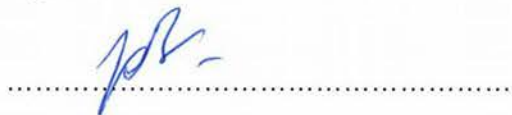
in the Australian Capital Territory

on 7 AUGUST 2020



Before me:

Signature of witness:



Name of witness:

MATTHEW BLUNN

Qualification of witness:

SOLICITOR AT SUPREME COURT

ANNEXURE - FPS-1

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018


**BEN ROBERTS-SMITH**


Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 48 pages is the annexure marked FPS-1 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

  
.....  
Witness *SOLICITOR AT SUPREME COURT*





**INSPECTOR-GENERAL  
OF THE  
AUSTRALIAN DEFENCE FORCE  
  
ANNUAL REPORT**

*01 July 2017 to 30 June 2018*

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## Inspector-General of the Australian Defence Force

**Senator the Hon Linda Reynolds, CSC**

**Minister for Defence**

Parliament House

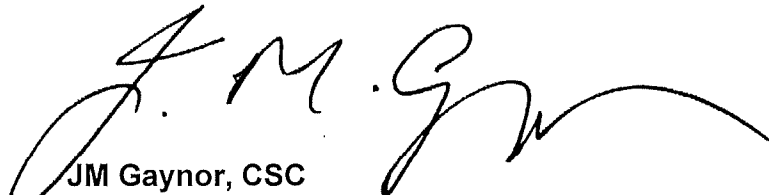
CANBERRA ACT 2600

Dear Minister

Under the provisions of the *Defence Act 1903*, section 110R, the Inspector-General of the Australian Defence Force is required to give the Minister an annual report for presentation to the Parliament.

I am therefore pleased to give you a Report on the operations of the Office of the Inspector-General of the Australian Defence Force for the period 01 July 2017 to 30 June 2018.

Yours sincerely



**JM Gaynor, CSC**  
Inspector-General of the Australian Defence Force

16 August 2019





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**INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE**  
**REPORT FOR THE PERIOD**  
**01 JULY 2017 TO 30 JUNE 2018**

**PREAMBLE**

The Office of the Inspector-General of the Australian Defence Force (IGADF) is an important element of the ADF military justice system, a system which provides the ADF with an Australian legal framework that applies to all ADF members in times of peace and war, whether in Australia or overseas. The ADF's operational capability relies heavily on a military justice system that is capable of achieving an appropriate balance between the need to enforce and maintain a high level of order and discipline, while maintaining and protecting the individual rights of ADF members.

The position of the IGADF is established under section 110B of the *Defence Act 1903* (the Act). 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.*

Mr James Gaynor, CSC was appointed as the IGADF by the Minister for Defence on 01 Dec 2016 in accordance with section 110E of the Act, for a term of five years, and continued as the IGADF during this reporting period.

The functions of the IGADF are prescribed in section 110C of the Act, as follows:

- a. inquiring into or investigating matters concerning the military justice system;
- b. conducting performance reviews of the military justice system, including internal audits, at times and in the manner IGADF considers appropriate;
- c. advising on matters concerning the military justice system, including making recommendations for improvements;
- d. promoting military justice values across the ADF;
- e. if directed by the Minister or the Chief of the Defence Force (CDF) to do so – inquiring into or investigating a matter concerning the ADF; and
- f. doing anything incidental or conducive to the performance of the IGADF's other functions.

The IGADF continues to contribute to a fair and effective military justice system by providing a centralised and dedicated function to oversee military justice and by monitoring and inquiring into military justice related issues and alleged failures within the system.

The ADF military justice system comprises four main components, each of which is intended to promote good order and discipline and thereby enhance operational effectiveness. The four components are:

- a. the taking of disciplinary action under the *Defence Force Discipline Act 1982* (DFDA) to enforce and maintain Service discipline;
- b. the imposition of administrative sanctions to correct individual behaviour;
- c. the conduct of administrative inquiries and investigations to establish the facts of an occurrence and make recommendations to remediate systemic or individual failings; and
- d. the handling and management of complaints by ADF members to ensure systemic or individual failings are identified.



## MESSAGE FROM THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE

The operating tempo in the Office of the IGADF was higher in 2017–18 than in previous reporting periods. This was driven by increases in the number of submissions received for investigation or inquiry, military justice performance audits conducted and inquiries into deaths in service being completed.

There were 48 open inquiry submissions carried over from 2016–17. In 2017–18, the IGADF received 65 new inquiry submissions, an approximate increase of six per cent over the number submitted in 2016–17. Comparable with previous reporting periods, approximately 30 per cent of those submissions proceeded to inquiry. As at 30 June 2018, 53 submissions had been finalised as a result of IGADF inquiry or assessment and 60 inquiry submissions were ongoing.

IGADF received an additional 35 notifications concerning Service Police professional standards breaches, of which 24 became the subject of IGADF investigations. The remaining 11 notifications were assessed by IGADF as matters that should more appropriately be addressed by another Defence Investigative Authority or the military chain of command.

In 2017–18, the IGADF conducted 57 military justice performance audits (Army 31, Air Force 18 and Navy eight), representing an increase of almost eight per cent over the 53 audits conducted in the previous reporting period.

During the reporting period, three units were identified to have had material deficiencies, or compliance breaches, necessitating a re-audit within 12 months.

During the conduct of the military justice performance audits, 3690 ADF personnel participated in focus group discussions, where rank appropriate discussions were held with regards to ADF member's rights and responsibilities under the DFDA, as well as current key military justice issues affecting the ADF.

Overall, there were 350 (Navy 48, Army 188 and Air Force 114) recommendations and 595 (Navy 92, Army 306 and Air Force 197) suggestions made to units during the conduct of the audit program.

In 2017–18, IGADF received notification of, and initiated inquiries into, 40 deaths in service of ADF members. During the same period, IGADF finalised 69 reviews (24 from deaths that occurred in 2017–18 and 45 in previous reporting periods).

In addition the IGADF commenced and completed an inquiry into a death that occurred during a training exercise.

Of the finalised inquiries, three were conducted under the Defence (Inquiry) Regulations 1985, as they commenced before the commencement of the IGADF Regulation 2016. These were the final inquiries to be conducted under the Defence (Inquiry) Regulations 1985. The remaining 66 inquiries were completed under the IGADF Regulation 2016.

In 2017–18, IGADF received 392 new applications for redress of grievance, a decrease of approximately eight per cent from 2016–17. As at 30 June 2018, 397 applications had been finalised (285 applications received in 2017–18 and 112 in previous reporting periods).

By the end of the reporting period there were 19 ROGs outstanding that were submitted under the Defence Force Regulations 1952, with the majority being progressed. Seven (36 per cent) of those old system ROGs are in relation to the Navy Maritime Technician 2010 career scheme policy. By the end of the reporting period, the IGADF was awaiting a New South Wales Supreme Court decision and finding in relation to this matter before these ROGs could be progressed. This decision and finding should be handed down in early July 2018.

At the request of the Chief of Army, and subsequently under the direction of CDF, in May 2016 IGADF established an inquiry into rumours of breaches of the law of armed conflict in Afghanistan between 2005 and 2016 and associated matters. In 2017–18, the inquiry gained significant momentum after public calls for information were made on 1 September 2017 and concluded on 3 November 2017—and is now pursuing additional lines of inquiry. Over 200 witnesses have been interviewed to date.

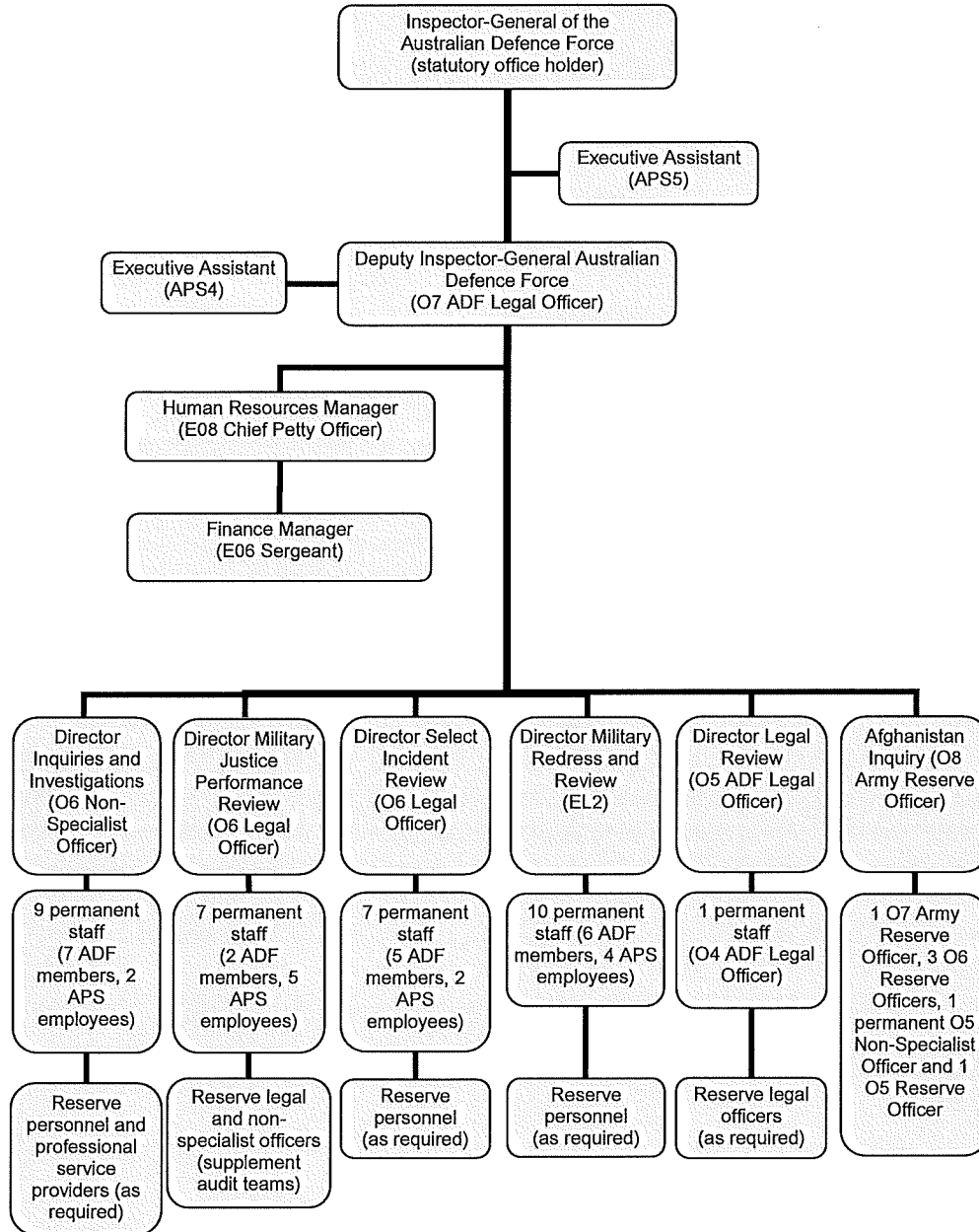
At this stage it is not possible to predict how long it will be before the Afghanistan Inquiry delivers its report, as this will depend on the number of additional lines of inquiry identified as the Inquiry progresses. However, at the conclusion of the Inquiry, its findings and recommendations will be reported to the CDF for consideration and referral to other relevant authorities if necessary.

As noted in the previous IGADF Annual Report, the interim legislative arrangements for the superior service tribunal system, which sits at the apex of the disciplinary component of the ADF's military justice system, effectively ceased on 21 September 2017 following the retirement from permanent service of Major General Ian Westwood, AO. While there has been no clear legislative action to affirm the current arrangements, the net effect is that the current superior service tribunal system continues to function largely unchanged and without incident since its reinstatement following the High Court decision in *Lane v Morrison* in 2009.

Furthermore, I endorse the remarks of the Judge Advocate General (JAG), Rear Admiral the Honourable Justice Michael Slattery, RANR, in his report for 2017 which identified a range of legislative reform proposals to superior service tribunals, including those relating to mentally impaired ADF members appearing before service tribunals, improving superior service tribunal procedures to civilian best practice, strengthening the independence of judge advocates, improving courts martial sentencing transparency and effectiveness, and modernising ADF investigative powers. The JAG incorporated an Annex to his report that summarised recommendations from previous reports that have been identified as requiring further action, but the aforementioned proposals are the most pressing. These legislative reform proposals, combined with those improvements that will be pursued as a consequence of the Summary Discipline System Review, will only enhance and promote the military discipline system as a fair, efficient and functional tool in support of command.

## STAFFING AND RESOURCES

Staff at the Office of the IGADF consists of both permanent and Reserve military personnel, as well as Australian Public Service (APS) employees. All employees have a demonstrated knowledge and experience of Service life and the military justice system, which contributes to the way in which they support the IGADF. The Office of the IGADF is therefore structured in the following way:





## **Staffing outlook**

Appropriate resourcing is paramount in meeting the capability output and strategic directions of the Office of the IGADF.

The Office of the IGADF continues to work within its budget allocation; however, there is growing pressure on resources as the IGADF is asked to respond to and investigate increasingly complex and highly sensitive matters. While the IGADF has managed the short-term needs of these inquiries through careful management of staffing resources, it is unsustainable for long-term strategic output.

Compounding these budgetary pressures is the IGADF's ability to maintain the critical Reserve support capability required to sustain operational tempo.

Single Service and non-Service groups provide Reserve support to the Office of the IGADF. Currently, there is a disconnect in the administrative process in the submission of reserve versus unit operating bids. This results in funding uncertainty, particularly where self-funded reserve resources are required to meet the shortfall from single service allocation.

Without a long-term funding plan, the IGADF is likely to lose skilled and experienced reserve members who seek assurances in work allocation. As a result, there may be an increasing reliance on external service providers to meet strategic responses.

Between 2010 and 2017, each of the Services established its own specialist inquiry cell. While IGADF supports initiatives to enhance professionalism in the conduct of inquiries, an unfortunate result is the greater competition for a limited pool of persons with the knowledge, skills and inherent ability to conduct inquiries.

## **Professional Service Providers**

The Office of the IGADF engages professional service providers during temporary peaks in service demand, and in circumstances when particular expertise is not available within the Office of the IGADF.

During this reporting period five professional service providers were engaged by the Office of the IGADF.

Professional service providers are engaged using procurement practices that are consistent with Defence procurement rules and all engagements in excess of \$10,000 are published on the AusTender website as soon as practicable.

## **IGADF Afghanistan Inquiry**

In May 2016, the IGADF established an Inquiry to determine whether there is any substance to rumours and allegations, including potential breaches of the Law of Armed Conflict relating to Special Operations Task Group (SOTG) deployments in Afghanistan during the period 2005 to 2016.

The Inquiry is an administrative process, not a criminal investigation. This process is intended not only to ascertain whether there has been misconduct, but equally to exonerate those who may be affected by unsubstantiated rumours and allegations.

As CDF directed IGADF to conduct the Inquiry, the Inquiry has powers to compel the production of evidence similar to those of a Royal Commission.

### **Staffing**

The IGADF Afghanistan Inquiry is led by an O8 Army Reserve Officer, and comprises one O7 Army Reserve Officer, three O6 Officers (two RAN and one Army) and two O5 Officers (one RAN and one Air Force).

### **Conduct of the Inquiry**

The Inquiry is being conducted in five phases:

**Phase 1 – Familiarisation.** Initially, the Inquiry team sought to identify and gain a detailed understanding of the operational, structural, cultural and historical environment that existed during the period under inquiry and which potentially contributed to the occurrence of the rumoured and alleged incidents—the *cause and effect* aspects of each factor. Factors considered include:

- a. the organisational structure of Special Operations Command (SOCOMD), including the organisational structures within the units that comprise SOCOMD;
- b. operational procedures within SOCOMD and within its constituent units;
- c. the operational environment in Afghanistan including, but not limited to:
  - (1) nature of the conflict — for example counter-insurgent operations;
  - (2) applicable Rules of Engagement;
  - (3) Special Forces tactics, techniques and procedures (TTPs);
  - (4) the operational tempo of the Special Forces;
  - (5) Coalition operating environment;
  - (6) Afghan cultural aspects and implications for operations; and
  - (7) the enemy, their equipment and capabilities, including TTPs.

As at the end of the reporting period, the familiarisation phase of the Inquiry was essentially complete.

**Phase 2 – Evidence and information gathering.** During this phase details of specific rumours or allegations (including dates, times and locations of incidents of interest), and surrounding and associated information and evidence was identified. This involved extensive documentary searches, including within Defence and other international agencies and organisations involved in the conflict in Afghanistan. By the end of the reporting period, information and evidence gathering has also involved the conduct of over 220 witness interviews.

This phase of the Inquiry is well advanced; however, as a result of interviews conducted up to the end of the reporting period and responses received during the public call for information conducted between 01 September and 03 November 2017, further lines of inquiry have emerged.

**Phase 3 – Consideration of alleged incident(s).** This phase is the current focus of the Inquiry. It involves inquiring into each of the rumours and allegations in order to establish their veracity or otherwise. This phase continues to evolve as new lines of inquiry emerge.

The Inquiry is being conducted in private, because it has implications for operational security and persons with protected identities are involved. Other reasons for private proceedings are to protect the confidentiality of witnesses and to protect the reputations of persons whose reputations might unfairly be affected by unsubstantiated rumours.

Throughout this phase, the Inquiry team has ensured that any persons who might be adversely affected by the Inquiry's findings and recommendations are afforded procedural fairness — the right of reply.

**Phase 4 – Consideration of cultural, psychological, operational and organisational factors.** Cultural, psychological, operational and organisational factors are being considered concurrently with the evidence-gathering and incident-consideration phases. The aim is to determine if and how any of these factors may have contributed to the rumoured and alleged conduct, and/or to the proliferation of the rumours and how these issues may be addressed for the future.

**Phase 5 – Report preparation and finalisation.** At this stage, it is not possible to predict precisely how long it will be before the Afghanistan Inquiry delivers its report, as this will depend on the number of additional lines of inquiry that emerge as the Inquiry progresses. While the Inquiry's focus remains on phases two, three and four, some preliminary aspects of report preparation are in train.

## **Findings and recommendations**

At the conclusion of the Inquiry, its findings and recommendations will be reported to the CDF for consideration and referral to other relevant authorities if necessary.

## **Secure and classified working office**

During the reporting period, refurbishment works were carried out within the Office of IGADF to enhance information security in connection with the Inquiry.



Given the range of statutory inquiry functions performed, and the prospect that IGADF will be required to undertake similarly sensitive inquiry and review work in future, it was considered that the modifications required to facilities would have longer term benefit to the IGADF.

## DIRECTORATE OF INQUIRIES AND INVESTIGATIONS

The IGADF provides an avenue for complaints relating to military justice issues where chain of command considerations or other factors may preclude recourse to normal avenues of complaint.

The IGADF's inquiry and investigation functions, other than Select Incident Review which is dealt with below, include the following responsibilities:

- a. at the direction of the Minister for Defence or CDF, to inquire into or investigate matters concerning the ADF;
- b. otherwise, to inquire into or investigate matters concerning the military justice system as directed by the IGADF; and
- c. to inquire into or investigate alleged breaches of the Service Police Code of Conduct by Military Police members.<sup>1</sup>

An IGADF inquiry into aspects of the military justice system can make findings and recommendations in relation to whether an alleged injustice has been substantiated. The scope of IGADF recommendations can include suggested improvements to the military justice system.

Inquiries undertaken by the IGADF are conducted under the provisions of the IGADF Regulation 2016. A small number (five) of legacy Inquiries, which commenced prior to the commencement of the IGADF Regulation 2016, are being conducted under transitional provisions of Part 7 of the Defence (Inquiry) Regulations 1985. These legacy Inquiries are likely to be completed within the next reporting period.

Inquiries conducted by the IGADF are independent of the chain of command, reducing the likelihood that allegations of undue command influence over outcomes could be made by the complainant.

As part of the provisions in the Regulations, IGADF has coercive powers to compel the cooperation of Reservists not on duty and, for a small number of inquiries directed by CDF, civilian personnel. As with other formal ADF inquiries, IGADF inquiry staff and witnesses are protected against civil suit for actions conducted in good faith in the course of an inquiry.

### Staffing

The Directorate of Inquiries and Investigations is led by an O6 General Service Officer, responsible to the IGADF for the conduct of inquiries, and investigations, into military justice incidents or complaints and inquiry into matters effecting the ADF. The Directorate comprises eight permanent ADF members, five Reserve personnel and two APS members, one of which is an Executive Level 1 (EL1) legal officer. Of the permanent ADF members, three are (E09) Service Police members

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<sup>1</sup> Following a decision on 29 November 2017 by the Chiefs of Service Committee (COSC), the term 'Military Police' has replaced the term 'Service Police' when referring in the Tri-Service context to the Naval Police Coxswains, Military Police and Air Force Police.

who inquire into, or investigate, allegations or complaints of breaches of professional standards by other Service Police members. The workload of DII is supplemented by Reserve officers and contractors, as required.

The structure of the Directorate ensures expansive knowledge and expertise in key focus areas including:

- Defence administration;
- ADF human resource management;
- command and control processes;
- deployed warlike, non-warlike and humanitarian operations;
- the military discipline system;
- ADF training;
- Defence financial management;
- Defence equity and diversity;
- complaint management;
- Service Policing; and
- administrative and discipline law.

During the reporting period, the Directorate recruited a small team of qualified and experienced part-time ADF members to undertake final editorial reviews of draft inquiry reports.

### **Submissions**

Current serving members, former serving members, families of members or former members, and other persons concerned about potential failures of military justice can make a submission to the IGADF. They can be relatively simple contemporaneous single issue complaints through to highly complex complaints raising multiple issues stretching over years or decades.

The decision on what action is to be taken in relation to a submission is made at the Office of the IGADF, except in those cases where the Minister or CDF has directed that an inquiry will be undertaken into specific matters. Each of the Services or other Defence Groups may request that IGADF conduct an inquiry, independent of the ordinary chain of command, into matters affecting the military justice system.



For a fourth consecutive reporting period, submissions were regularly characterised by the complexity and multiplicity of issues raised, frequently needing legal interpretation and consultation with other Defence authorities.

In 2017–18, the IGADF received 65 inquiry submissions, an increase of approximately six per cent from 2016–17. Comparable with previous reporting periods, almost 30 per cent of these submissions proceeded to inquiry.

Similar to previous reporting periods, the main categories of complaints received related to:

- abuse of authority;
- abuse of process;
- avoidance of due process;
- failure to act;
- bullying; harassment; and inappropriate behaviour.

Approximately 22 per cent of submissions resulted in referral for further consideration by other Defence authorities. Referrals can occur for a number of reasons, including:

- following the preliminary assessment by the Office of the IGADF, when issues of concern lay within the remit of the single Service environment, and where the complainant retained faith in their higher Service chain of command, complaints were generally referred to single Service authorities to take appropriate action;
- submissions which raised complaints about issues that were either unrelated to military justice or did not fall within the jurisdiction of the IGADF to address were referred directly to the relevant jurisdictional authority if appropriate; and
- assessments of submissions which did not warrant an inquiry, but identified discrepancies or a lack of clarity in Defence policies or processes, the IGADF would request the policy sponsor to consider further review.

#### **Inquiry caseload**

During 2017–18, the IGADF assessed 113 matters, including 48 matters carried over from the previous reporting period. A number of new and continuing submissions were of a highly complex nature, which required significant cross-Group and/or inter-Departmental liaison and coordination.

The time taken to complete an inquiry can be influenced by many factors, including:

- complexity of the complaint;
- time elapsed since the alleged incident;
- number and location of personnel involved (complainants, respondents and witnesses);
- amount and availability of witness statements and evidence;
- involvement of other functional areas; and
- number of inquiries subject to review and clearance at a particular time.

By the end of the reporting period, 53 submissions had been finalised as a result of IGADF inquiry or assessment. About 10 per cent (five) of the submissions received were found by IGADF to have the allegations wholly or partially substantiated.

#### **Inquiry aftercare duties**

The IGADF continued to provide provisions of aftercare duties for inquiries, investigations and complaints during the reporting period. These aftercare requirements included:

- a. requests for reconsideration of decisions not to inquire into matters or to reopen completed inquiries;
- b. requests for access to inquiry material either via administrative release or under the provisions of the *Freedom of Information Act 1982*; and
- c. complaints submitted across multiple external avenues or agencies, such as:
  - (1) Minister for Defence or other parliamentarians;
  - (2) Commonwealth and Defence Force Ombudsman;
  - (3) Australian Human Rights Commissioner; and
  - (4) Office of the Australian Information Commissioner.

A small number of cases involved unusually persistent complainants who continued to seek satisfaction through the reiteration of issues previously addressed both within Defence and through external review agencies, up to and including the Federal Court.

There is a continuing trend for complainants to exercise all complaint avenues available to them, either sequentially or simultaneously, and it is not unusual for IGADF to encounter a 'scattergun' approach where multiple Commonwealth and

State/Territory agencies are dealing with effectively the same complaint or elements thereof.

Managing the expectations and frustrations of such complainants can be challenging for IGADF inquiry and investigation staff. A particular area of disappointment for complainants is in the reporting of allegations of historical war crimes or offences under superseded military discipline law related to the Vietnam era, where IGADF does not have jurisdiction over such matters, either because of their potentially criminal nature or because they significantly predate the current military justice system.

### **Critical Lessons Learned Regarding Defence Inquiries**

In 2017–18, IGADF identified a number of critical lessons to support the conduct of and minimise the likelihood of flaws arising in future Defence inquiries.

The lessons were drawn from an examination of a range of IGADF inquiries, including a long running inquiry officer inquiry (IOI) initiated by an ADF headquarters under the authority of Part VI of the Defence (Inquiry) Regulations 1985. While the IOI obtained and analysed a great deal of evidence, a number of critical flaws resulted in a determination not to rely on the lengthy and complex report for subsequent decision-making; the evidence obtained by the IOI and elements of the analysis were confirmed as reliable and available to decision-makers.

**Timeliness.** The purpose of a Defence inquiry is to provide commanders with information in a timely fashion on the basis of which properly formed decisions for further action may be made.

In certain instances, IGADF inquiries found that by the time the IOI report was submitted, action was already well in progress to remediate key systemic matters subject to recommendations in the report. As a result, while some findings were of potential use to decision-makers, others had been overtaken by events, as a result of which the inquiry on the whole did not represent a good use of Defence resources.

**Definition of terms.** It is not unusual for complainants to allege that they have been disadvantaged or mistreated due to a particular dysfunctional ADF workplace 'culture'. In examining attempts to address cultural issues, the IGADF experience has been that the term 'workplace culture' is so ill-defined, the extent to which culture contributes to an individual's decisions so subjective, and the expertise of inquiry officers in sociocultural concepts so limited, that it is too difficult to be adequately captured through the administrative inquiry process.

Inquiries that focus on examining identifiable factors underpinning specific actions and incidents, to provide information on which commanders can base decisions, are more effective than those attempting to delineate intangibles.

**Methodology.** In attempting to address complex allegations it is important that the appropriate methodology is selected. Proper scoping of an inquiry before its commencement is essential in determining the boundaries and ascertaining the



correct methodology for addressing the situation for which the need for inquiry has been identified.

Terms of Reference should not be too broad, or be allowed to expand during the course of evidence gathering to where the type of inquiry originally selected is not the best fit.

Furthermore, where an Inquiry is broad and complex, consideration should be given to establishing a Commission of Inquiry (COI). A COI provides for coercive powers beyond those of an IOI, such as the ability to summons any person to appear as a witness and answer questions, rather than just a member of the Defence Force. An alternative in such situations is to split the matter up into smaller, discrete inquiries into particular events or thematic groups of events, rather than stacking multiple related issues into an unwieldy omnibus inquiry.

**Staffing.** Having selected the inquiry methodology, the correct selection of inquiry staff is fundamental to success. An Inquiry Officer with the appropriate level of experience for the complexity of the matter should be selected, and then provided with the suitable level of staff resources to complete the Inquiry. Delays in the completion of inquiries often arise from key inquiry personnel having to split their time between the inquiry and other assigned duties. Likewise, the quality of some inquiries has been affected by single inquiry officers rushing to meet a deadline, leading to a failure to obtain all reasonably available and relevant evidence.

**Legal Review.** The legal review conducted before an inquiry report is submitted a decision-maker is critical to identifying flaws and faults that might impact on the reliability of the report and its underlying evidence. A number of instances were encountered by IGADF where the legal review of an inquiry report had not been sufficiently robust, leading to subsequent requirements for decision-makers to undertake further inquiry or direct fresh assessments of evidence gathered by inquiry officers.

### **Allegations of Historical War Crimes**

During the course of the reporting period, IGADF received a small number of submissions that included allegations of historical war crimes (generally during the Vietnam War) or breaches of military law preceding the introduction of the *Defence Force Discipline Act 1982*.

War crimes are offences under the provisions of the *Crimes Act 1900* and are thus matters falling within the jurisdiction of the Australian Federal Police (AFP). IGADF has sought AFP advice on the processes for referring historical war crimes allegations. The AFP employs a Case Categorisation and Prioritisation Model (CCPM) to determine how to allocate its limited available investigative resources. Key factors in the CCPM include the alleged crime type, the potential impact on Australian society, the importance of the matter to the AFP, and the resources required to undertake an investigation.

Alleged offences under previous Defence military justice legislation, such as the falsification of gallantry or distinguished service award nominations, do not usually

have a connection with contemporary military justice arrangements in the ADF. Accordingly, unless the identification of historical irregularities exposes failures or flaws in current military justice processes, which could then be remedied by recommendations the IGADF might make to relevant authorities, they do not warrant the conduct of an IGADF military justice inquiry.

### **Military Police Professional Standards**

The ADF Military Police professional standards are currently governed by CDF Directive 14/2014 *Service Police Professional Standards: A code of conduct and management of complaints against Service Police*.

The Directive requires that the reporting of all complaints regarding Military Police must be referred to the IGADF. The IGADF's Professional Standards investigative capability enables the review of such allegations of serious breaches of the Service Police Code of Conduct to be conducted independently of the Joint Military Police Unit<sup>2</sup> and, in particular, the ADF Investigative Service (ADFIS) and other Military Police authorities.

In 2017–18, IGADF received 35 complaints against Military Police, of which 24 became the subject of further IGADF inquiry or investigation. A further eight cases were carried forward from the previous reporting period, resulting in investigation activity on 32 matters during the reporting period.

A particular feature during the reporting period was the increasing provision of notification to commanders where negative behavioural trends were identified by the IGADF Professional Standards section that may not have been apparent at unit level. The section provided advice to unit commands on potential avenues to address individual or group behaviours that do not accord with the expected standards of a Military Police member, either through training, counselling, formal administrative sanctions or disciplinary action.

### **Own initiative inquiry**

As reported in 2016–17, on 22 May 2017 the IGADF directed the undertaking of an own initiative inquiry into the ADF Service Police Code of Conduct and Professional Standards system by Group Captain Philip Moss, AM. The aim of the IGADF inquiry was to identify potential improvements to the current Military Police Code of Conduct and Professional Standards system.

The report of the own initiative inquiry was submitted prior to the end of the reporting period. Key recommendations of the inquiry report included the need to retain a Professional Standards system and Code of Conduct for Military Police, with an enhanced focus on whether an individual is a fit and proper person to perform Military Police duties. The approval and implementation phases of the inquiry are currently in progress.

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<sup>2</sup> On 01 March 2018 the Joint Service Police Group, established in January 2017, was renamed the Joint Military Police Unit.

## DIRECTORATE OF MILITARY JUSTICE PERFORMANCE REVIEW

The Directorate of Military Justice Performance Review is responsible for the annual military justice audit program. This function is specified in Section 110C of the Act and provides an ongoing mechanism for the conduct of internal audits and a review of the military justice system.

The IGADF audit program contributes significantly to the monitoring of the health and effectiveness of the military justice system within the ADF. Approximately 50 military justice performance audits are undertaken by the IGADF during each reporting period. This figure represents approximately 10 per cent of all auditable ADF units.

The audits focus on disciplinary and administrative components of the military justice system and how each component is administered at unit level, and allows for the assessment of how appropriately military justice law and policies are being complied with, and implemented. In addition, and where appropriate, an audit draws the attention of the unit to areas where the delivery of military justice can be improved.

To ensure that the IGADF's military justice audit program is conducted professionally and with credibility, audit procedures and practices have been aligned as closely as practicable with the relevant Australian Standards on Assurance Engagements (ASAE):

- a. *ASAE 3000 Assurance Engagements Other than Audits or Reviews of Historical Financial Information,*
- b. *ASAE 3100 Compliance Engagements, and*
- c. *ASAE 3500 Performance Engagements.*

The audit process is to undertake spot-checks of available records to determine the appropriateness of the military justice practices being employed, and where possible, identify lapses or failures in administering military justice at the unit level. An overall assessment, inclusive of recommendations to address any breaches of law or policy, and suggestions for better work practices for the implementation of military justice, is provided to unit's Command team on completion of the audit.

Focus group discussions are held with representative groups of unit personnel, based on worn rank and, where appropriate, according to gender. These discussions allow the audit team to gauge each participant's appreciation of the military justice system, and to gain an understanding of how military justice is implemented across each of the rank levels at the unit being audited.

Each element of the audit contributes to the compilation of an overall military justice performance report, assessing the quality of military justice delivered at the relevant unit.

Minor policy breaches are the most common findings from the audits; however, on occasions, audit teams have identified more significant breaches of military justice law and policies. Where such circumstances prevail, the identified unit will be required to undertake a re-audit within a 12 month period, to ensure all breaches of military justice laws and policies have been addressed.

The IGADF audit program provides numerous benefits for the ADF, including:

- a. unit-initiated rectification of military justice processes and practices which the prospect of an IGADF audit may encourage;
- b. improvements to unit military justice delivery implemented during audits or as a result of audit recommendations or suggestions;
- c. the possibility that an audit might provide early warning of unit-specific issues with potential military justice impacts;
- d. the promotion of military justice values among unit commanders and staff who are accountable for military justice in their unit and among unit personnel who take part in focus group discussions; and
- e. mitigation of strategic risk by means of an assurance process in which units are audited on a periodic basis.

### **Staffing**

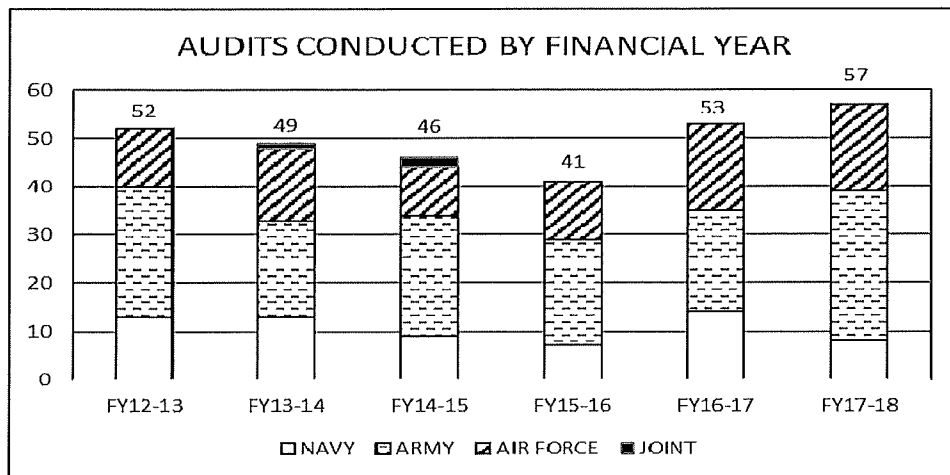
The Directorate of Military Justice Performance Review is led by an O6 Legal Officer and comprises two permanent ADF members and five APS employees. In association with permanent staff, Reserve legal and non-specialist officers supplement the military justice unit audit teams.

### **Military justice performance audit program**

In 2017–18, the IGADF conducted 57 military justice performance audits (Army 31, Air Force 18 and Navy eight), representing an increase of almost eight per cent over the 53 audits conducted in the previous reporting period.

The following graph shows the number of audits conducted by service since financial year (FY) 2012–13.





During the reporting period, three units were identified to have had material deficiencies, or compliance breaches, necessitating a re-audit within 12 months.

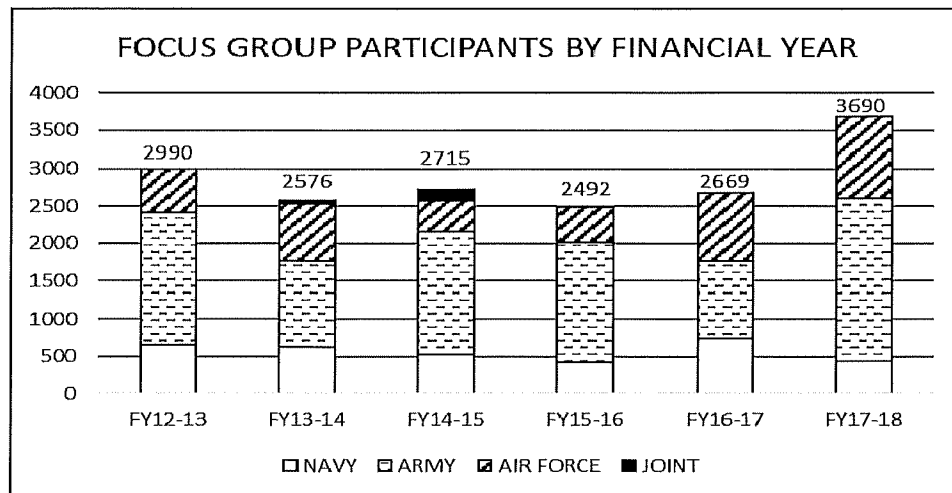
Overall, there were 350 (Navy 48, Army 188 and Air Force 114) recommendations and 595 (Navy 92, Army 306 and Air Force 197) suggestions made to the unit during the conduct of the audit program. Common shortfalls or areas for improvement for units with compliance breaches include:

- a. the unit's inadequate awareness of military justice procedures;
- b. a lack of appropriate disciplinary appointments;
- c. incomplete or out of date DFDA delegations;
- d. an absence of suitable registers for notifiable incidents, fact finding and administrative inquiries;
- e. limited record keeping and absence of corporate files; and
- f. a failure to enter military justice data (investigations, DFDA offences, administrative sanctions, civil convictions, administrative inquiries and involuntary termination) onto relevant ADF information tracking systems.

Common suggestions made by the IGADF audit teams during the conduct of military justice performance audits include the conduct of regular DFDA training to inform all personnel of their basic rights and responsibilities under the DFDA, and to conduct more specialised training to enable relevant personnel to perform their DFDA roles, functions and responsibilities.

During the reporting period, 3690 ADF personnel (Army 2162, Navy 444 and Air Force 1084) participated in a focus group discussion during the course of the audit program.

The graph below depicts the focus group participation rate across the services since FY2012–13.



### Focus group survey outcomes

Focus group discussions, along with an analysis of the survey responses, continue to provide a useful indication of the effectiveness of the ADF's military justice system administered at the unit level. Responses to the focus group survey during the reporting period show:

- a. 55 per cent of participants believe they receive adequate discipline training to allow the member to discharge their DFDA responsibilities;
- b. 72 per cent of participants were aware of their rights and obligations under the discipline system;
- c. 77 per cent of participants believed their unit would treat them fairly and impartially if they were the subject of an administrative inquiry;
- d. 86 percent of respondents understand the concept of the 'right to be heard' of the 'right of reply', otherwise known as procedural fairness;
- e. 30 per cent of participants believed adverse administrative action procedures take too long;
- f. 79 per cent of participants had confidence in their chain of command to resolve complaints;
- g. 61 per cent of participants believed their unit maintained a balance between the rights of complainants and the rights of respondents;
- h. 20 per cent of participants believed they had experienced unacceptable behaviour at their unit;

- i. 85 per cent of participants knew where to obtain advice or information on unacceptable behaviour;
- j. 44 per cent of participants believed the military justice system provides sufficient feedback to complainants and respondents;
- k. 68 per cent of participants believed all ranks are treated equitably under the military justice system; and
- l. 68 per cent of respondents believe morale was good.

#### **Military Justice Online Survey**

A supplement of military justice questions is administered annually with the online *YourSay Organisational Climate* survey. The survey was conducted in September 2017, with a total of 10,734 ADF members completing the military justice supplement survey.

While it is not possible to explain definitively the differences between the *YourSay* survey responses and the IGADF focus group survey responses, such differences may be attributed to the following:

- a. The IGADF focus group survey expressly limits responses to the respondent's experience in the preceding 12 months at the unit being audited; the *YourSay* survey does not include this posting limitation.
- b. The difference in the samples for each research activity. The IGADF survey is completed by all participants in organised focus groups. The *YourSay* survey is completed voluntarily by ADF members from a 100 per cent sample (minus very senior officers) email list, who self-select to undertake the survey. Results of the *YourSay* survey may, therefore, be affected by non-response bias. The demographics of respondents must be considered in analysing the results.
- c. The IGADF focus group survey is completed in the context of a military justice performance audit focus group, during which respondents' attention is specifically drawn to key elements of the military justice system, while the *YourSay* survey is completed in isolation, focused on organisational climate, and is completed online.
- d. Junior personnel (junior officers and enlisted personnel) represented a high proportion (58 per cent) of respondents in the *YourSay* survey; while IGADF focus group survey results are derived from a more even distribution across the range of ADF ranks.

Results from the online survey, as well as corresponding results to the IGADF focus group survey for 2017–18, are detailed below.

| Respondents who...  | YourSay Survey Results | IGADF Focus Group Survey Results |
|---|------------------------|----------------------------------|
| believe the discipline system is fairly and consistently applied.   | 47%                    | 74%                              |
| believe the DFDA is an effective tool for the maintenance of discipline.  | 59%                    | 80%                              |
| believe the complexity of the DFDA discourages the laying of charges.   | 45%                    | 33%                              |
| believe members found guilty of DFDA offences are in fact guilty.   | 47%                    | 45%                              |
| believe members subject to adverse administrative actions are treated fairly.   | 53%                    | 65%                              |
| Believe adverse administrative action responses are fairly considered being the imposition of a sanction.                         | 59%                    | 73%                              |
| are aware of their avenues of complaint under the military justice system.  | 69%                    | 69%                              |
| know how to lodge a Redress of Grievance.   | 63%                    | 56%                              |
| believe complaints made to the chain of command are dealt with fairly and resolved promptly.                                      | 58%                    | 68%                              |
| believe all genders are treated equitably under the military justice system.  | 57%                    | 70%                              |
| believe the chain of command would take appropriate action if they became aware of an incident or complaint of sexual misconduct. | 87%                    | 93%                              |
| believe the alcohol testing program is effective at reducing alcohol abuse/misuse in the ADF.                                     | 45%                    | 68%                              |
| believe the drug testing program is an effective deterrent to drug use/abuse in the ADF.  | 51%                    | 70%                              |

Survey results allow for the benchmarking of a unit's ability to deliver a healthy, effective and efficient military justice system, in comparison to their Service's average for the previous period. This assists the chain of command to identify possible issues where response rates for individual units diverge significantly from the service average.



## Information Tracking Systems

The IGADF currently sponsors two information tracking systems: the ADF Administrative Inquiries Tracking System (ADFAITS); and Defence One—Conduct Reporting and Tracking System (CRTS).

ADFAITS is the primary, ADF-wide, information system for the capture and tracking of administrative inquiries, and provides a repository of information regarding these inquiries. Data is added and maintained by the units and formation level. In 2017–18, 47 inquiry officer inquiries were entered in ADFAITS. Navy accounted for eight, Army 27, Air Force 11 and CDF/Joint command units one.

During the reporting period, the review of the governing policy for the ADFAITS system, Defence Instruction (General) Administrative 65-1 *Administrative Inquiry Tracking* was finalised. The review concluded that the policy governing the capture and tracking of administrative inquiries be relocated to the Administrative Inquiries Manual, at which time the Defence Instruction can be cancelled.

The CRTS system was designed to track an ADF member's entire conduct record and is an integral tool for effective career management and discipline maintenance. Through timely and accurate data entry by the unit, the CRTS system allows the IGADF to provide military justice statistical data and analysis to command, identifying discipline trends, as well as responding to media enquiries.

During the reporting period, IGADF staff worked with the Directorate of Military Personnel Policy to successfully transition the policy governing the CRTS system from Defence Instruction (General) Administrative 10-8 *Conduct Reporting and Tracking System* to the Military Personnel Policy Manual, Part 9, Chapter 8.

In addition, IGADF, as a key stakeholder, provided input for the establishment of the new Defence-wide Case Management System (CMS). It is anticipated that the new CMS system will adopt all the characteristics of both the ADFAITS and CRTS systems, as well as other Defence data bases.

## Requests for information

The IGADF continues to see a high demand for military justice statistics and analysis. The Office of the IGADF responded to requests for information from the CDF, VCDF, Chief of Air Force, Chief of Army, the Office of the Judge Advocate General, the Registrar of Military Justice, Provost Marshal ADF and the Summary Discipline System Review Team. Additionally, the Office of the IGADF responded to Freedom of Information requests relating to military justice data. A synopsis of some of the key military justice statistical information generated during the reporting period is contained in the Annex to this report.

## **DIRECTORATE OF SELECT INCIDENT REVIEW**

The IGADF has the responsibility to inquire into the death of a member of the Defence Force—where the death appears to have arisen out of or in the course of the member's service in the Defence Force—and provide assurance to CDF, Government and the public that Defence is responding appropriately to service related deaths. These inquiries are conducted independently of the chain of command.

### **Staffing**

DSIR is led by an O6 Legal Officer and supported by four permanent ADF personnel and two APS employees. Specialist Reserve Officers support the workload of DSIR, as required.

### **Death inquiry process**

An IGADF death inquiry gathers information and provides a report to CDF, which explains the circumstances of the death of the ADF member and specifically any connection between the member's service in the ADF and their death. The report identifies whether or not Defence policies and procedures have been followed and evaluates whether or not Defence policies and procedures are suitable and makes recommendations about how they might be improved. The IGADF has flexibility in how information is obtained about a service death, including conducting a desk-top review or inquiring in private or in public.

Through the inquiry process, IGADF consults with the Defence Community Organisation (DCO) and the relevant Service Headquarters to ensure that care is taken when engaging with the deceased ADF members family in an effort to reduce ongoing grief and minimise harm.

Throughout the inquiry process, IGADF engages with a variety of internal and external organisations, including State and Territory police and coroners, Department of Veterans' Affairs, Veterans and Veterans Families Counselling Service, Comcare, State and Territory Registries of Births, Deaths and Marriages and other subject matter experts. Throughout 2017–18, IGADF continued to develop and refine its engagement with these stakeholders.

Where required, IGADF uses coercive powers to obtain information. External agencies have been receptive to requests under compulsion, as it provides them with the legal authority and protection for the release of information.

### **Inquiries**

In 2017–18, IGADF received notification of and commenced inquiries into 40 deaths of ADF members.

In 2017–18, IGADF finalised 69 inquiries into deaths in service; 45 related to deaths that occurred in previous years and 24 were from deaths in this reporting period. Of those 69 deaths, the broad causes of death were:

- 35 (51 per cent) medical;
- 15 (22 per cent) suicide;
- 13 (19 per cent) accident;
- 4 (5 per cent) drug toxicity; and
- 2 (3 per cent) misadventure.

In addition the IGADF commenced and completed an inquiry into a death that occurred during a training exercise.

Of the finalised inquiries, three were conducted under the Defence (Inquiry) Regulations 1985, as they commenced before the commencement of the IGADF Regulation 2016. These were the final inquiries to be conducted under the Defence (Inquiry) Regulations 1985.

During the reporting period, the CDF terminated a CDF Commission of Inquiry (COI) and referred the matter to IGADF for inquiry. The CDF COI had previously been suspended during civilian criminal proceedings; however, on recommencement, issues relating to the conduct of the proceedings arose. In order to avoid the risk of further delay, the COI was terminated and CDF referred the matter to IGADF. Assistants IGADF were directed to use the material previously gathered by the COI and in any other relevant proceedings, to the greatest extent consistent with law and fair process, to assist with the findings. This Inquiry was ongoing at the end of the reporting period.

## DIRECTORATE OF MILITARY REDRESS AND REVIEW

The Directorate of Military Redress and Review (DMRR) considers complaints submitted by ADF members through the Redress of Grievance (ROG) process.

Under Part 7 of the *Defence Regulation 2016* grievances are submitted for consideration, by their chain of command and now the IGADF. DR16 commenced on 01 October 2016 and provides a consolidated and more flexible ROG process with a single layer of review in whatever manner the IGADF considers to be appropriate to the circumstances.

This reporting period was the first Financial Year all ROGs were submitted under the DR16 system. Overall, the new system has been of considerable benefit with improved analysis and management of risk and accountability.

Defence policy states that complaints should be dealt with at the lowest possible level, so members are still required to submit their ROG to their Commanding Officer (CO). The CO is required to refer the complaint to the IGADF within 14 days. IGADF works closely with COs to determine the most appropriate way of dealing with the ROG. In the majority of cases, the ROG is substantively dealt with by the CO with subsequent review by the IGADF.

This arrangement positions the ROG as another function of command and removes the perception that ROGs are an onerous or burdensome task. Furthermore, it instills confidence within COs and promotes their ability to address ROGs 'in-house' in the first instance, thereby better enabling COs to focus on commanding their units and, in so doing, creating an important nexus between this regulatory requirement and Defence capability.

The benefits from this process are already being realised, with the majority of ROGs being substantively dealt with by the CO with subsequent review by the IGADF. The overall effect is a more user-friendly, timely and efficient ROG process; with COs considering the new ROG system to be easier to understand and administer.

In addition to this interaction with COs at the unit level, IGADF continues to interact with all three Services through their career management agencies. Without reducing the independence of those statutory functions associated with the Office of the IGADF, the prudent liaison with these agencies for those more sensitive and, potentially, pressing matters, enables a better shared understanding of the issues at hand. It also often leads to important time-gains, which assist in the overall efficient processing of ROGs under this new legislative arrangement.

IGADF also actively engages in outreach strategies, aimed at delivering a broader corporate awareness of the ROG process. These strategies include active engagement with command teams and administrative staff about considerations attached to the regulations, as well as the nature of the shared responsibilities between commands and IGADF. These strategies also target pre-command seminars, to educate attendees on the regulations ahead of them on assuming their command responsibilities.



It is important to note, IGADF considers every complaint, but has the discretion to not consider any complaint in detail, or to stop considering any complaint for a variety of reasons.

### **Staffing**

DMRR is led by an Executive Level 2 (EL2) APS employee and comprises six ADF members and four APS employees, including one EL1 legal officer. Suitably experienced and qualified Reserve members supplement the staffing levels to assist with the ROG workload.

In 2017–18, approximately 2000 Reserve days were allocated for reserve case officers. Reserve usage across the three Services was Navy 7 per cent, Army 43 per cent and Air Force 50 per cent. In contrast, Army personnel accounted for 48 per cent of all ROGs submitted during the reporting period, while Navy and Air Force personnel accounted for 29 per cent and 23 per cent respectively.

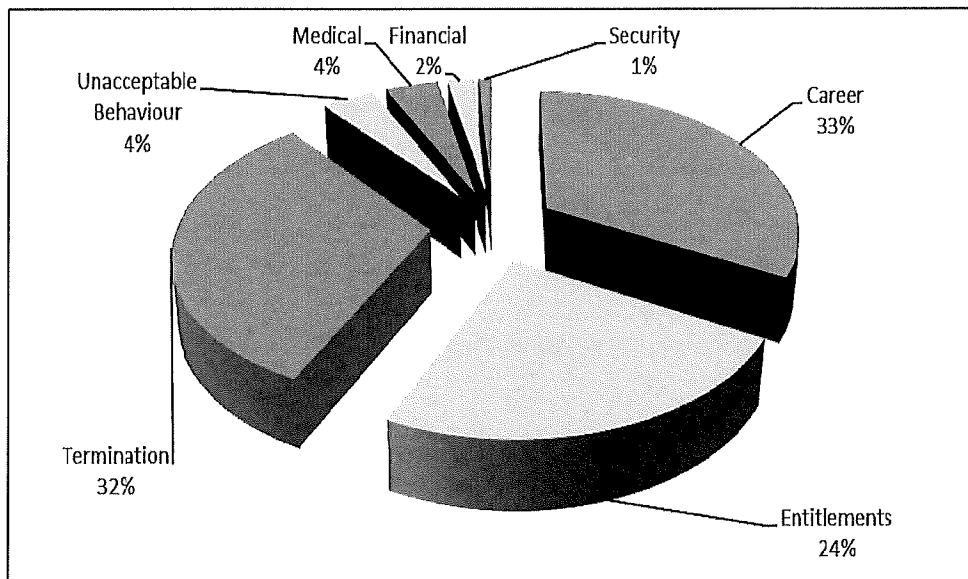
### **Historical ROGs**

As at 30 June 2018, 19 ROGs submitted under the old ROG system (Part 15 of the Defence Force Regulations 1952) were ongoing. Seven (36 per cent) of those old system ROGs are in relation to the Navy Maritime Technician 2010 career scheme policy. At the end of the reporting period, the IGADF was awaiting a decision and findings by the New South Wales Supreme Court in relation to this matter, before these ROGs could be progressed.

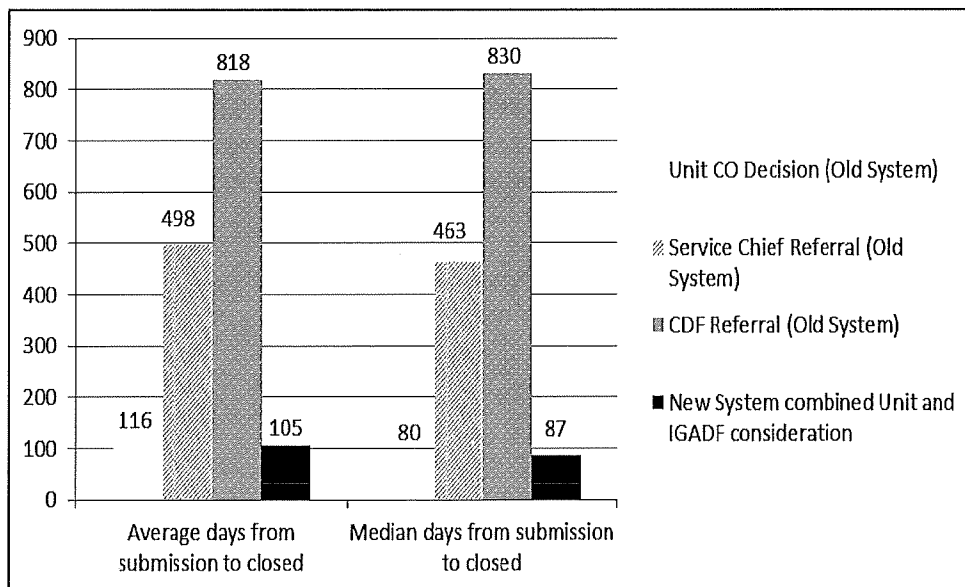
### **ROGs submitted**

In 2017–18, 392 ROGs were submitted, which represents about an eight per cent decrease on the previous reporting period (423). Despite the minor decrease in ROGs submitted during this reporting period, the figure is comparable to the average number (400) of ROGs submitted each year over the past five financial years to IGADF.

In line with recent trends, in 2017–18 the main subjects of complaint concerned career (33 per cent), termination of service (32 per cent), and entitlements (24 per cent). In the reporting period, subjects of complaint were:



Since the introduction of Part 7 of the *Defence Regulation 2016*, the length of time between the submission of the ROG and its completion has significantly reduced. Under the old ROG system, average completion time was 498 days, while under the new ROG system, in 2017–18, the average time had reduced to 102 days, with a median time of 87 days. Delays in finalising ROG applications under the old ROG system were the basis of the majority of complaints about Defence to the Defence Force Ombudsman. These delays were not attributable to the CDF or Service Chiefs, but rather reflected the structural impediments to speedy resolution of complaints that were inherent in the old ROG system.



## **Decisions and outcomes**

ROG decision outcomes are categorised under six headings:

- complaint not reviewable;
- withdrawn by member;
- administrative resolution;
- no merit;
- some merit (partially upheld); and
- has merit (fully upheld).

Overall, 12 per cent of complaints that proceeded to a decision were substantiated either in whole or in part. While 10 per cent were withdrawn by the applicant prior to substantive consideration as a ROG. Some of these withdrawals likely occurred for reasons of recognised merit and subsequent resolution.

### **ROGs finalised at unit level**

During the reporting period, 347 ROGs (Navy 82, Army 169 and Air Force 96) were finalised at unit level:

- 187 were found to have no merit;
- 44 were withdrawn by the applicants;
- 46 were not reviewable;
- 20 were partially upheld;
- 42 were fully upheld;
- 7 were resolved administratively outside the ROG process; and
- one was automatically referred to the Service Chief for consideration (under Regulation 77 of the Defence Force Regulations 1952).

### **ROGs finalised at Service Chief and CDF Level**

During the reporting period, 10 ROGs (Army eight and Air Force two) were finalised at the CDF level. All of these ROGs were found to have no merit.

A further 40 ROGs (Navy 7, Army 22 and Air Force 11) were decided at the Service Chief level:

- 19 were found to have no merit;
- 11 were fully upheld;
- three were withdrawn by the applicants;
- three were not reviewable;
- one was partially upheld; and
- two were resolved administratively outside of the ROG process.

One other ROG is being considered as part of an IGADF Inquiry.

#### **Complaints to the Defence Force Ombudsman (DFO)**

Under the old ROG system, complaints about delays in ROG handling used to account for the highest proportion of complaints to the DFO. The number of complaints to the DFO about ROG handling has significantly reduced since commencement of Part 7 of the *Defence Regulation 2016*.



## **DIRECTORATE OF LEGAL REVIEW**

The Directorate of Legal Review (DLR) provides legal advice to IGADF concerning the conduct of military justice inquiries and investigations, military justice performance reviews and audits, military justice advisings and the promotion of military justice. DLR fulfils this role by:

- a. providing legal advice to IGADF;
- b. conducting legal reviews of IGADF inquiry reports;
- c. conducting inquiries as an Assistant IGADF;
- d. commenting on legislative and policy changes to improve and enhance the military justice system;
- e. providing legal advice in relation to investigations, inquiries, sanctions, redress of grievance and other complaints;
- f. designing and developing awareness training to promote military justice; and
- g. providing awareness training on military justice courses.

### **Staffing**

DLR is led by an O5 ADF Legal Officer and comprises two permanent ADF legal officers and, similar to other Directorates within the Office of the IGADF, is supplemented by specialist Reserve legal officers.

### **Activities**

Specific matters on which IGADF provided advice or opinion in 2017–18 included comments on the Administrative Inquiries Manual, Incident Reporting and Management Manual, Use of Recording Devices in the ADF, and the review of a number of agenda items as part of the Military Justice Coordination Committee. IGADF also provided a review of the *Defence (Inquiry) Regulations 2018* and amendments to the *IGADF Regulation 2016*.

## SUMMARY DISCIPLINE SYSTEM REVIEW

As noted in the previous IGADF Annual Report, the Office of the IGADF was consulted on numerous occasions throughout the conduct of the Review into the Summary Discipline System, commissioned by the CDF on 23 November 2016. The Review was in response to concerns that the existing system is overly complex, difficult to use, unresponsive and characterised, because of its complexity, by excessive delay. The Review was tasked to recommend a specific model of summary discipline that is easy to use, timely and responsive, fair and just for all personnel and trusted by the ADF and the wider community.

On 29 November 2017, the Chiefs of Service Committee (COSC) endorsed the findings and recommendations of the Review.

A Summary Discipline Implementation Team has been appointed reporting directly to the Vice Chief of the Defence Force who, as the accountable officer for military justice, is responsible to CDF for ensuring that the recommendations and outcomes of the Review are implemented.

Internal changes, in accordance with the Review recommendations have commenced with the publication in March 2018 of a *Commanders' Guide to Discipline* and a *Commanders' Guide to Punishment*. Other improvements to policy, training and education, and simplification of procedures and improved oversight of the summary discipline system are being progressed.

To achieve a more efficient summary discipline system, that is easier to use and less complex, amendment of the DFDA will be required. The ADF seeks to simplify discipline proceedings consistent with Parliament's direction in 2008 following the enactment of section 146A of the DFDA pertaining to the evidence framework in a summary trial.

In addition, the report places significant emphasis on the potential benefit of discipline data in terms of trend analysis as an accountability tool and as a potential early-warning indicator.

Some of the report recommendations focus on making more data accessible by command to improve command oversight and management. As a result, IGADF has held discussions with Environmental Commanders–Forces Command, Air Commander and Fleet Commander—to assist in providing a better perspective on the summary discipline system and the military justice system in general, within each of the Services.

Ultimately, the outcome of the review has been the adoption of a new summary discipline model that will be easier to use, and more timely and responsive, while still providing procedural fairness to ADF members.

## **VISITS AND OTHER ACTIVITIES**

Engagement with international counterparts is critical in providing insight into alternative approaches to contemporary military justice matters, and allows for the identification of better practices to assist in the ongoing refinement of military justice related policies and processes.

### **Visit by the New Zealand Ministry of Defence Deputy Secretary Independent Review**

The Office of the IGADF had the pleasure of hosting a small delegation from the New Zealand Ministry of Defence in March 2018. The primary focus of the visit was on the similarities between the ADF military justice system and the New Zealand Defence Force military justice processes.

The visit allowed the delegation to gain a better appreciation of the complexities of the ADF military justice system through discussions with the key ADF military justice entities including, DFO, Head Defence Legal (HDL), Registrar of Military Justice, Defence Counsel Service, Director Military Prosecutions, the Joint Military Police Unit and the Summary Discipline Review Team.

### **Visit by the South Korean High Military Court**

On 15 March 2018, the Office of the IGADF was visited by a delegation from the South Korean High Military Court, who were being hosted by HDL. The visit enabled the South Korean delegation to gain an understanding and appreciation of the ADF's military justice practices and procedures, as well as strengthen relationships between the ADF's key military justice appointments and the South Korean delegation.

Discussions during the delegation's visit to the Office of the IGADF focused primarily on Service discipline, and the ROG and inquiry process. Similarities between the legal frameworks in which the two military justice systems operate was also discussed.

### **Attendance at conferences**

Throughout 2017–18, the IGADF attended and presented at a number of military justice related conferences.

In November 2017, IGADF travelled to Wellington, New Zealand to present at the New Zealand Defence Force *Transparency and Accountability in Modern Military Operations* workshop. The IGADF presentation reported on the functions, roles and responsibilities of the Office of the IGADF, current military justice issues and a brief analysis of military justice statistics.

The IGADF and Deputy IGADF convened the inaugural meeting of Inspectors-General (IG) on 29 March 2018, which was attended by other Commonwealth IGs and Deputy IGs from the Inspector-General of Intelligence and Security, Inspector-General of Taxation, Inspector-General of Biosecurity and Inspector-General of Bankruptcy. The purpose of the meeting was to discuss and share ideas on

alternative regulatory practices, and learn about the ways in which each IG operates within their respective jurisdiction. The meeting also provided an excellent opportunity for the IGADF to establish integral relationships with other agencies who share similar oversight functions. It is intended that future meetings be held on a bi-annual basis.

The IGADF attended the 9<sup>th</sup> International Conference of Ombuds Institutions for Armed Forces (ICOIAF) from 8-10 October 2017. The ICOIAF was set up to promote the important roles that institutions like ombudsman, Inspectors-General, commissioners and people advocacy groups play in protecting human rights and the prevention of maladministration within international armed forces, characterised by their independence and impartiality from the chain of command they are tasked to oversee. The conference is designed to enhance the institutions' effectiveness and capability in carry out their respective roles.

### **Military justice seminars, training and forums**

As in previous years, the IGADF engaged with stakeholders at a variety of seminars and forums across Australia, presenting on the role of the Office of the IGADF and current military justice topics. These courses included the Legal Training Modules, which provide specialist professional training for ADF legal Officer's, Command Courses and Reserve Legal Officer training activities.

Internally, IGADF staff undertook professional development training on a range of topics including guidance on assessing witnesses and making adverse credit findings, reviewing and discussing lengthy inquiry processes and discussing transition issues relevant to ROGs and complaints.

## CONCLUSION

The operating tempo in the Office of the IGADF was higher in 2017–18 than in previous reporting periods. This was driven by an increase in the numbers of submissions received for investigation or inquiry, military justice performance audits conducted and inquiries into deaths in service being completed.

Contributing to the higher than usual operating tempo was the continued high demand for IGADF-produced military justice statistics and analysis, as well as responding to Freedom of Information requests.

In 2017–18, the IGADF inquiry into the rumoured allegations of breaches of the law of armed conflict in Afghanistan between 2005 and 2016 (and associated matters) gained significant momentum, expending considerable IGADF resources. By the end of the reporting period, over 200 witnesses had been interviewed and additional lines of inquiry had been identified.

A fair and effective military justice system is necessary for the ADF's overall operational effectiveness. Based on the information available to the IGADF, the standard of discipline and appropriate support for individual rights across the ADF has remained strong overall. While challenges within in the military justice remain, there has been no indication of any reluctance to deal with them, or implement reform where necessary to reduce the complexity of those challenges.

Overall, the Office of the IGADF continues to display high standards expected of a Statutory Appointed office and achieve an operational capacity that exceeds previous years, while doing so within similar resource allocations.



## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

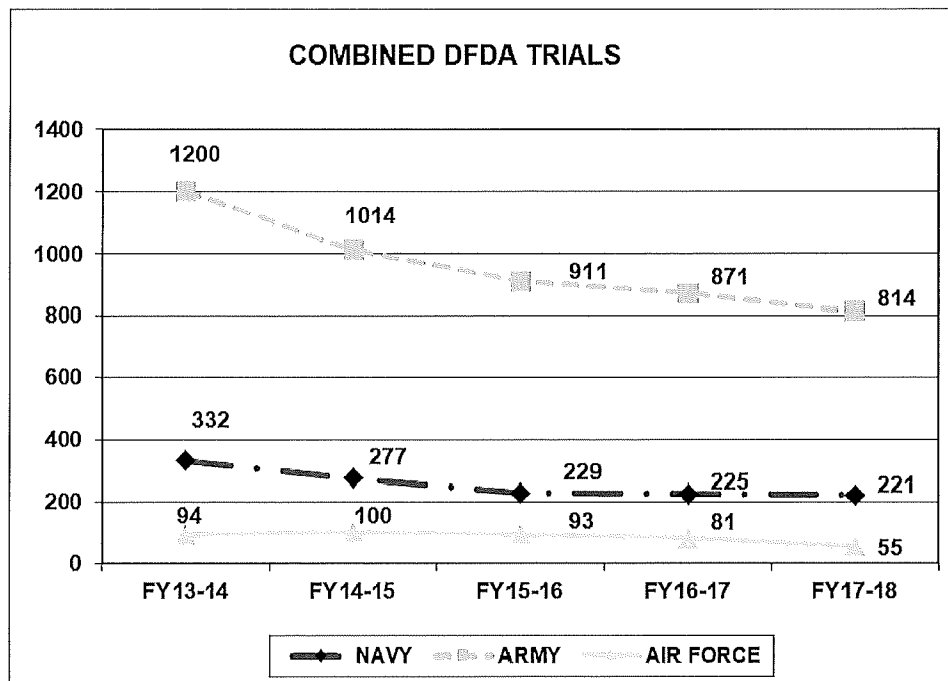
|   |         |
|---|---------|
| Australian Defence Force  | ADF     |
| ADF Administrative Inquiry Tracking System                        | ADFAITS |
| ADF Investigative Service   | ADFIS   |
| Australian Public Service   | APS     |
| Australian Standards on Assurance Engagements                     | ASAE    |
| Chief of the Defence Force  | CDF     |
| Commission of Inquiry   | COI     |
| Conduct Reporting and Tracking System                             | CRTS    |
| <i>Defence Force Discipline Act 1982</i>                          | DFDA    |
| Directorate of Legal Review                                       | DLR     |
| Directorate of Military Justice Performance Review                | DMJPR   |
| Directorate of Military Redress Review                            | DMRR    |
| Directorate of Select Incident Review                             | DSIR    |
| Executive Level 1   | EL1     |
| Executive Level 2   | EL2     |
| Inspector-General of the Australian Defence Force                 | IGADF   |
| Officer Level 4 (referring to a Major or equivalent)              | O4      |
| Officer Level 5 (referring to a Lieutenant Colonel or equivalent) | O5      |
| Officer Level 6 (referring to a Colonel or equivalent)            | O6      |
| Officer Level 7 (referring to a Brigadier or equivalent)          | O7      |
| Officer Level 8 (referring to a Major General or equivalent)      | O8      |
| Redress of Grievance  | ROG     |
| <i>Defence Act 1903</i>   | the Act |

## MILITARY JUSTICE STATISTICS

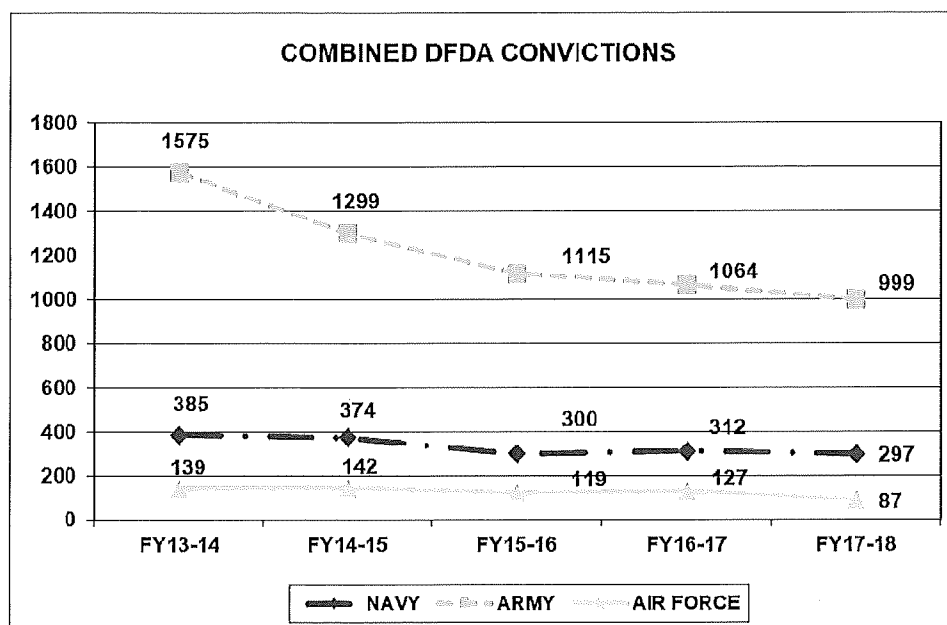
### Discipline statistics

The overall offending rate continued its steady decline in each Service, a trend observed since financial year (FY) 2013-14. The total number of trials (courts martial, Defence Force magistrate trials and summary trials) has decreased by almost eight percent, from 1177 (Navy 225, Army 871 and Air Force 81) in FY2016-17 to 1090 (Navy 221, Army 814 and Air Force 55) in FY2017-18.

Similarly, the total number of convictions recorded across the three Services has followed an almost identical trend, decreasing from 1503 in FY2016-17 to 1383 in FY2017-18<sup>3</sup>. Recent trial and conviction trends are illustrated in the below graphs.



<sup>3</sup> Discipline convictions usually outnumber trials due to some ADF members being tried for multiple discipline offences from a single discipline trial.



Superior trials (Courts martial and DFM trials) continued to decrease during the reporting period, a trend that has been observed over the past four financial years. In FY2017–18 there were 32 superior trials recorded equating to a decrease of approximately six per cent, from the 34 trials recorded in FY2016–17.

The offending rate at summary trial level continued to decrease during the reporting period. Overall there was a seven per cent decline in summary trials from 1142 (Navy 218, Army 854 and Air Force 70) in FY 2016–17 to 1058 (Navy 206, Army 803 and Air Force 49) in FY2017-18, continuing recent trends experienced over the past four reporting periods.

During the same period, the number of convictions across the three Services decreased by eight per cent from 1391 (Navy 288, Army 1014 and Air Force 89) in FY2016–17 to 1283 (Navy 236, Army 970 and Air Force 77) in FY2017–18.

Highlighting fairness and transparency within the summary discipline system, there was a total of 60 (Navy 34, Army 23 and Air Force three) not guilty verdicts awarded, while a further 37 (Navy 7, Army 29 and Air Force 1) convictions were quashed on review. In addition, a further 12 accused persons pleaded not guilty to some or all of the charges against them, with four subsequently being found not guilty of some or all of those charges against them at the superior trial level.

#### **Alcohol conviction statistics**

During FY2017-18, there were 185 disciplinary convictions recorded where the misuse of alcohol was a contributing factor (excluding alcohol misuse while on deployment), equating to an increase of 38 per cent from the 134 recorded in

FY2016–17. Navy accounted for 59 (32 per cent), Army 116 (63 per cent) and Air Force 10 (5 per cent).

There were a further 35 disciplinary convictions for alcohol related offences committed on deployment during the same period. Navy accounted for 19 (54 per cent), Army 15 (43 per cent) and Air force one (three per cent).

#### **Discipline infringement statistics**

In FY2017–18, there were 5047 disciplinary officer infringements recorded. This represents an overall increase of around seven per cent over the 4743 infringements recorded in FY2016–17. Navy recorded an increase of 22 per cent from 1540 in FY2016–17 to 1981 in FY2017–18, while Air Force increased by 15 per cent from 374 to 440 over the same period. Army recorded a slight decrease of almost eight per cent from 2829 in FY2016–17 to 2626 in FY2017–18.

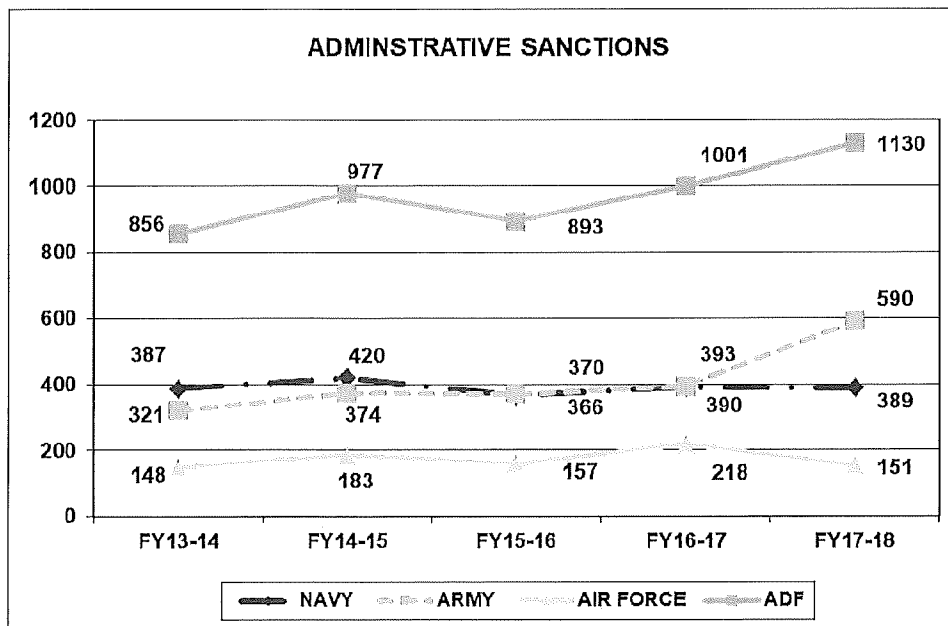
#### **Administrative sanctions statistics**

The administrative sanctions system is designed to protect the reputation of the ADF through targeting and correcting shortfalls in appropriate or acceptable behaviour, and in a member's performance and standards. Administrative sanctions include, but are not limited to, formal warnings, censures, termination of service, reduction in rank, removal from an appointment or locality, denial or delay of promotion or revocation of provisional promotion, loss of security clearance and change of employment category.

The main reasons an administrative sanction were imposed during the reporting period include misuse of alcohol (253), civil offences (204), fitness test failure (319), personal qualities (209) and unsatisfactory conduct (692).

The imposition of administrative sanctions experienced an increase of approximately 13 per cent during the reporting period, from 1001 in FY2016–17 (Navy 390, Army 393 and Air Force 218) to 1130 in FY2017-18 (Navy 389, Army 590 and Air Force 151).

As indicated in the below graph, since FY2015–16 the use of administrative sanctions has increased by (by almost 27 per cent), most likely offsetting the gradual decline in the use of the DFDA.



Army again recorded the highest use of administrative sanctions since FY2015–16; historically Navy has used administrative sanctions more than the Army or Air Force. During FY2017-18, Army accounted for 52 per cent of all administrative sanctions, while Navy accounted for 35 per cent and Air Force 13 per cent.

Of the 1130 sanctions imposed, formal warnings (405), counselling (313), termination of service (216), censures (67) and suspension from duty (69) account for 95 per cent of all sanctions imposed, and remain the most common form of administrative sanction imposed. The remaining 60 (five per cent) of the sanctions imposed include reduction in rank, administrative posting and administrative warning.

### Protection Orders

The requirement to report and record protection orders issued against ADF members was introduced on 01 May 2017. During FY2017-18, 48 protection orders were recorded. Of those, 41 (85 per cent) were issued against Army members, six (13 per cent) against Navy members and one (two per cent) against an Air Force member. In addition, 20 (Army 17, Navy one and Air Force two) protection orders were extended during the reporting period.

### Civil conviction statistics

The civil conviction of ADF members increased by 27 per cent from 124 to 158 between FY2016-17 and FY2017-18. The most common form of punishment imposed by a civilian authority continues to be monetary fines (84) and the loss or suspension of motor vehicle licence (60), which together account for 89 per cent of all punishments imposed by a civilian authority.







ANNEXURE - FPS-2

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

**BEN ROBERTS-SMITH**

Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 32 pages is the annexure marked FPS-2 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:



.....  
Signature



.....  
Witness

Solicitor, the Supreme Court



INSPECTOR-GENERAL  
OF THE  
AUSTRALIAN DEFENCE FORCE  
  
ANNUAL REPORT

*01 July 2018 to 30 June 2019*

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Requests and inquiries should be addressed to [ig.adf@defence.gov.au](mailto:ig.adf@defence.gov.au) or on 1800 688 042.



Inspector-General of the Australian Defence Force

**The Hon Linda Reynolds MP**  
**Minister for Defence**  
Parliament House  
CANBERRA ACT 2600

Dear Minister

Pursuant to section 110R of the *Defence Act 1903*, I am pleased to give you my report—on the operations of the Inspector-General of the Australian Defence Force for the period 01 July 2018 to 30 June 2019—for presentation to the Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J.M. Gaynor', with a long, sweeping horizontal stroke at the end.

**JM Gaynor, CSC**  
Inspector-General of the Australian Defence Force

25 November 2019

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**INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE**  
**REPORT FOR THE PERIOD**  
**01 JULY 2018 TO 30 JUNE 2019**

**PREAMBLE**

The position of the Inspector-General of the Australian Defence Force (IGADF) is established under section 110B of the *Defence Act 1903*. The position performs an important governance and oversight role in relation to certain ADF activities and processes, including the military justice system.

This is achieved through the IGADF being a statutory appointment who sits outside the ordinary chain of command, and who provides centralised, independent and dedicated complaint handling, review, audit and inquiry functions. The IGADF reviews complaints, inquires into deaths of ADF members and also monitors or inquiries into military justice related issues and alleged failures in the military justice system.

On 01 December 2016, and in accordance with section 110E of the Defence Act, the then-Minister for Defence appointed Mr James Gaynor, CSC as the IGADF for a period of five years. Mr Gaynor continued in his appointment as the IGADF during the period covered by this report.

Section 110C of the Defence Act and section 5 of the *Inspector-General of the Australian Defence Force Regulation 2016* prescribe the functions of the IGADF, which are to:

- a. inquire into or investigate matters concerning the military justice system
- b. conduct performance reviews of the military justice system, including internal audits, at the times and in the manner IGADF considers appropriate
- c. advise on matters concerning the military justice system, including making recommendations for improvements
- d. promote military justice values across the ADF
- e. inquire into or investigating deaths of ADF members in service
- f. oversee the statutory Redress of Grievance scheme
- g. if directed by the Minister or the Chief of the Defence Force (CDF) to do so – inquire into or investigate a matter concerning the ADF, and
- h. do anything incidental or conducive to the performance of the IGADF's other functions.

During the reporting period, the IGADF Executive participated in a strategic planning day as part of a broader IGADF strategic planning project. One of the main aims of the strategic planning project has been to update the IGADF's vision and mission statements noting the significant change in the roles and functions of the IGADF since the previous vision and mission statements were developed.

In an organisation with broad functions and a diverse work force like the Office of the IGADF, vision, mission and values statements play an important role in aligning staff with a common purpose to anchor the positive work of the office. The new statements are:

***Vision*** – *To be trusted and promote fairness in the ADF*

***Mission*** – *Provide impartial, fair and independent decisions and oversight of matters concerning the ADF*

***Values*** –

- *Respect*
- *Integrity*
- *Independence*
- *Impartiality*

## **MILITARY JUSTICE SYSTEM**

The military justice system provides the ADF with an Australian legal framework that applies to all ADF members in times of peace and armed conflict, whether in Australia or overseas.

There are four components that make up the ADF military justice system, each of which is intended to promote good order and discipline and thereby enhance operational effectiveness. These are:

- a. taking disciplinary action under the *Defence Force Discipline Act 1982* (DFDA) to enforce and maintain Service discipline
- b. imposing administrative sanctions to correct individual behaviour
- c. conducting administrative inquiries and investigations to establish the facts of an occurrence and make recommendations to remediate systemic or individual failings, and
- d. handling and managing complaints by ADF members to ensure systemic or individual failings are identified.

The ADF's operational capability relies heavily on a military justice system that balances the maintenance and protection of ADF members' individual rights, with the maintenance and enforcement of a high level of discipline. The IGADF is uniquely placed to ensure this balance is achieved and maintained.

## **INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE'S MESSAGE**

There has been a consistently high operating tempo in the Office of the IGADF over recent reporting periods. This continued in 2018–19 as a result of an increase in the number of military justice performance audits conducted, and numbers of submissions received for investigation or inquiry and grievance complaints that were generally consistent with the previous reporting period.

The number of deaths of ADF members was comparable with previous reporting periods.

During the 2018–19 reporting period, IGADF assessed 104 submissions outside the statutory Redress of Grievance scheme, including 65 new matters and 39 matters carried over from the previous reporting period.

Of the 65 new submissions received, 31 were finalised during the reporting period. Of the submissions received in previous reporting periods, 25 were finalised. At the end of the reporting period, 48 matters were undergoing review.

As previously reported, in May 2016 the IGADF established an Inquiry into the conduct of Special Forces members who were deployed in Afghanistan during the period 2005 to 2016.

IGADF also received 24 complaints relating to Military Police professional standards. This represents a reduction of 31 per cent from the 35 complaints received during the previous period. Of those complaints received in 2018–19, 12 were investigated and closed, five were not investigated following assessment and seven remain open. In two cases disciplinary action was recommended, and five recommendations for adverse administrative action were made.

IGADF conducted 62 military justice performance audits (Navy 12, Army 33, Air Force 14 and Joint units three) in 2018–19. This represents an increase of approximately nine per cent from the 57 audits conducted in 2017–18. During the reporting period, two units were found to have material deficiencies in the unit's adherence to military justice law and policy, necessitating a re-audit within 12 months of the original audit.

During the course of the 2018–19 audit program, a total of 325 (Navy 39, Army 195, Air Force 70 and Joint 21) recommended corrective actions were made to ADF units. A further 667 (Navy 116, Army 346, Air Force 165 and Joint 40) suggestions were made during the audit program.

A total of 4723 ADF personnel (Navy 1064, Army 2702, Air Force 692 and Joint or tri-service units 265) participated in a focus group discussion during the course of the audit program in 2018–19.

In 2018–19, IGADF received notification of, and commenced inquiries into, 31 deaths of ADF members.

During the same period, IGADF finalised 48 inquiries into deaths in service; 28 related to deaths that occurred in previous years with the remaining 20 deaths occurring in this reporting period. Twenty-three per cent of those deaths finalised were found to have arisen out of, or in the course of, the ADF member's service.

Of those 48 deaths, the broad causes of death were:

- 19 (40 per cent) suicide
- 13 (27 per cent) accident
- 12 (25 per cent) illness
- 2 (4 per cent) drug toxicity, and
- 2 (4 per cent) misadventure.

ADF members submitted 360 Redress of Grievance complaints in 2018–19, which represents a nine percent decrease on the 392 complaints received in 2017–18. The number of complaints submitted by Navy members decreased by 26 per cent (84 compared to the previous period of 113). The number of complaints from Army members remained relatively stable (195 compared to the previous period of 190), and the number of Air Force members' complaints decreased by 9 per cent (81 compared to the previous period of 89).

In 2018–19, the highest proportion of Redress of Grievance complaints across the ADF related to the career issues (41 per cent), termination of service (39 per cent) and entitlements (11 per cent).

As at 1 July 2018, there were 132 open complaints by ADF members, which decreased by 33 percent to 89 as at 30 June 2019.

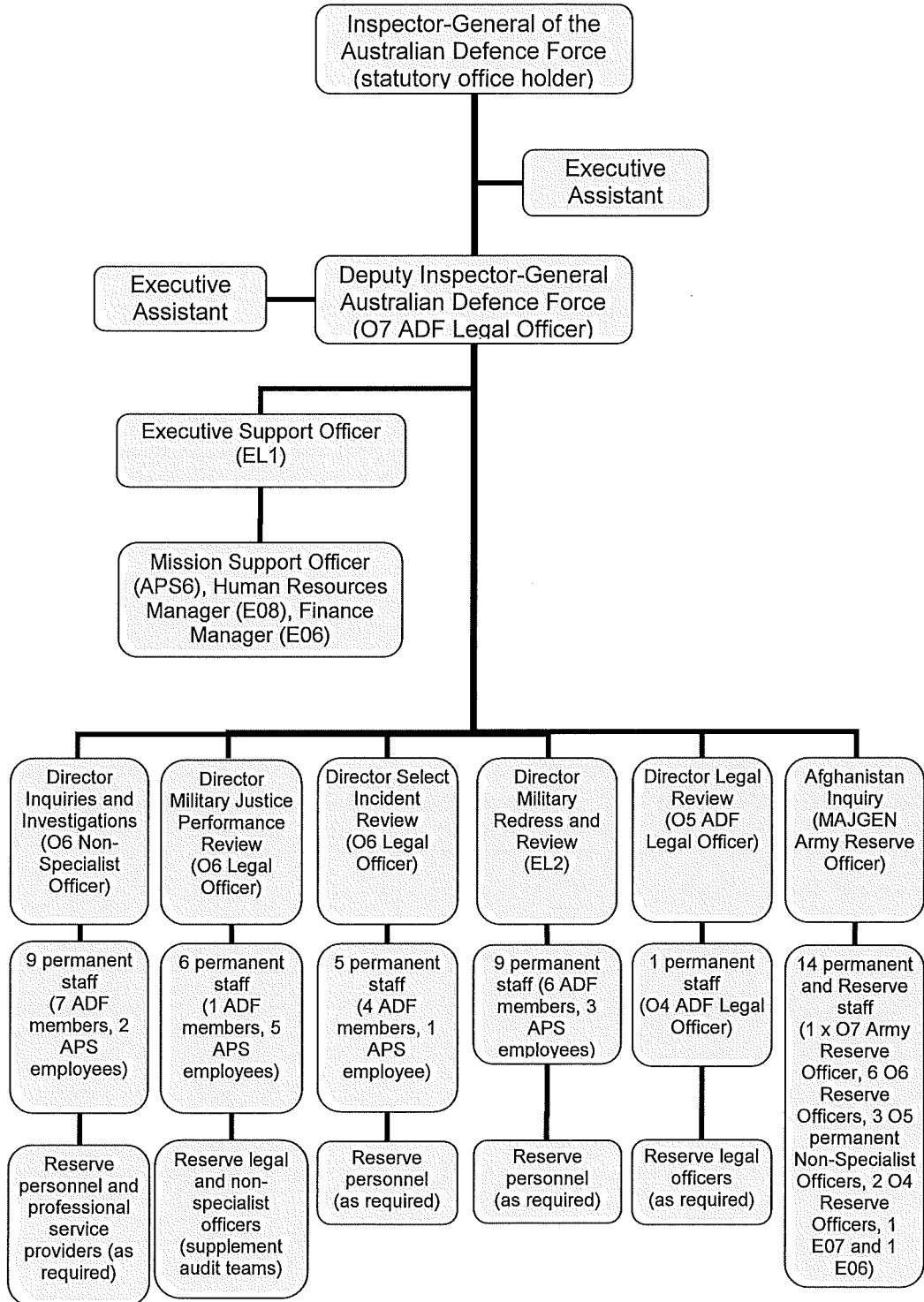
During the reporting period, 403 complaints (Navy 104, Army 218 and Air Force 81) were closed.

#### **STAFFING AND RESOURCES**

The Office of the IGADF is an integrated work environment and consists of Australian Public Service (APS) employees as well as permanent and reserve ADF personnel. All staff have relevant Defence experience including, where necessary, demonstrated knowledge of the military justice system which enables them to support the IGADF to perform his statutory role and functions.

The Office of the IGADF's organisational structure is designed to support these statutory functions, as well as provide necessary administrative support.

The structure of the Office of the IGADF is as follows:



At 30 June 2019, the Office of the IGADF staffing numbers totalled 103 personnel, consisting of 42 permanent staff and 61 Reserve personnel.

|                           | Permanent head count | Reserve head count |
|---------------------------|----------------------|--------------------|
| Navy                      | 5                    | 14                 |
| Army                      | 11                   | 23                 |
| Air Force                 | 10                   | 24                 |
| Australian Public Service | 16                   | n/a                |
| <b>Total</b>              | <b>42</b>            | <b>61</b>          |

At the end of the reporting period, recruitment activity for three vacant APS positions was ongoing with the positions expected to be filled early in 2019–20.

During the second half of the reporting period, from December 2018 to 30 June 2019, an O6 officer was the Deputy IGADF. This will continue until January 2020 when a new O7 Deputy IGADF will commence her posting.

#### **Staffing outlook**

Appropriate resourcing is critical to meet the capability and strategic demands of the Office of the IGADF.

As the inquiry and investigative work of the IGADF increases in complexity and sensitivity, demand for more highly skilled and experienced staff also increases. The Office of the IGADF works within its budget allocation and manages short term needs through careful management of staffing resources, including drawing on experienced reserve personnel and professional service providers.

In 2019–20, the Office of IGADF will continue to work to attract and retain APS and ADF staff, and others, with the requisite knowledge, experience and skills to assist IGADF.

#### **Professional Service Providers**

The Office of the IGADF engages professional service providers to provide a range of services for the organisation in surge periods and in circumstances where the necessary expertise is not available in the Office of the IGADF.

In 2018–19, five professional service providers were engaged by the Office of the IGADF to undertake inquiry work. A further six providers delivered a range of services including legal expertise, data analysis, mediation activities, and training delivery and facilitation.

Professional service providers are engaged consistent with Defence procurement rules. Engagements in excess of \$10 000 are published on the AusTender website unless they are privileged or would prejudice the conduct of an audit, inquiry or investigation.

#### **IGADF AFGHANISTAN INQUIRY**

##### **Background**

Since May 2016, the IGADF has been conducting an independent Inquiry to determine whether there is any substance to rumours and allegations relating to possible breaches of the Law of Armed Conflict (LOAC) by members of the Special Operations Task Group (SOTG) in Afghanistan over the period 2005 to 2016.

The Inquiry is an administrative process, not a criminal investigation. This process is intended not only to ascertain whether there is substance to rumours and allegations of misconduct, but also to exonerate those who may be affected by unsubstantiated rumours and allegations.

The Inquiry has powers to compel the production of evidence similar to those of a Royal Commission.

### **Staffing**

The Inquiry is led by Major General the Honorable Justice Paul Brereton AM RFD, a Judge of Appeal of the Supreme Court of New South Wales, who is supported by a dedicated team drawn from across the permanent and reserve forces. Consistent with Defence's total workforce model, the size and composition of the team are informed by the breadth of skillsets required, the interrelationship of many lines of inquiry, the need to maintain control of sensitive information, and the efficient use of available resources. As new lines of inquiry emerged during the reporting period additional resources—including personnel—were allocated to the Inquiry.

During the reporting period the dedicated team assisting Major General Brereton comprised:

- a. one O7 Army Reserve Officer
- b. six O6 Reserve Officers (three RAN and three Army)
- c. three O5 Officers (one RAN Reserve Officer, one Army Reserve Officer and one Permanent Air Force Officer)
- d. two O4 Reserve Officers (one Army and one Air Force)
- e. one E07 Reserve Warrant Officer (Army), and
- f. one E06 Reserve Chief Petty Officer.

These officers work according to the needs of the Inquiry. The decision to keep the inquiry team relatively small has been deliberate. This is because of the seriousness of the rumours and allegations, and the classified nature of the operational circumstances of the incidents under inquiry. A relatively small team facilitates the control of inquiry information.

During the reporting period, additional administrative support was provided from time to time by the Office of the Inspector-General of the Australian Defence Force.

### **Support to persons involved in the Inquiry**

During the reporting period, persons involved in, or concerned by, the Inquiry continued to have access to a range of legal, psychological, medical, pastoral and social work support services. The Inquiry conducts its proceedings so as to minimise the impact on witnesses and ensure that they have access to appropriate support mechanisms.

### **Conduct of the Inquiry**

The Inquiry is being conducted in private:

- because it involves matters of operational security and protected identities



- for the protection of witnesses and of the reputations of individuals who may be unfairly harmed by publication of rumours that turn out to be unsubstantiated, and
- to protect lines of inquiry.

As reported last year, the Inquiry is being conducted in five phases: phase 1—familiarisation; phase 2—Evidence and information gathering; phase 3—consideration of alleged incidents; phase 4—consideration of cultural, psychological, operational and organisational factors; and phase 5—report preparation and finalisation. Further background detail about these phases can be found on pages 7–8 of the IGADF Annual Report for the period 01 July 2017 to 30 June 2018 <https://www.defence.gov.au/mjs/Master/docs/IGADF-AnnualReport2017-18.pdf>.

During the reporting period, the Inquiry's focus shifted from phases two, three and four to phases three, four and five. However, further lines of inquiry have continued to emerge.

From its commencement in May 2016, by the end of the reporting period the Inquiry had examined 338 witnesses.

At the end of the reporting period there were 55 separate incidents or issues under inquiry covering a range of alleged breaches of the Law of Armed Conflict, predominantly unlawful killings of persons who were non-combatants or were no longer combatants, but also 'cruel treatment' of such persons. The Inquiry is also examining incidents relevant to the organisational, operational and cultural environment which may have enabled the alleged Law of Armed Conflict breaches. The Inquiry is not focused on decisions made during the 'heat of battle'. Rather, its focus is the treatment of persons who were clearly non-combatants or who were no longer combatants.

The time frame for the Inquiry is influenced by the number and complexity of lines of inquiry; the number, location, availability and welfare of witnesses; and above all the need for thoroughness and fairness.

The Inquiry is now approaching the final stages of evidence-taking. Evidence gathering remains ongoing in relation to some lines of inquiry, concurrently with drafting of sections of the Inquiry's report.

The Inquiry's task has been very difficult not only because of its serious subject matter. Most other inquiries commence following specific allegations where not only the incidents and events themselves but also potential witnesses are known or can be easily identified. The starting-point for the IGADF Afghanistan Inquiry—vague rumours of Special Forces soldiers' very serious wrongdoing over a period of more than ten years—was much less well defined. The Inquiry team has had to find out what rumours there were, and then to try to track each rumour through multiple witnesses and documentary records back to its source.

It has also taken some years for members of the Special Forces community—both those who continue to serve and former members—to develop sufficient confidence in the Inquiry and the genuineness of Defence senior leadership's desire to find out if the rumours are true, to be prepared to make disclosures to the Inquiry.

Gaining the confidence and trust of some of these witnesses, whose ADF careers have been spent in an environment in which secrecy is treated as fundamental, has required considerable effort and time. As this has been progressively achieved, more witnesses have been prepared to make disclosures, and new evidence has continued to emerge, some resulting in new lines of inquiry, and some reinforcing or corroborating existing lines of inquiry.

During the reporting period and even now, some witnesses are only just becoming willing to make disclosures.

Once evidence gathering is complete, given the seriousness of the allegations, there will necessarily have to be a rigorous procedural fairness process.

On completion of the Inquiry, IGADF will provide a report to the Chief of the Defence Force who will decide on further action. The report will include:

- a. A summary and analysis of the evidence pertaining to each significant line of inquiry, and a conclusion as to whether or not and to what extent there is evidence of a breach of the Law of Armed Conflict or other misconduct.
- b. Where there is evidence of misconduct, appropriate and nuanced recommendations, having regard to the available evidence and its strength, for consideration by the Chief of the Defence Force, as to what action should be taken to address it.
- c. A review of the structural, operational, command and cultural environment in which these acts may have occurred and which may have enabled them, and make recommendations for consideration by the Chief of the Defence Force about potential reforms and measures to address them, in order to minimise any risk of recurrence.
- d. Provide closure for SOCOMD by exposing past misconduct where appropriate to do so, enabling it to be considered separate from but informing the present and future development of the Command.
- e. Provide closure for the many serving and former soldiers who have lived with concerns about the subject matter of these rumours for many years.

## DIRECTORATE OF INQUIRIES AND INVESTIGATIONS

The Directorate of Inquiries and Investigations (DII) conducts administrative inquiries following submission by an individual or organisation, or at the direction of the Minister for Defence or CDF. Inquiries undertaken by the IGADF are conducted under the provisions of the *IGADF Regulation 2016*.

DII also investigates potential breaches by Military Police of the Military Police Code of Conduct.

An IGADF inquiry can make findings and recommendations in relation to whether an alleged injustice has been substantiated. The scope of IGADF recommendations can include suggested improvements to the military justice system, or in the case of matters directed by the Minister for Defence or CDF, recommendations for improvement to the ADF more broadly. As with other formal ADF inquiries, IGADF inquiry staff and witnesses are protected against civil suit for actions conducted in good faith in the course of an inquiry.

During 2018–19, all outstanding legacy inquiries under the previous regulations were completed. These were finalised in accordance with the transitional provisions<sup>1</sup> applying to Part 7 of the *Defence (Inquiry) Regulations 1985*.

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<sup>1</sup> See Part 3 of the *Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016*

While the most common source of submissions remains serving or former serving members and their families, there has been a small increase in submissions from members of the public. Submissions can range from relatively simple contemporaneous single issue complaints through to highly complex complaints raising multiple issues stretching over years or decades.

A key focus is providing procedural justice to individuals who have made submissions. Ensuring individuals know that they have been heard and understand the basis for inquiry findings promotes greater confidence in the military justice system.

### **Staffing**

DII is currently led by a specialist O6 Legal Officer, responsible to the IGADF for the conduct of inquiries and investigations into military justice incidents or complaints, Military Police professional standards and inquiries into matters affecting the ADF as directed by the Minister for Defence or CDF.

During the reporting period DII had nine permanent staff members consisting of: one O6 officer, two O5 officers, one O4 officer, three E09 service police, one APS EL1 and one APS6. In addition to these permanent staff, the Directorate engages reserve officers and suitably experienced contractors as required.

The work of DII is specialised and has for some years been reliant on the expertise of long-term staff who are now nearing retirement. The Directorate is building capacity by increasing its trained reserve workforce to provide long-term inquiry capability. This will provide a pool of suitably qualified members for the next five to ten years.

### **Submissions**

IGADF receives submissions from a range of individuals and organisations relating to their concerns about military justice matters. These submissions span from simple procedural matters to complex legal and regulatory issues, and can be contemporaneous or historical. In addition IGADF can be directed to undertake an inquiry by the Minister for Defence or CDF.

On receipt, submissions are assessed and a determination made as to whether to inquire, refer or not proceed. The referral power is used primarily for first-instance complaints, where a service headquarters can effectively resolve the issue.

During this reporting period, IGADF received 65 new submissions. 31 submissions were finalised during the reporting period. Twenty-five submissions from previous reporting periods were closed. At 30 June 2019, IGADF had 48 open submissions.

Twenty-four complaints were received relating to Military Police professional standards. 12 complaints were investigated, five were not investigated following assessment and seven remain open. In two cases disciplinary action was recommended, with 5 recommendations for adverse administrative action.

### **Inquiry caseload**

During 2018–19 reporting period IGADF assessed 104 matters and closed 56 of these. This included 65 new matters and 39 matters carried over from the previous reporting period.

Submissions are becoming increasingly lengthy, complicated and often cross groups in Defence. This results in matters taking longer to complete as areas of inquiry are added.

Equally affected are the range and complexity of documentary evidence and witness testimony.

Substantiation of matters varies in accordance with the manner and type of submission and the requirements of IGADF directions. However, in terms of findings of breaches of administrative law, policy or jurisdiction the substantiation of these remains consistent at approximately 10 percent.

### **Lessons learned regarding Defence inquiries**

IGADF has identified a number of lessons to improve Defence inquiries and complaint management more broadly.

### **Vulnerable complainants**

IGADF receives a number of submissions from individuals who have a mental illness or individuals experiencing distress. In these cases, IGADF has found that it is sometimes time- and cost-saving to dedicate resources to assist the individual to articulate their complaint. By ensuring that the complaint is properly understood at the outset, resources can be applied more effectively and procedural justice can be achieved.

### **Notification of inquiry outcomes**

An essential component of procedural justice is ensuring that the complainant understands the process by which their matter was assessed and the way in which the outcome was derived.

Outcome correspondence that merely provides the conclusion (for example that a complaint was substantiated or not substantiated) does not promote confidence in military justice outcomes and can in some cases lead to erroneous assumptions. Accordingly, the Office of the IGADF provides comprehensive notification of inquiry and assessment outcomes. Where relevant, this can include an opportunity for the complainant to read an unredacted copy of the inquiry report.

### **Military Police Professional Standards**

ADF Military Police professional standards are governed by CDF Directive 14/2014 *Service Police Professional Standards: A code of conduct and management of complaints against Service Police*.

All complaints against the conduct of Military Police are recorded and assessed. In 2018–2019, IGADF received 24 complaints, a reduction from the 35 complaints received during the previous period. Of those complaints received, 12 were investigated and closed, five were not investigated following assessment and seven remain open. In two cases disciplinary action was recommended, with 5 recommendations for adverse administrative action.

The professional standards section of the Directorate has adopted an engagement program to support commanders with early notification of concerning behavioural trends of an individual that may not have been identified at unit level due to the regular movement of staff.

The section provided advice to unit commands on potential avenues to address individual or group behaviours that do not accord with the expected standards of a Military Police member, either through training, counselling, formal administrative sanctions or disciplinary action.

IGADF staff began the process to amend the Service Police code of conduct to reflect recommendations of IGADF's own-motion review of military police professional standards. This work was ongoing at the end of the reporting period.

## **DIRECTORATE OF MILITARY JUSTICE PERFORMANCE REVIEW**

The Directorate of Military Justice Performance Review (DMJPR) is responsible to IGADF for conducting performance reviews of the military justice system. This is done by way of internal audits of individual ADF ships, units and establishments.

The IGADF audit program monitors the health and effectiveness of the military justice system at each ADF unit and, by extrapolation, the ADF. Approximately 60 military justice performance audits are undertaken by IGADF audit teams during each financial year. This figure represents just under 13 per cent of all ADF units.

The IGADF's military justice audit program is conducted in line with the relevant Australian Standard on Assurance Engagements (ASAE) 3100 *Compliance Engagements*.

Major ADF units are routinely selected to be audited approximately every four to five years with initial training establishments selected more frequently. A team from OIGADF visits the unit and conducts a combination of spot-checks of available records and discussions with unit personnel, to determine the appropriateness of the military justice practices being employed in the unit.

The aim of each audit is to assess the unit's compliance with Defence law and policy relating to military justice. Audit reports will result in making recommendations to the unit on corrective action that needs to be undertaken to ensure compliance with law or policy. The audit report may also make suggestions for the unit to consider to implement best practice.

Audit teams conduct focus group discussions with representative unit personnel, grouped according to worn rank and, where appropriate, gender. These discussions allow the audit team to gauge each participant's appreciation of the military justice system, and to gain an understanding of how military justice is implemented across each of the rank levels at the unit being audited.

Minor failures to comply with policy are the most common findings from the audits. However, on occasion, auditors may conclude that the unit has not complied, in material respects, with the requirements of military justice law and policy as identified in the audit criteria. Where these material deficiencies impact individual members' rights, or are indicative of a systemic break down in military justice procedures in the unit, the unit will be subject to re-audit within 12 months.

The IGADF audit program benefits the ADF and ADF members in numerous respects. This includes encouraging a unit to improve military justice processes and practices using audit criteria as a guide; receiving subject matter expertise from audit team members during an audit; the promotion of military justice values among unit commanders and staff who are accountable for military justice in their unit; and educating unit personnel about the military justice system.

### **Staffing**

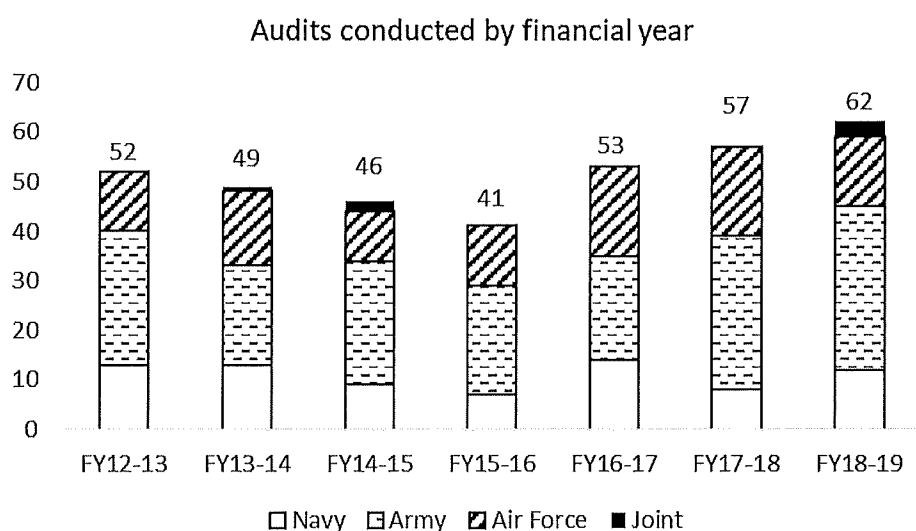
DMJPR is led by an O6 Legal Officer and comprises one other permanent ADF member and five APS employees. One ADF member is on a flexible working arrangement. The Director and one ADF member joined IGADF in 2019. The majority of the Directorate have a long

association with IGADF and hold a depth of corporate knowledge. Reserve legal and non-specialist officers comprise the majority of the military justice audit teams, supplemented by the core permanent Directorate staff.

#### Military justice performance audit program

Audit teams conducted 62 military justice performance audits of ADF units (12 Navy, 33 Army, 14 Air Force and three joint or tri-service units) in 2018–19. This represents an increase of approximately nine per cent from the 57 audits conducted in 2017–18.

The following graph shows the number of audits conducted by service since financial year (FY) 2012–13.



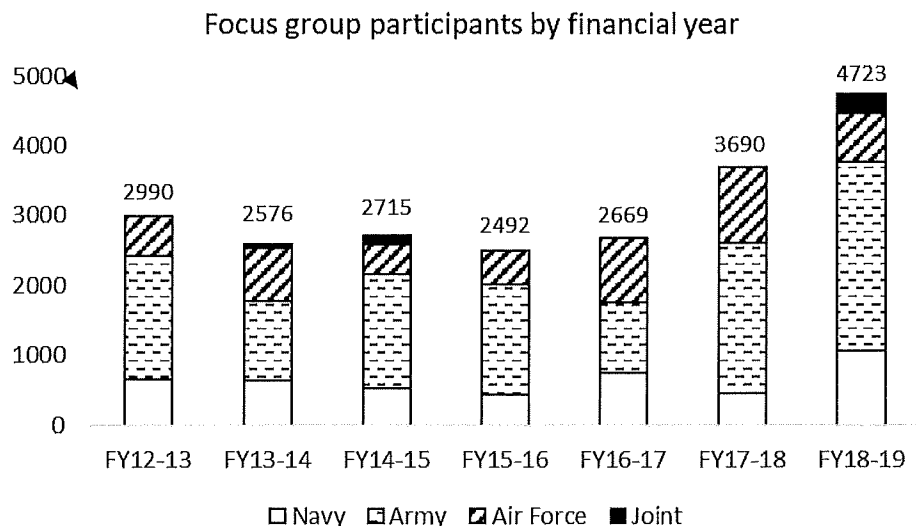
Of the units audited during the reporting period, two were identified to have had material deficiencies, necessitating a re-audit within 12 months.

During the course of the 2018–19 audit program, a total of 325 (Navy 39, Army 195, Air Force 70 and Joint 21) recommendations were made to ADF units. IGADF audit reports made a further 667 (Navy 116, Army 346, Air Force 165 and Joint 40) suggestions. Common shortfalls or areas for improvement for units with compliance breaches in 2018–19 include:

- a. record keeping and data entry relating to military justice cases
- b. awareness of military discipline arrangements (although there was no evidence this shortfall had resulted in injustice to any accused person)
- c. promulgation of alcohol testing areas, and
- d. frequency of prohibited substance testing.

A total of 4723 ADF personnel (Navy 1064, Army 2702, Air Force 692 and Joint units 265) participated in audit focus group discussions during the reporting period.

The graph below depicts the focus group participation rate across the services since FY2012–13.



#### Focus group survey outcomes

A military justice survey is completed by each focus group participant. An analysis of the survey responses provides a useful indication of the participants' perceptions of the effectiveness of the ADF's military justice system administered at their unit.

During the reporting period, responses to the focus group survey showed:

- a. 73 per cent of participants believed the discipline process is fairly and consistently applied
- b. 80 per cent of participants believed the DFDA is an effective tool for the maintenance of discipline
- c. 60 per cent of participants believed they receive adequate discipline training to allow the member to discharge their DFDA responsibilities
- d. 75 per cent of participants were aware of their rights and obligations under the discipline system
- e. 78 per cent of participants believed their unit would treat them fairly and impartially if they were the subject of an administrative inquiry
- f. 87 per cent of respondents understood the concept of the 'right to be heard' or the 'right of reply', otherwise known as procedural fairness
- g. 27 per cent of participants believed adverse administrative action procedures take too long
- h. 80 per cent of participants had confidence in their chain of command to resolve complaints



- i. 67 per cent of participants believed their unit maintained a balance between the rights of complainants and the rights of respondents
- j. 18 per cent of participants believed they had experienced unacceptable behaviour at their unit
- k. 87 per cent of participants believed appropriate action would be taken if they reported an incident of unacceptable behaviour
- l. 89 per cent of participants knew where to obtain advice or information on unacceptable behaviour
- m. 70 per cent of participants believed all ranks would be treated equally under the military justice system
- n. 75 per cent of participants believed all genders would be treated equitably under the military justice system
- o. 46 per cent of participants believed the military justice system provides sufficient feedback to complainants and respondents
- p. 93 per cent of participants believed appropriate action would be taken against an incident or complaint of sexual misconduct, including sexual assault, and
- q. 77 per cent of respondents believed morale was good.

#### **DIRECTORATE OF SELECT INCIDENT REVIEW**

Pursuant to section 5(a) of the *Inspector General of the Australian Defence Force Regulation 2016* the IGADF inquires into the death of a member of the Defence Force where the death appears to have arisen out of, or in the course of, the member's service in the ADF.

Since 01 July 2014 the Directorate of Select Incident Review (DSIR) in the Office of IGADF has conducted inquiries into ADF members' deaths. In discharging this responsibility, the IGADF provides assurance to the CDF, Government and the public that Defence is responding appropriately to service-related deaths. All IGADF inquiries are conducted according to law and independently of the chain of command.

#### **Staffing**

The Directorate is usually led by an O6 Legal Officer. However, for much of the second half of the reporting period, DSIR was led by an EL2 public servant seconded from the Department of Veterans' Affairs, as part of a reciprocal exchange. The Director is supported by four permanent ADF personnel and one APS employee. When required, Specialist Reserve Officers and contractors support DSIR's caseload.

#### **Death inquiry process**

Following notification an ADF member has died, DSIR will gather information. This information gathering process commences with formal correspondence to the deceased ADF member's next-of-kin. That correspondence informs the next-of-kin IGADF will be conducting an independent review of the death and invites them to contribute relevant information.

The subsequent inquiry process may be as simple as a desktop review of documentary information through to a full-scale inquiry in which witnesses are summoned to give evidence.

IGADF uses the information DSIR gathers to report to CDF and explain the circumstances of the death. All such reports are unique as they are dependent on the type of incident and the circumstances that led to each ADF member's death.

Any report produced will identify whether or not Defence policies and procedures have been followed and, where necessary, will evaluate whether relevant policies and procedures are suitable. A report may also make recommendations about how any policies or procedures might be improved.

Where relevant, DSIR will engage and consult with a number of internal and external organisations. This includes State and Territory police and coroners, DVA, Open Arms (formerly Veterans and Veterans Families Counselling Service), Comcare, State and Territory Registries of Births, Deaths and Marriages, and other subject matter experts.

Through any inquiry process, DSIR consults with the Defence Community Organisation (DCO) and the relevant Service Headquarters to ensure that the utmost care is taken when engaging with the family of deceased ADF members. This is to ensure that no additional grief or harm is caused as a result of a death inquiry.

Where necessary, DSIR can use coercive powers to obtain information. Experiences to date have shown that a number of external agencies prefer to have requests under compulsion, as it provides them legal authority and protection for the release of information.

### **Service death inquiries**

In 2018–19, IGADF received notification of, and commenced inquiries into, 31 deaths of ADF members.

In 2018–19, IGADF finalised 48 inquiries into deaths in service; 28 related to deaths that occurred in previous years with the remaining 20 deaths occurring in this reporting period. In 23 per cent of the inquiries finalised in 2018–19, the ADF member's death was found to have arisen out of, or in the course of the member's service.

Of those 48 deaths, the causes of death were:

- 19 (40 per cent) suicide
- 13 (27 per cent) accident
- 12 (25 per cent) illness
- 2 (4 per cent) drug toxicity, and
- 2 (4 per cent) misadventure.

### **DIRECTORATE OF MILITARY REDRESS AND REVIEW**

The Directorate of Military Redress and Review (DMRR) primary role is to consider Redress of Grievances, known as 'complaints', submitted by serving ADF members. A complaint must be about a decision, act or omission that relates to the member's ADF service.

Complaints are submitted to the member's Commanding Officer (CO). DMRR has designated desk officers for each service who liaise with members and their chain of command on the most appropriate means by which to consider each complaint.

2018–19 is the second complete financial year that complaints have been considered under Part 7 of the *Defence Regulation 2016* (DR 2016). The process continues to be refined and improved to provide expedited, independent and fair resolution for complainants.

The majority of complaints continue to be dealt with by the complainant's CO. However, IGADF is aware of and considers all complaints, and retains oversight or the ability to further consider matters where appropriate.

If a complainant is dissatisfied with the outcome of IGADF's consideration of their complaint, they may ask for internal review. They may also approach the Defence Force Ombudsman.

### **Staffing**

DMRR continues to be led by an Executive Level (EL) 2 APS Director with many years' experience in Defence administration and complaint handling. The Deputy Director is a permanent Wing Commander (O5 equivalent), Air Force Personnel Capability Officer. They lead a team of permanent and Reserve ADF members who make up the IGADF Service Desk Officers.

IGADF consideration of complaints is undertaken by ADF and APS members located throughout Australia. DMRR is also supported by an EL1 Lawyer.

### **Outreach**

IGADF first became responsible for Redress of Grievance system oversight on 01 July 2014. Since then, a key feature of IGADF's approach to Redress of Grievance complaint handling has been dedicated DMRR staff providing general, procedural guidance to complainants and also to Redress of Grievance decision-makers. This has resulted in better and timelier decision-making.

During the reporting period DMRR reviewed and simplified information presented to Navy and Air Force pre-command and personnel officer courses, thereby improving the training's usefulness.

### **Caseload**

ADF members submitted 360 complaints in 2018–19 which represents a nine percent decrease on 2017–18 (392). The number of complaints submitted by Navy members decreased by 26 per cent (84 against the previous period of 113). The number from Army members has remained relatively consistent (195 against the previous period of 190), while Air Force decreased by 9 per cent (81 against the previous period of 89).

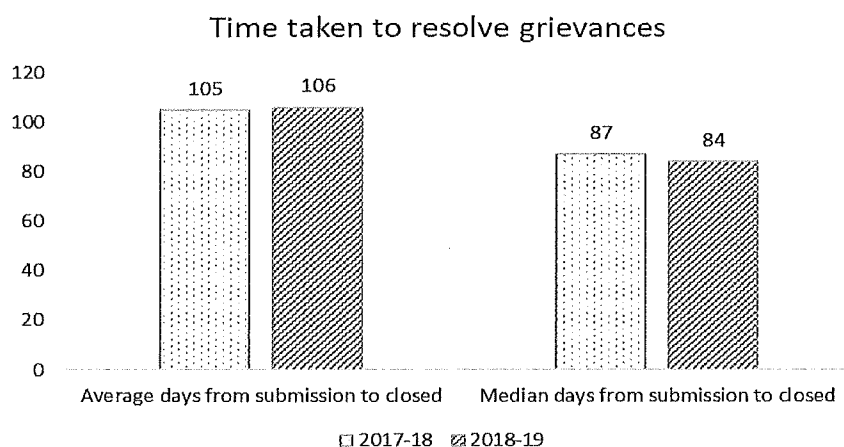
In 2018–19, the highest proportion of complaints across the ADF concerned member's career (41 per cent), termination of service (39 per cent) and entitlements (11 per cent).

As at 1 July 2018, there were 132 open complaints by ADF members, which by 30 June 2019 had decreased by 33 percent to 89 open complaints.

Of the 403 complaints completed in 2018–19 (Navy 104, Army 218 and Air Force 81):

- 231 were found not to be substantiated
- 53 were withdrawn by members
- 55 were outside jurisdiction of the Redress of Grievance system<sup>2</sup>
- 19 were partially upheld
- 29 were fully upheld
- 16 were resolved administratively outside the complaint process.

The average time taken to close these complaints was 106 days and the median time was 84 days.



## DIRECTORATE OF LEGAL REVIEW

The Directorate of Legal Review (DLR) provides strategic legal advice to government on behalf of IGADF and the Office of IGADF in order to assist the IGADF to fulfil his statutory function.

DLR fulfils this role by:

- conducting legal reviews of IGADF inquiry reports
- participating in audits throughout Australia to improve military justice performance
- advising on legislative and policy changes to improve and enhance the military justice system

<sup>2</sup> Where this occurs, the complaint may be considered under the IGADF's broader military justice jurisdiction or the complainants are referred to the appropriate avenue for their specific complaint including, for example, the scheme for Compensation for Detriment caused by Defective Administration, or the Defence Force Ombudsman.

- d. providing legal advice in relation to investigations, inquiries, sanctions, redress of grievance and other complaints, and
- e. designing and developing awareness training to promote military justice.

### **Staffing**

DLR is led by an O5 ADF Legal Officer and comprises one other permanent ADF legal officer supplemented by specialist reserve and APS legal officers.

### **Activities**

In 2018–19 DLR managed legislative reform projects on behalf of IGADF which resulted in regulatory amendments to enhance the management of complaints and the conduct of inquires under the *IGADF Regulation 2016*.

DLR also engaged with Defence partners to enhance Public Interest Disclosure arrangements for complainants to IGADF. The new arrangements ensure those disclosers who complain to IGADF retain protections available to them under the Public Interest Disclosure scheme, including the right to remain anonymous and protections against reprisal.

### **SUMMARY DISCIPLINE SYSTEM REVIEW**

During the reporting period IGADF staff provided ongoing support, including statistical information, to the ADF's Summary Discipline Implementation Team who are implementing the recommendations made during their review into the Summary Discipline System in 2017.

### **INFORMATION TRACKING SYSTEMS AND STATISTICAL DATA**

As reported previously, IGADF sponsors two information tracking systems. These two systems are: the ADF Administrative Inquiries Tracking System (ADFAITS); and Defence One—Conduct Reporting and Tracking System (CRTS).

ADFAITS remains the principal, ADF-wide, information system capturing and tracking administrative inquiries. ADFAITS is an information repository of such inquiries. ADFAITS relies heavily on units and formation level headquarters maintaining and updating information in the database. During the reporting period, 15 inquiry officer inquiries were entered in ADFAITS. Navy accounted for one, Army 12, Air Force one and Joint command units one.

CRTS is part of a personnel database which records and tracks ADF members' individual conduct. CRTS tracks individual disciplinary cases and administrative sanctions. As such CRTS becomes an integral tool for effective career management and discipline maintenance.

By default, data entry into CRTS is primarily each ADF unit's responsibility. Qualified staff at each ADF unit enter conduct data for ADF members posted to that unit. Ultimately timely and accurate data entry by the unit is paramount to the quality of the data output produced from CRTS. It is that data on which IGADF relies to identify discipline trends and provide military justice statistical data and analysis to the ADF.

Considerable improvements in the quality of CRTS data had been noted in recent years, particularly in the capture of matters dealt with at the higher tribunal level. However, towards the end of the reporting period IGADF staff noticed deterioration in CRTS data entry. Following the reporting period, IGADF drew this deterioration in CRTS data entry to the

attention of the Vice Chief of the Defence Force, who has since taken action to improve the situation.

Because CRTS is part of a personnel database, aggregating CRTS data to produce organisational statistics is often a manual rather than an automatic endeavour.

### **Requests for information**

Building on previous years, the demand for military justice statistics compiled by IGADF staff continues to increase. The IGADF responded to requests from both military justice entities and other areas in Defence. Data supplied by IGADF includes unit level investigations and timeframes, DFDA trial data and timeframes, administrative sanctions, protection orders and complaint data. The Annex to this report provides a synopsis of some of the key military justice statistical information generated during this reporting period.

## **CONFERENCES, VISITS AND OTHER ACTIVITIES**

### **Commonwealth Government Inspectors-General**

On 18 March 2019 the IGADF convened the second meeting of Commonwealth Government Inspectors-General. The aim of these meetings is to enhance governance. The meetings are an opportunity each year for Commonwealth inspectors-general with similar functions and responsibilities to share new or improved oversight practices and procedures. The meetings also provide participants insights into alternative approaches to common challenges.

### **International Conference of Ombuds Institutions for Armed Forces**

The IGADF attended the 10<sup>th</sup> International Conference of Ombuds Institutions for the Armed Forces (ICOAF) in Johannesburg on 28–30 October 2018. The conference was jointly hosted by the South African Military Ombud and the Geneva Centre for the Democratic Control of Armed Forces.

The conference allows participants to share experiences and approaches to current military justice challenges.

During this conference, the IGADF together with the Commonwealth Ombudsman's representative, held initial discussions with representatives from the Geneva Centre for the Democratic Control of Armed Forces about the potential for Australia to co-host the 13<sup>th</sup> ICOAF in 2021.

### **Visit by the Israel Defence Force—Deputy Military Advocate General**

Defence Legal hosted a delegation from the Israel Defence Force, including the Deputy Military Advocate General, in November 2018. During this visit the delegation briefly attended the Office of the IGADF to gain an insight into the roles, functions and responsibilities of the IGADF and current military justice topics. Specifically, the delegation were interested in discussing law enforcement in an operational context.

Such visits are opportunities to liaise with international authorities about oversight in their armed forces.

### **Military justice seminars, training and forums**

Each year the IGADF engages with stakeholders by attending various seminars and forums across Australia, presenting on the role of the IGADF, and discussing current military justice and other topics. During the reporting period, the IGADF presented on numerous courses including: Legal Training Modules for ADF legal officers, command courses and reserve legal officer training activities.

Professional development training has been instrumental in establishing and maintaining appropriate skills for IGADF staff over recent reporting periods. During 2018–19, IGADF staff undertook development training in the analysis of evidence, complex inquiry processes, questioning witnesses and interview techniques, and influencing through communication and report writing.

### **CONCLUSION**

Recent reporting periods have identified a consistently high operating tempo in the Office of the IGADF. This continued in 2018–19 with the high workload characterised by an increase in the number of military justice performance audits, and numbers of submissions, grievance complaints and ADF death notifications that were similar to previous years.

IGADF monitoring activities, including analysis of military justice data, suggest the administration of discipline, including at unit level, appropriately protects the individual rights of ADF members. This contributes significantly to a fair and effective military justice system, thus ensuring operational effectiveness.

Overall, I remain satisfied with the rate of effort achieved by the Office of the IGADF in 2018–19 while matching the high operating tempo of previous reporting periods.



## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

|   |         |
|---|---------|
| Australian Defence Force  | ADF     |
| ADF Administrative Inquiry Tracking System                        | ADFAITS |
| ADF Investigative Service   | ADFIS   |
| Australian Public Service   | APS     |
| Australian Standards on Assurance Engagements                     | ASAE    |
| Chief of the Defence Force  | CDF     |
| Case Management System  | CMS     |
| Commission of Inquiry   | COI     |
| Conduct Reporting and Tracking System                             | CRTS    |
| <i>Defence Act 1903</i>   | the Act |
| <i>Defence Force Discipline Act 1982</i>                          | DFDA    |
| Directorate of Legal Review                                       | DLR     |
| Directorate of Military Justice Performance Review                | DMJPR   |
| Directorate of Military Redress Review                            | DMRR    |
| Directorate of Select Incident Review                             | DSIR    |
| Enlisted 06   | E06     |
| Enlisted 07   | E07     |
| Enlisted 08   | E08     |
| Executive Level 1   | EL1     |
| Executive Level 2   | EL2     |
| Inspector-General of the Australian Defence Force                 | IGADF   |
| Officer Level 4 (referring to a Major or equivalent)              | O4      |
| Officer Level 5 (referring to a Lieutenant Colonel or equivalent) | O5      |
| Officer Level 6 (referring to a Colonel or equivalent)            | O6      |
| Officer Level 7 (referring to a Brigadier or equivalent)          | O7      |
| Officer Level 8 (referring to a Major General or equivalent)      | O8      |
| Redress of Grievance  | ROG     |
| Special Operations Command  | SOCOMD  |
| Special Operations Task Group                                     | SOTG    |

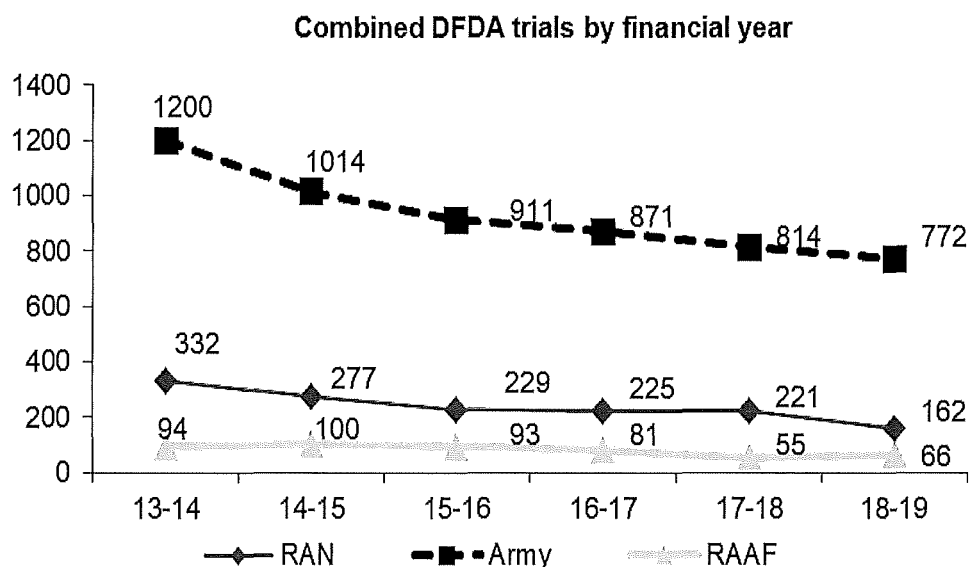
## MILITARY JUSTICE STATISTICS

### Discipline statistics

The steady decline in the overall number of disciplinary trials (courts martial, Defence Force magistrate trials and summary trials) continued in 2018–19 with a further reduction of eight per cent compared with the previous year.

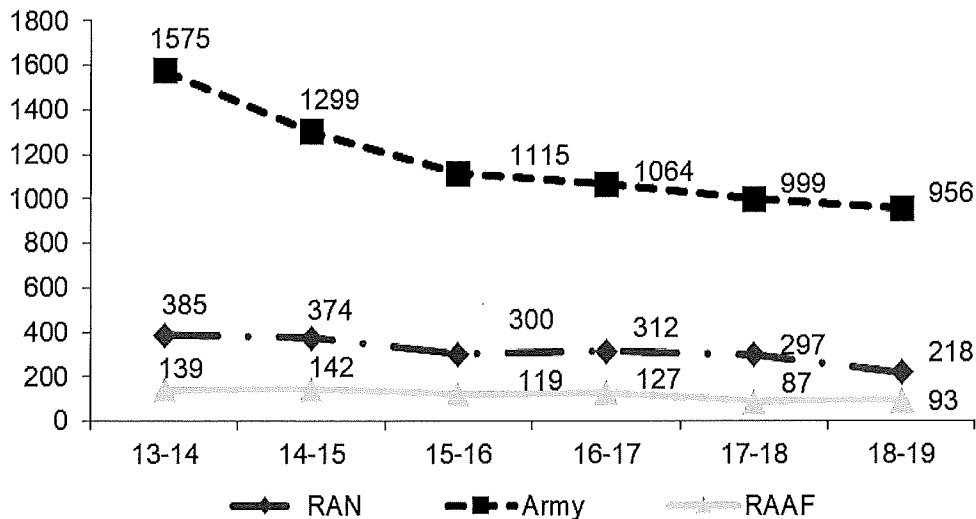
During this reporting period, there were a total of 1000 trials (Navy 162, Army 772 and Air Force 66) conducted, down from a total of 1090 trials (Navy 221, Army 814 and Air Force 55) in 2017–18.

Continuing this trend, the total number of convictions recorded across the ADF decreased by six per cent from 1383 in 2017–18 to 1267 in 2018–19<sup>3</sup>. Recent trial and conviction trends are illustrated in the below graphs.



<sup>3</sup> Discipline convictions usually outnumber trials because charge sheets often include more than one charge.

**Combined DFDA convictions by financial year**



Superior trials (courts martial and Defence Force magistrate trials) decreased by a further six per cent, a trend that has been observed over the past five financial years. In 2018–19 there were 30 superior trials recorded, compared to 32 trials recorded in 2017–18.

Discipline trials at the summary level continued to decrease during the reporting period, extending this trend to the past five reporting periods. Overall there was an eight per cent decline in summary trials from 1058 (Navy 206, Army 803 and Air Force 49) in 2017–18 to 970 (Navy 153, Army 757 and Air Force 60) in 2018–19.

During the same period, the number of convictions, from summary level trials, across the three Services decreased by six per cent from 1283 (Navy 236, Army 970 and Air Force 77) in 2017–18 to 1200 (Navy 198, Army 925 and Air Force 77) in 2018–19.

In 2018–19, there was a combined total of 67 (Navy 13, Army 38 and Air Force 16) not guilty verdicts, and a further 42 (Navy 8, Army 32 and Air Force two) convictions were quashed on automatic review. These results indicate the ADF discipline system is operating fairly.

#### **Alcohol conviction statistics**

During this reporting period, there were 146 disciplinary convictions recorded where the misuse of alcohol was a contributing factor (excluding alcohol misuse while on deployment), equating to a 21 per cent decrease from the 185 recorded in 2017–18. Navy accounted for 44 (30 per cent), Army 90 (62 per cent) and Air Force 12 (5 per cent).

A further 34 disciplinary convictions for alcohol related offences committed on deployment during the same period, were recorded. Navy accounted for 19 (56 per cent), Army 11 (32 per cent) and Air force four (12 per cent).

#### **Discipline infringement statistics**

In 2018–19, there was a significant decrease of 14 per cent in the number of disciplinary

officer infringements reported to the IGADF. Overall there were 4331 (Navy 1433, Army 2523 and Air Force 375) infringements recorded in 2018–19 compared to 5047 (Navy 1981, Army 2626 and Air Force 440) recorded in 2017–18

### Administrative sanctions statistics

During this reporting period a total of 1218 (Navy 334, Army 718 and Air Force 166) administrative sanctions were imposed. The administrative sanctions system protects the reputation of the ADF through targeting and correcting shortfalls in professional or acceptable behaviour, and in a member's performance and standards.

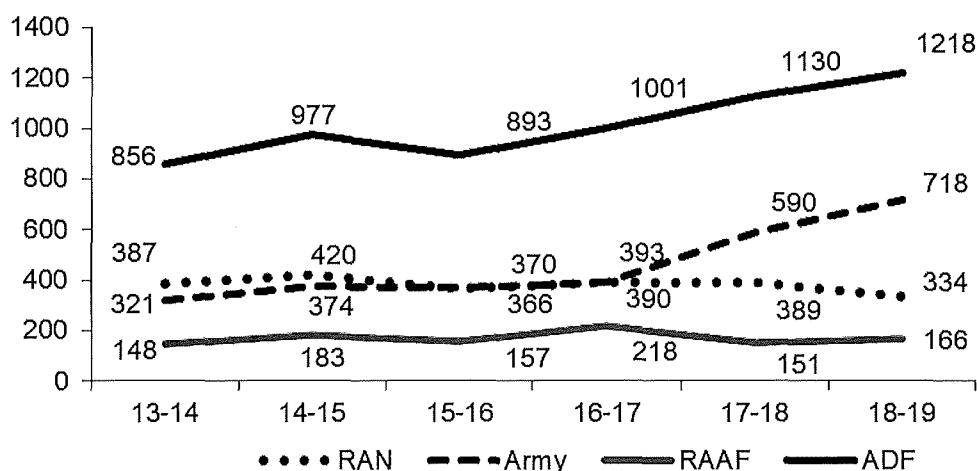
Administrative sanctions include, but are not limited to

- formal warning
- censure
- termination of service
- reduction in rank
- removal from an appointment or locality
- denial or delay of promotion or revocation of provisional promotion
- loss of security clearance, and
- change of employment category.

The main reasons for the imposition of an administrative sanction in 2018–19 were; misuse of alcohol (204), civil offences (159), fitness test failure (359), personal qualities (157) and unsatisfactory conduct (741).

As indicated in the below graph, the overall use of administrative sanctions continues to increase. Army again recorded the highest use of administrative sanctions and accounts for 59 per cent of all sanctions imposed, while Navy accounts for 27 per cent and Air Force 14 per cent.

**Administrative sanctions by financial year**



Of the 1218 sanctions imposed, formal warnings (469), counselling (343), termination of service (202), censures (78) and suspension from duty (67) account for 95 per cent of all sanctions imposed, and remain the most common form of administrative sanction imposed.

The remaining 59 (five per cent) of the sanctions imposed include reduction in rank, administrative posting and administrative warning.

#### **Protection orders**

ADF members are required to report protection orders issued against them. In 2018–19, 37 protection orders were reported and recorded. Of those, six (16 per cent) were issued against Navy members, 27 (73 per cent) against Army members, and four (11 per cent) against an Air Force member.

In addition, 14 (Navy one, Army 12 and Air Force one) protection orders were extended during the reporting period.

#### **Civil convictions**

Increases in the civil conviction of ADF members over recent reporting periods did not continue in 2018–19, with a 37 per cent decrease from 158 in 2017–18 to 99 in 2018–19.

Continuing with recent trends, the most common sentences imposed by civilian courts or authorities on ADF defendants in 2018–19 were monetary fines and the loss or suspension of motor vehicle licences, which together account for 88 per cent of all sentences imposed.





ANNEXURE - FPS-3

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

**BEN ROBERTS-SMITH**


Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 4 pages is the annexure marked FPS-3 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

  
.....  
Witness *SOLICITOR, AT SUPREME COURT*



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Department of Defence

## Military Justice

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Afghanistan Inquiry -  
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## Inspector-General ADF Afghanistan Inquiry - Public Call for Information

### Call for Information About Rumours of Possible Breaches of the Laws of Armed Conflict in Afghanistan

The Inspector-General of the Australian Defence Force (IGADF) is conducting an Inquiry into rumours of possible breaches of the Laws of Armed Conflict by members of the Australian Defence Force (ADF) in Afghanistan, between 2005 and 2016.

The Inquiry would like anyone who has information regarding possible breaches of the Laws of Armed Conflict by Australian forces in Afghanistan, or rumours of them, to contact the Inquiry.

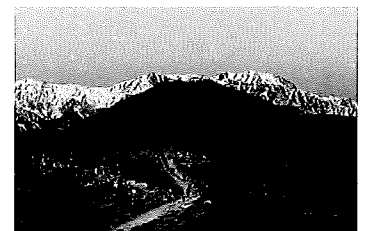
Email: [IGADF.1716@defence.gov.au](mailto:IGADF.1716@defence.gov.au)

Post: IGADF Inquiry 1716, BP25-4, Brindabella Park, PO Box 7924, CANBERRA BC ACT 2610

The Inquiry is being conducted in private. Arrangements can be made for the identity of persons providing information to be protected and kept confidential and for information to be received in-



Defence and the Department of Veterans' Affairs care about the welfare of all personnel involved in the IGADF Afghanistan Inquiry and are committed to ensuring there is [access to support](#) for individuals and their families.



Australian military personnel approach the summit of Charandaz peak during a hike


## Contacts

person.

The IGADF is a statutory office holder, and the Inquiry is independent of the ADF chain of command.

## Notices placed in local Afghani newspapers

on the morning of Christmas Eve in the training area of the Afghan National Army Officer Academy near Kabul, Afghanistan.



**Australian Government**  
Department of Defence

### Inspector-General of the Australian Defence Force

تقاضای معلومات در مورد شایعاتی که ممکن است قوانین جنگ در افغانستان نقض گردیده باشد

بازرس عمومی نیروهای مسلح استرالیا شایعاتی را که ممکن است اعضای نیروهای مسلح استرالیا در بین سالهای ۲۰۰۵ - ۲۰۱۶ از قوانین جنگ در افغانستان تخلف نموده باشند، مورد بررسی قرار می دهد.

این تحقیق از تمام آن عده اشخاصی که راجع به شایعات یا اتهامات تخلف از قوانین جنگ در افغانستان توسط نیروهای استرالیاایی معلومات دارند تقاضا می کند که با پروسه تحقیق تماس بگیرند.

ایمیل: IGADF.1716@defence.gov.au  
آدرس پستی:  
IGADF Inquiry 1716  
BP25-4, Bridabella Park  
PO Box 7924  
CANBERRA BC ACT 2610

این تحقیق در شرایط محرمانه صورت می گیرد. تدابیری اتخاذ می گردد تا هویت اشخاص معلومات دهنده محفوظ و محرمانه باقی بماند و معلومات در مناقشات رویارویی اخذ می شود.

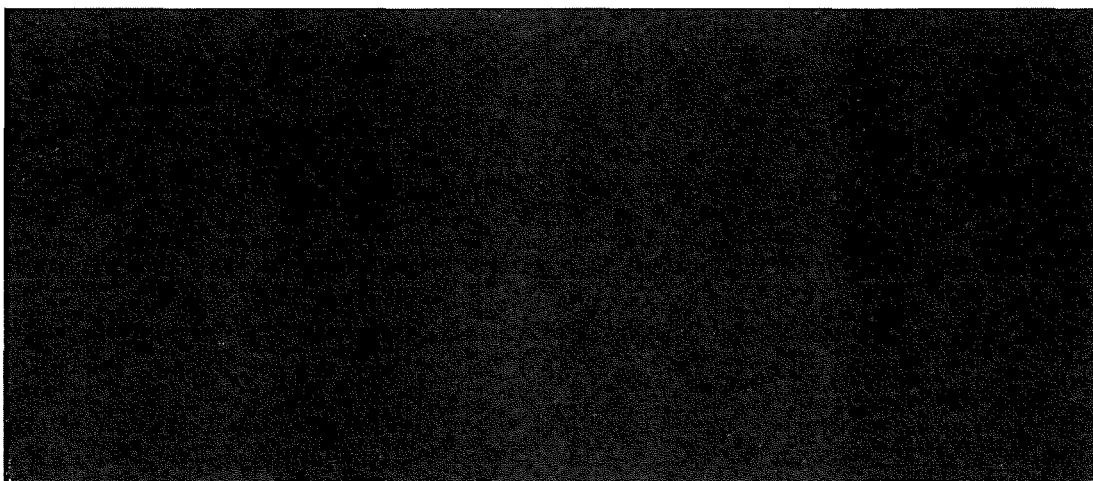
بازرس عمومی نیروهای مسلح استرالیا یک مرجع قانونی است و این تحقیق مستقل از رهبری نیروهای مسلح استرالیا است.


هیچ نوع غرامت پولی پرداخت نمی گردد و نه ویزای استرالیا از ملوق این پروسه داده می شود.

هرگاه این اطلاعات به سبب تشویش خاطر شما و یا شخص دیگری که می شناسید می گردد، شما می توانید با لایف لاین استرالیا به شماره 13 11 14 تماس بگیرید.

For more information, visit [www.defence.gov.au](http://www.defence.gov.au)

Public call for information - advertisement in Arman Monthly, 5 March 2018 (Dari translation) [ PDF-168KB]





**Australian Government**  
Department of Defence

## Inspector-General of the Australian Defence Force

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تقاضای معلومات در مورد شایعاتی که ممکن است قوانین جنگ در افغانستان نقض گردیده باشد

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ایمیل: [IGADF.1716@defence.gov.au](mailto:IGADF.1716@defence.gov.au)  
آدرس پستی:  
IGADF Inquiry 1716  
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CANBERRA BC ACT 2610

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Creating a Culture of Trust and Integrity  
Building a Better Defence Force

Public call for information - advertisement in Persian Herald, 8 March 2018 (Dari translation) [ PDF-168KB]

|   |  |  |   |   |
|---|--|--|---|---|
| <div style="border: 1px solid black; padding: 5px; text-align: center;"> <b>Accessing<br/>Our<br/>Information</b> </div> <p>Defence Service &amp; Personnel Records</p> <p>Freedom of Information</p> <p>Information Publication Scheme</p> | <p><b>Popular publications</b></p> <p>Annual reports</p> <p>Budget</p> <p>Defence White Paper</p> <p>FOI Disclosures</p> <p>Inquiry Reports</p> <p>Pay &amp; Conditions Manual</p> <p>Publications</p> | <p><b>In focus</b></p> <p>Defence Strategic Update 2020</p> <p>Afghanistan Inquiry</p> <p>Welfare Support</p> <p>IGADF Welfare Support</p> <p>COVID 19 Support</p> <p>Fighting Fit - ADF Health Portal</p> <p>PostingConnect - Posting, Moving &amp; Relocations</p> <p>Defence acknowledges the Traditional Custodians of Country</p> | <div style="border: 1px solid black; padding: 5px;"> <p><b>Like the website?</b></p> <p>We welcome you to take our 20 second survey and help us improve the site.</p> <div style="border: 1px solid black; padding: 2px; text-align: center; margin-top: 10px;"> <a href="#">Feedback</a> </div> </div> | <p><b>Minister for Defence</b></p> <p>Home page</p> <p>Biography</p> <p>Media releases</p> <p>Speeches</p> <p>Transcripts</p> |
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ANNEXURE - FPS-4

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

**BEN ROBERTS-SMITH**

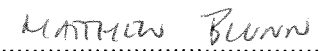
Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 34 pages is the annexure marked FPS-4 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

  
.....  
Witness *ACT SUPREME COURT*  
*SAILING*



**INSPECTOR-GENERAL  
OF THE  
AUSTRALIAN DEFENCE FORCE  
  
ANNUAL REPORT**

*01 July 2016 to 30 June 2017*

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ISSN 2207-6050 (Print)  
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## **Inspector-General of the Australian Defence Force**

**Senator the Hon Marise Payne**  
**Minister for Defence**  
Parliament House  
CANBERRA ACT 2600

Dear Minister

As the Inspector-General of the Australian Defence Force, I am pleased to submit a Report on the operations of the Office of the Inspector-General of the Australian Defence Force for the period 01 July 2016 to 30 June 2017.

This report is submitted to you for presentation to Parliament under the provisions of the *Defence Act 1903*, Section 110R.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J.M. Gaynor'.

**JM Gaynor, CSC**  
Inspector-General of the Australian Defence Force

07 December 2017





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**INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE**  
**REPORT FOR THE PERIOD**  
**01 JULY 2016 TO 30 JUNE 2017**

**PREAMBLE**

The position of Inspector-General of the Australian Defence Force (IGADF) is established under section 110B of the *Defence Act 1903* (the Act). The appointment of the IGADF is made by the Minister for Defence in accordance with section 110E of the Act.

The then Brigadier James Gaynor, CSC continued to act as the IGADF during the reporting period until his substantive appointment for a term of five years on 01 December 2016, at which time he resigned from the Australian Defence Force (ADF).

Section 110C of the Act prescribes the functions of the IGADF as follows:

- a. inquiring into or investigating matters concerning the military justice system;
- b. conducting performance reviews of the military justice system, including internal audits, at times and in the manner IGADF considers appropriate;
- c. advising on matters concerning the military justice system, including making recommendations for improvements;
- d. promoting military justice values across the ADF;
- e. if directed by the Minister or the Chief of the Defence Force (CDF) to do so – inquiring into or investigating a matter concerning the ADF; and
- f. doing anything incidental or conducive to the performance of the IGADF's other functions.

During the period 01 July 2016 to 30 June 2017 (the reporting period), two new Defence legislative instruments were made—the *Defence Regulation 2016* and the *Inspector-General of the Australian Defence Force Regulation 2016*—with both Regulations commencing on 01 October 2016. These two Regulations replaced the previous legislative and administrative arrangements applicable to operations of the IGADF.

Significantly, the new Regulations prescribe the other functions for the IGADF, including the power to inquire into or investigate:

- a. complaints made by members of the ADF about a decision, act or omission in relation to the member's service; and

- b. deaths of members of the ADF that appear to have arisen out of, or in the course of, the member's service.

The ADF's operational capability relies heavily on a military justice system that is capable of achieving an appropriate balance between the need to enforce and maintain a high level of order and discipline, while maintaining and protecting the individual rights of ADF members. The IGADF continues to contribute to a fair and effective military justice system by providing a centralised and dedicated military justice oversight function and by monitoring and inquiring into military justice related issues and alleged failures within the system.

The ADF military justice system comprises four main components:

- a. the taking of disciplinary action under the *Defence Force Discipline Act 1982* (DFDA) to enforce and maintain Service discipline;
- b. the imposition of administrative sanctions to correct individual behaviour and/or protect the reputation of the ADF;
- c. the conduct of administrative inquiries and investigations to establish the facts of an occurrence and make recommendations to remediate systemic or individual failings to improve and enhance operational effectiveness; and
- d. the handling and management of complaints by ADF members to ensure systemic or individual failings are identified and remediated to improve and enhance operational effectiveness.

## OVERVIEW

Consistent with previous reporting periods, the operating tempo in the Office of IGADF remained relatively high in the reporting period. At the commencement of the reporting period, 29 submissions were under inquiry. During the reporting period, an additional 61 inquiry submissions were received by IGADF and 42 submissions were finalised. The residual 48 submissions remained open at the end of the reporting period.

Submissions under inquiry by the IGADF at the end of the reporting period include: a number of CDF directed inquiries into complaints alleging unacceptable behaviour, medical mismanagement, administrative mismanagement and procedural flaws during the conduct of fact finding processes; allegations of undue process and interference with career management decisions; and allegations of flawed Service inquiry processes.

In addition to these inquiry submissions, IGADF received 32 submissions in relation to Service Police professional standards matters. Of these, 19 became the subject of IGADF investigations, while 13 were assessed by IGADF as matters that should more appropriately be addressed by another Defence Investigative Authority. The increasing complexity of the issues being disclosed in submissions continued throughout the reporting period, a trend that has been witnessed over the past three reporting periods.

During the reporting period, 53 military justice performance audits were conducted. This represents approximately 10 per cent of all auditable ADF units. Material deficiencies were identified in one unit. Units identified as having material deficiencies are re-audited within approximately 12 months. As noted in the previous IGADF Annual Report, two units were identified as having material deficiencies and were subject to re-audit in this reporting period; both units were subsequently found to have no material deficiencies in their military justice arrangements. During the conduct of the military justice performance audits, 2669 ADF personnel participated in focus group discussions.

In the reporting period, the IGADF initiated 43 new reviews of deaths in service of ADF members and finalised 23 reviews (18 from deaths in previous reporting periods and five from this reporting period). The IGADF also finalised four formal inquiries into ADF member deaths, finalised one inquiry into a non-death matter and recommenced management and coordination of administrative support for the resumption of a CDF Commission of Inquiry (COI). The nature of the deaths or incidents reviewed and inquired into by the IGADF during the reporting period were predominantly suicide, motor vehicle accidents, training accidents or medical issues of ADF members.

Additionally, the IGADF provided administrative support to the recommencement of the CDF COI into an accident involving a military truck 08 October 2012, which resulted in the death of a junior enlisted ADF member. The then CDF appointed the COI on 24 October 2012; however, it was adjourned while a NSW criminal prosecution was conducted against the truck's driver. The criminal trial concluded in March 2017, with the former member being acquitted of all charges.

In the reporting period, there were 423 new applications for redress of grievance received, an increase of approximately eight per cent from the previous reporting period. Of these applications, 91 were submitted under the *Defence Force Regulations 1952* and 332 were submitted under the new Defence Regulation, which came into effect on 01 October 2016. Additionally, a total of 370 applications were finalised, some of which had been received in the current reporting period, while others were received in previous reporting periods.

Of the applications for redress of grievance submitted during the reporting period, a number of grievances required considerable review, including: grievances related to the imposition of administrative sanctions; decisions relating to the suspension of members from duty when charged with civilian offences; and a decisions concerning the enforcement of return of service obligations.

In March 2016, the Chief of Army (CA) requested that the IGADF conduct a Scoping Inquiry to ascertain whether there is any substance to rumours relating to Special Operations Task Group (SOTG) activities during deployments in Afghanistan. The Inquiry commenced in May 2016. As a result of changes in legislation pertaining to the IGADF, since December 2016 the inquiry has continued at the direction of the CDF.

The IGADF Scoping Inquiry is being led by Major General the Honourable Justice Paul Brereton AM, RFD.

During the reporting period, the IGADF established an own initiative review of the Service Police Code of Conduct and Professional Standards System. The aim is to conduct a broader review of the Code of Conduct and Professional Standards investigation and enforcement system to identify and report on potential improvements to the current system, in line with both civilian and Service police best practices. The review is being undertaken by Group Captain Phillip Moss, AM, a reserve Legal Officer and former Integrity Commissioner and Head of the Australian Commission for Law Enforcement. The inquiry was ongoing at the end of the reporting period.

During the reporting period, the renewed Military Justice Coordination Committee (MJCC) appointed Commodore Nigel Perry, RANR to conduct a review into the timeliness and effectiveness of the summary discipline system. The Office of the IGADF has been consulted numerous times throughout the review, and has supplied discipline statistics in response to requests from the review team.

From 01 December 2016, following amendments to the *Ombudsman Regulations 1977*, complaints alleging sexual abuse, serious physical abuse, bullying or harassment can be inquired into by the Defence Force Ombudsman (DFO). Under the expanded role, the DFO will provide an oversight function for the handling of abuse-related complaints within Defence. During the reporting period IGADF consolidated its productive staff-level working relationships with the DFO, including facilitating the attendance of DFO staff on military justice performance audits.

In addition, the IGADF held discussions with some of the other Commonwealth Inspectors-General to develop relationships with office holders with similar functions. The purpose of those discussion was to share ideas and learn about alternative regulatory practices.

As has been raised by the Judge Advocate General (JAG), Rear Admiral the Honourable Justice Michael Slattery, RANR, in his most recent Annual Report for 2016, it is noted that the superior military tribunal system of trials by court martial and Defence Force magistrate currently continues in accordance with interim legislative arrangements—the *Military Justice (Interim Measures) Act (No 1) 2009*, as amended by the *Military Justice (Interim Measures) Amendment Act 2013*, and *Defence Legislation (Enhancement of Military Justice) Act 2015*.

Moreover, it is worth reiterating the JAG's observations concerning the retirement of the Chief Judge Advocate (CJA), Major General Ian Westwood, AM, with effect on 21 September 2017, that the interim legislative arrangements will effectively cease to have any effect, as Major General Westwood's appointment was the last appointment in force under these arrangements. Notwithstanding the recent appointment of a new CJA, the absence of any legislation amending the DFDA to reinforce the optimal safeguards of independence of additional judges advocate through their appointment and remuneration, remains a concern in an otherwise robust disciplinary system.

Overall, I remain satisfied that the high standards expected of the Office of the IGADF continue to be met and the rate of effort to achieve operational capacity within current resource allocation remains high.

## STAFFING AND RESOURCES

Staffing at the Office of the IGADF comprises multidisciplinary teams of permanent and Reserve military personnel, and Australian Public Service (APS) employees who have knowledge and experience of Service life and the military justice system. To support the performance of the IGADF's statutory roles and functions, the Office is structured as follows:

- a. Executive – comprising the IGADF (a statutory officeholder), Deputy IGADF (an O7 Legal Officer), and four administrative support staff—two Executive Assistants (APS 4/5), one Human Resources Manager (Chief Petty Officer (E08)) and one Finance Manager (Sergeant (E06)). During the reporting period, the then-Brigadier Gaynor continued to act as IGADF, while the Director of Military Redress and Review performed duties as Acting Deputy IGADF. On 01 December 2016, Mr James Gaynor, who had resigned from all forms of ADF service, was substantively appointed as the IGADF. Brigadier Bronwyn Worswick was posted to the position of Deputy IGADF with effect 19 December 2016.
- b. Directorate of Inquiries and Investigations (DII) – led by an O6 Non-Specialist Officer, is responsible to the IGADF for the inquiry, and conduct of investigations, into military justice incidents or complaints. DII comprises seven permanent ADF members, four Reserve personnel and two APS members, including one Executive Level 1 (EL1) legal officer. The ADF members include three (E09) Service Police members who provide the necessary skill-sets to inquire into, or investigate, allegations or complaints of breaches of professional standards by other Service Police members. The work of DII is supported by a core body of 10-12 Reserve officers, which is supplemented by additional Reserve officers and contractors, as required.
- c. Directorate of Military Justice Performance Review (DMJPR) – led by an O6 Legal Officer, is responsible to IGADF for the conduct of military justice performance audits, the collection and analysis of military justice statistics from military justice databases and other sources, and the management of IGADF and wider military justice information systems. DMJPR staff comprises two permanent ADF members and four APS employees. DMJPR military justice unit audit teams are predominantly supplemented by Reserve legal and non-specialist officers, as required.
- d. Directorate of Select Incident Review (DSIR) – led by an O6 Legal Officer, is responsible to IGADF for the coordination and management of inquiries into deaths of ADF members and other serious incidents. DSIR comprises five permanent ADF personnel and one APS employee. The work of DSIR is supplemented by highly qualified and specialist Reserve officers, as required.
- e. Directorate of Military Redress and Review (DMRR) – led by an Executive Level 2 (EL2) APS employee, is responsible to IGADF for the management of the formal grievance and complaint process, and the preparation of review briefs referred for final decision by CDF and Service



Chiefs. DMRR comprises six ADF members and four APS employees, including one EL1 legal officer. To assist with the grievance workload, DMRR is continually supplemented by suitably experienced and qualified Reserve members.

- f. Directorate of Legal Review (DLR) – led by an O5 ADF Legal Officer, is responsible to IGADF for the conduct of legal reviews of IGADF inquiries and investigations, the provision of advice on military justice matters, and the promotion of military justice values across the ADF through the conduct of military justice awareness and familiarisation seminars. DLR comprises two permanent ADF legal officers, supplemented as required by Reserve legal officers.

Reserve capability and the allocation of appropriate resources is an essential requirement to meeting the Office of the IGADF capability output and strategic directions. During the reporting period, single Service and non-Service groups provided sufficient Reserve resources to meet the fluid and dynamic environment in which the Office of the IGADF operated.

Similarly, professional service providers have been funded and used during the reporting period. These services have been employed to meet temporary peaks in service demands that the Office of the IGADF has been tasked with.

The additional resources and budgetary allocations were required to sustain the higher rates of effort across the Office of IGADF and to allow the outsourcing of some administrative and legal support services, which were again required during the reporting period.

## **DIRECTORATE OF INQUIRIES AND INVESTIGATIONS**

The IGADF's inquiry and investigation functions include the following responsibilities:

- a. at the direction of the Minister for Defence or CDF, to inquire into or investigate matters concerning the ADF;
- b. otherwise, to inquire into or investigate matters concerning the military justice system; and
- c. to inquire into or investigate alleged breaches of the Service Police Code of Conduct by Service Police members.

The IGADF provides an avenue for complaints relating to military justice issues where chain of command considerations may discourage, or other factors may preclude, recourse to normal avenues of complaint. An IGADF inquiry into aspects of the military justice system can make findings and recommendations in relation to whether an alleged injustice has been substantiated. The scope of IGADF recommendations can include suggested improvements to the military justice system.

Submissions to the IGADF are received from serving members, former serving members, families of members or former members, and other persons concerned about potential failures of military justice. Such submissions can range from relatively simple contemporaneous single issue complaints through to highly complex complaints raising multiple issues stretching over years or decades. Continuing the trend that has been observed over the last three reporting periods, submissions during this period were frequently characterised by the complexity and multiplicity of issues raised.

During the first three months of the reporting period, IGADF inquiries and investigations were conducted under the provisions of Part 7 of the Defence (Inquiry) Regulations 1985. From 01 October 2016, all new inquiries were conducted under the provisions of the Inspector-General of the Australian Defence Force Regulation 2016 (the IGADF Regulation), with transitional provisions providing for continuation of earlier inquiries under the previous regulations. This differentiates IGADF inquiries from single Service or other ADF administrative inquiries, which are conducted under Part 6 of the Defence (Inquiry) Regulations 1985. This important difference provides several benefits, the most significant being that IGADF inquiries are conducted independently of the chain of command, thereby reducing the likelihood of allegations of undue command influence over outcomes.

During the reporting period, IGADF inquiries had recourse to coercive powers under both Regulations. The Defence (Inquiry) Regulations 1985 provided the power to require the cooperation of ADF witnesses (including Reservists on duty) to attend and answer all questions, other than in certain exempt circumstances. The IGADF Regulation provides expanded coercive powers, permitting IGADF inquiries to compel the cooperation of Reservists whether on or off duty. In a fundamental change to the previous powers, an IGADF inquiry that has been directed by the Minister or CDF may compel the cooperation of any person, including members of the public. As with other formal ADF inquiries, IGADF inquiry officers and witnesses are protected against civil suit for actions arising in the course of their inquiry duties.

A perennial challenge for the Office of the IGADF with respect to inquiries and investigations is the maintenance of sufficient numbers of suitably qualified and experienced staff, including part-time staff, to achieve IGADF's mission and objectives in a reasonable and timely manner. Fortunately, the majority of IGADF inquiries and investigations staff has many years experience either in the full or part-time ADF or in the APS. This enables them to bring a great deal of service knowledge and expertise in inquiry and investigation related tasking, including key focus areas such as: Defence administration; ADF human resource management; command and control processes; deployed warlike, non-warlike and humanitarian operations; the military discipline system; ADF training; Defence financial management; Defence equity and diversity; complaint management; and Service Policing. The continual development and maintenance of a cadre of suitably qualified and experienced staff is being pursued through a combination of active engagement with the Services and word-of-mouth recruitment.

Another emerging challenge for the Office of the IGADF during the reporting period was a significant increase in aftercare requirements for inquiries, investigations and complaints. These aftercare requirements included:

- a. requests for reconsideration of decisions not to inquire into matters or to reopen completed cases;
- b. requests for access to inquiry material either via administrative release or under the provisions of the *Freedom of Information Act 1982*; and
- c. complaints to the:
  - (1) Minister for Defence or other parliamentarians;
  - (2) Commonwealth and Defence Force Ombudsman;
  - (3) Australian Human Rights Commissioner; and
  - (4) Office of the Australian Information Commissioner.

While parallel complaint avenues have always existed, there is a continuing trend for complainants to exercise these options, either sequentially or simultaneously, and it is not unusual to encounter a 'scattergun' approach where multiple agencies are dealing with effectively the same complaint. Addressing these aftercare requirements represented a substantial impost on the available resources within the Office of the IGADF.

### **Submissions**

A submission is a complaint or concern expressed by a member of the ADF or member of the public received by, or referred to, the IGADF. The decision on what action is to be taken in relation to a submission is made by the IGADF. Each of the Services or other Defence Groups may request that IGADF conduct an inquiry, independent of the ordinary chain of command, into matters affecting the military justice system.

During the reporting period, the IGADF received 61 inquiry submissions, a decrease of approximately 10 per cent over the number submitted in the preceding reporting period. Comparable with previous reporting periods, approximately 30 per cent of these submissions proceeded to full inquiry, with the main subjects including: abuse of authority; abuse of process; avoidance of due process; harassment; and inappropriate behaviour. However, this figure is only a partial measure of the total inquiry-related workload, with 29 matters carried forward from the previous reporting period, resulting in activity across the total of 90 matters during the reporting period. Furthermore, a number of new and continuing submissions were of a highly complex nature, which required significant cross-Group and/or inter-Departmental liaison and coordination.

The time taken to complete an inquiry can be influenced by many factors, including, but not limited to: the complexity of the complaint; time elapsed since the alleged incident; the number and location of personnel involved (complainants, respondents and witnesses); the amount and availability of witness statements and evidence; involvement of other functional areas; and the number of inquiries subject to review and clearance at a particular time.

During the reporting period 42 submissions were finalised as a result of IGADF inquiry or assessment. Of these, five submissions were found by IGADF to have been wholly or partially substantiated.

### **Service Police Professional Standards**

The ADF Service Police professional standards are currently governed by CDF Directive 14/2014 *Service Police Professional Standards: A code of conduct and management of complaints against Service Police*. The Directive provides that the reporting of all complaints regarding Service Police must be referred to the IGADF, recognising the unique role ADF Service Police play within the military justice system, and the imperative for a system to ensure that Service Police perform their duties ethically, to the highest personal and professional standard, and in accordance with the law. The IGADF's Professional Standards investigative capability enables the review of such allegations of serious breaches of the Service Police Code of Conduct to be conducted independently of the Joint Service Police Group (established in January 2017) and, in particular, the ADF Investigative Service (ADFIS) and other Service Police authorities.

During the reporting period, IGADF received 32 complaints against Service Police, of which 19 became the subject of further IGADF inquiry or investigation. A further 21 cases were carried forward from the previous reporting period, resulting in investigation activity on 40 matters during the reporting period.

### **Own initiative inquiry**

On 22 May 2017, IGADF directed the undertaking of an own initiative inquiry into the ADF Service Police Code of Conduct and Professional Standards system by Group Captain Philip Moss, AM. The aim of the IGADF inquiry is to identify potential improvements to the current *Police Code of Conduct and Professional Standards* system. The inquiry will consider the current system by:

- a. Assessing the form and functionality of the current system;
- b. Benchmarking the current system against civilian police best practice;
- c. Assessing the scope to which any Professional Standards system should encompass non-core policing roles;
- d. Determining whether the Code of Conduct should constitute a general order for the purpose of the DFDA;
- e. Assessing the adequacy and effectiveness of the Code of Conduct training;
- f. Assessing the adequacy of the current Service Police complaint system;
- g. Assessing the adequacy of the current policy and procedural documents;
- h. Assessing the mechanisms for the application of potential sanctions arising from confirmed breaches of the Code of Conduct;

- i. Drafting a revised Code of Conduct and any necessary supporting policy or procedural documents and directives.

The own initiative inquiry was ongoing at the end of the reporting period.

## **DIRECTORATE OF MILITARY JUSTICE PERFORMANCE REVIEW**

### **Audit function**

One of the main functions of the IGADF is to provide an ongoing mechanism for the conduct of internal audits and a review of the military justice system. This function is specified in section 110C of the Act, which states that the IGADF is to:

*....conduct performance reviews of the military justice system, including internal audits, at the times and in the manner the Inspector-General ADF considers appropriate.*

The IGADF seeks to conduct around 50 military justice performance audits in each reporting period, representing approximately 10 per cent of all auditable ADF units. The audits assess whether units are complying with, and implementing, military justice law and policy appropriately. In addition the audits identify possible areas for improvement in unit arrangements for the effective delivery of military justice.

The IGADF military justice performance audits look at both the disciplinary and administrative components of the military justice system and how each component operates at unit level.

Audit procedures and practices have been aligned as closely as possible to the relevant Standards on Assurance Engagements issued by the Auditing and Assurance Standards Board, namely:

- a. ASAE 3000 *Assurance Engagements Other than Audits or Reviews of Historical Financial Information*,
- b. ASAE 3100 *Compliance Engagements*, and
- c. ASAE 3500 *Performance Engagements*.

During the conduct of military justice performance audits, spot-checks of available records are undertaken by audit team members to verify and confirm appropriate practices are employed, identify possible lapses and failures in the delivery and administration of military justice at the unit level, and to provide the unit's Command team with recommendations to address breaches of policy and suggestions for better work practices when implementing military justice at the unit level.

Audit team members also conduct focus group discussions with representative groups of unit personnel, based on worn rank and, in some cases, according to gender. The purpose of these focus group discussions allows the audit team to assess and report on the participants' overall awareness of the military justice

system, as well as their perceptions of the implementation of military justice law and policy in the audited unit.

The findings from each element of the audit are compiled to generate an overall military justice performance report, which makes an assessment against specific criteria of the quality of military justice delivered at the relevant unit.

Generally, audits find minor policy breaches; however, occasionally audit teams have identified more significant breaches of military justice law and policies. In these circumstances, the relevant unit is re-audited within the following 12 months or as soon as possible thereafter.

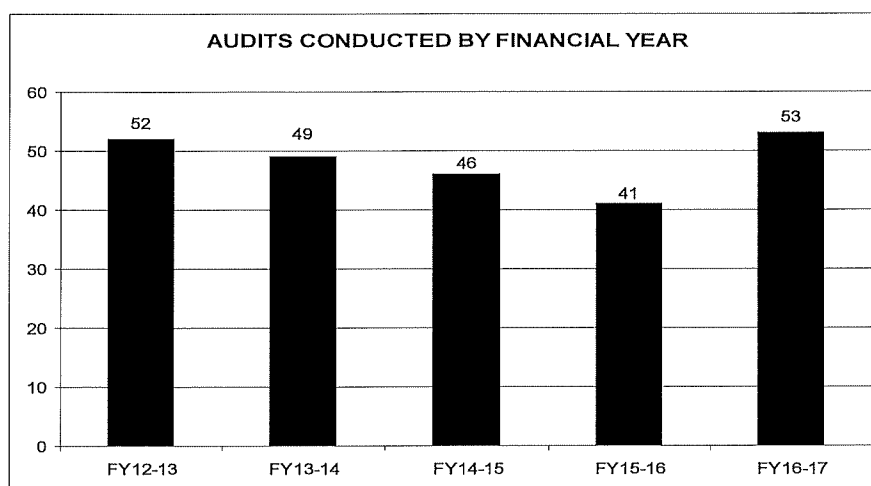
The IGADF audit program provides numerous benefits for the ADF, which include, but are not limited to:

- a. unit-initiated rectification of military justice processes and practices which the prospect of an IGADF audit may encourage;
- b. improvements to unit military justice delivery implemented during audits or as a result of audit recommendations or suggestions;
- c. the possibility that an audit might provide early warning of unit-specific issues with potential military justice impacts;
- d. the promotion of military justice values among unit commanders and staff who are accountable for military justice in their unit and among unit personnel who take part in focus group discussions; and
- e. mitigation of strategic risk by means of an assurance process in which units are audited on a periodic basis.

#### **Military justice performance audit program**

By the end of the reporting period, 53 audits of ADF units (Army 21, Navy 14, and Air Force 18) had been completed. This represents an increase of around 29 per cent over the 41 audits conducted in the previous reporting period.

The graph below illustrates the number of audits conducted since financial year (FY) 2012–13.



During the reporting period, material deficiencies were identified in one of these units (representing just under two per cent of audited units). Consistent with IGADF audit procedures, this unit will be re-audited within the next 12 months.

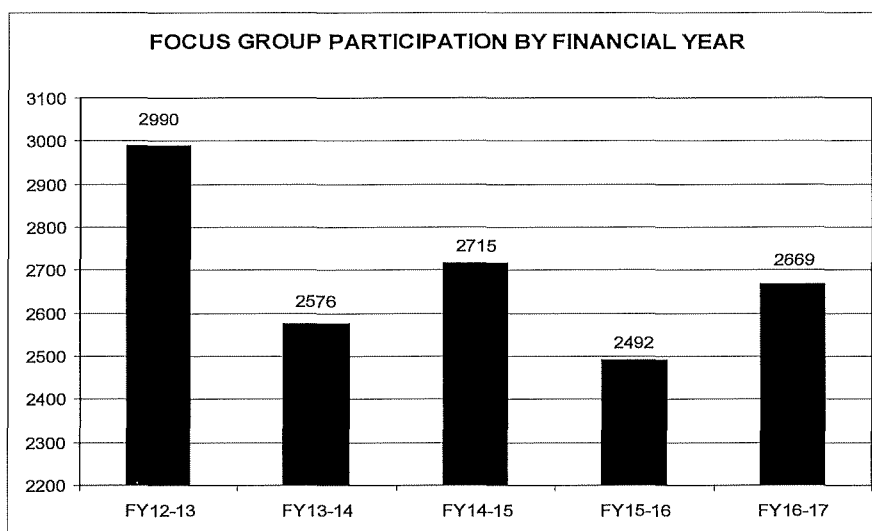
Common shortfalls or areas for improvement for units with compliance breaches include:

- a. the unit's inadequate awareness of military justice procedures;
- b. a lack of appropriate disciplinary appointments;
- c. incomplete or out of date DFDA delegations;
- d. an absence of suitable registers for notifiable incidents, fact finding and administrative inquiries;
- e. limited record keeping and absence of corporate files; and
- f. a failure to enter military justice data (investigations, DFDA offences, administrative sanctions, civil convictions, administrative inquiries and involuntary discharges) onto relevant ADF information tracking systems.

The need to conduct regular DFDA training to inform all personnel of their basic rights and responsibilities under the DFDA, and to conduct more specialised training to enable relevant personnel to perform their DFAD roles, functions and responsibilities are among the common suggestions made by IGADF as a result of the audit program.

During the reporting period, 2669 ADF personnel (Army 9743, Navy 779 and Air Force 947) participated in a focus group discussion during the course of the audit program.

The graph below depicts the focus group participation rate since FY2012–13.



#### **Focus group survey outcomes**

Focus group discussions, along with an analysis of the survey responses, continue to provide a useful indication of the effectiveness of the ADF's military justice system administered at the unit level. Responses to the focus group survey during the reporting period show:

- a. 79 per cent of participants believe the discipline system is fairly and consistently applied at unit level;
- b. 84 per cent of participants believe the DFDA is an effective tool for maintaining discipline;
- c. 76 per cent of participants were aware of their rights and obligations under the discipline system;
- d. 33 per cent of participants believed the complexity of the DFDA discourages the laying the charges;
- e. 81 per cent of participants believed their unit would treat them fairly and impartially if they were the subject of an administrative inquiry;
- f. 77 per cent of participants believed their unit would fairly consider any response made by the member before imposing an administrative sanction against them;



- g. 82 per cent of participants had confidence in their chain of command to resolve complaints;
- h. 72 per cent of participants believed complaints made to their chain of command would be dealt with fairly, promptly and impartially;
- i. 64 per cent of participants believed their unit maintained a balance between the rights of complainants and the rights of respondents;
- j. 16 per cent of participants believed they had experienced unacceptable behaviour at their unit;
- k. 90 per cent of participants knew where to obtain advice or information on unacceptable behaviour;
- l. 93 per cent of participants believed their unit would take appropriate action if they became aware of an incident or complaint of sexual misconduct, including a sexual offence; and
- m. 79 per cent of participants believed all genders are treated equally under the military justice system.

The individual unit survey results are compared with the survey averages, for their Service, from the previous financial year period. This allows the benchmarking of the unit's ability to deliver a healthy, effective and efficient military justice system. The results assist the IGADF to assess trends in the ADF's perceptions of the military justice system, and indicate where response rates vary significantly from Service average, assisting the chain of command to identify possible issues.

While the IGADF audits contribute significantly to the monitoring of the health and effectiveness of the military justice system within the ADF, the IGADF also relies on accessing data from both internal and external information sources to analyse, identify, examine and propose remedies for military justice failures and shortcomings.

### **Information Tracking Systems**

The IGADF sponsors two information tracking systems: the ADF Administrative Inquiries Tracking System (ADFAITS); and the Defence One – Conduct Reporting and Tracking System (CRTS).

ADFAITS is the primary, ADF-wide, information system for the capture and tracking of administrative inquiries, and provides a repository of information regarding these inquiries. The IGADF continues to monitor and develop ADFAITS to ensure the system can cater to the requirements of the users. The ADFAITS system was successfully upgraded as part of the Centralised Processing project in October 2016.

An in-depth review of the governing policy for the ADFAITS system, Defence Instruction (General) Administrative 65-1 *Administrative Inquiry Tracking*, occurred during the reporting period. The review identified the need for the policy to be

relocated within the *Administrative Inquiries Manual*, with work continuing on the review and implementation of the revised policy.

During the reporting period there were 35 (Navy 2, Army 31, Air Force 1 and CDF 1) administrative inquiries recorded on ADFAITs.

CRTS tracks an ADF member's entire conduct record and has become an integral tool for effective career management and discipline maintenance. Through timely and accurate data entry, the CRTS system allows the IGADF to provide military justice statistical data and analysis to command, identifying discipline trends, as well as responding to media enquiries.

During the reporting period the CRTS system was identified as a suitable information tracking system for recording and tracking protection orders, which includes domestic violence orders and apprehended violence orders, amongst others. Subsequently work was undertaken on the CRTS system to allow for the recording and monitoring of protection orders where an ADF member is subject to such an order.

Similarly, during the reporting period, the governing policy for the use of the CRTS system, Defence Instruction (General) Administrative 10-8 *Conduct Reporting and Tracking System*, was reviewed. The IGADF is working with the Directorate of Military Personnel Policy to have the policy information relocated to the *Military Personnel Policy Manual*.

### **Requests for information**

The Office of the IGADF experienced an increase in demand to provide military justice statistics and analysis during the reporting period, from both internal and external agencies. The Office of the IGADF responded to requests for information from the CDF, VCDF, Chief of Air Force, Chief of Army, the Office of the Judge Advocate General, the Registrar of Military Justice, Provost Marshal ADF, the Summary Discipline System Review Team, the Australian Human Rights Commission and the Australian War Memorial. In addition, the Office of the IGADF actioned multiple Freedom of Information requests for military justice related data.

A synopsis of some of the key military justice statistical information generated during the reporting period is contained in the Annex.

### **DIRECTORATE OF SELECT INCIDENT REVIEW**

The Directorate of Select Incident Review (DSIR) conducts reviews and formal inquiries into the circumstances of all deaths in service of ADF members, whether they are combat or non-combat related. DSIR is also responsible for conducting reviews and inquiries into any other select incident not involving the death of an ADF member. To assist the performance of this IGADF function, CDF Directive No 15/2015 *Reporting of Deaths of ADF Members and Support to IGADF and CDF Appointed Inquiries* was released in October 2015. The Directive requires Service Chiefs to promptly report the death of a member of their Service to IGADF and it directs the Chief of Joint Operations (CJOPS) to report the death of ADF members

force-assigned to him. In some circumstances, the CDF might appoint a COI and, on those occasions, DSIR manages and coordinates support to the conduct of the CDF COI.

During the reporting period, DSIR coordinated and conducted IGADF reviews and inquiries under Part 7 of the Defence (Inquiry) Regulations 1985 and the Inspector-General of the Australian Defence Force Regulation 2016. The latter regulation provides IGADF with the legislative basis to review and inquire into the death of an ADF member when the death appears to have arisen out of, or in the course of, the member's service in the ADF. These reviews and any formal inquiry by the IGADF are conducted independently of the chain of command.

After notification from Navy, Army, Air Force or Joint Operations Command, DSIR reviews the circumstances of each death, including examination of compliance with Defence policies and procedures. The review and inquiry process is well established, but it requires close liaison and coordination with Service Headquarters, Joint Operations Command, Joint Health Command, Defence Community Organisation, ADFIS as well as commands, formations and units. Investigations into deaths often require input from Federal, State or Territory police forces and relevant Coroners – this contact is conducted through the support of ADFIS.

On completion of a review or inquiry, IGADF provides written advice to the CDF as to whether the death appears to have arisen out of, or in the course of, the member's service. IGADF review and inquiry reports provide CDF with accurate and unbiased information that may be used for internal decision making. When appropriate, IGADF will also make recommendations to the CDF to improve policies and procedures with the purpose of preventing a recurrence of incidents.

Reports provided to the IGADF and CDF are closely scrutinised to ensure that all evidence which is reasonably practicable to obtain has been obtained, that procedural fairness has been provided to adversely affected individuals and that recommendations made in IGADF reports are appropriate for implementation.

During the reporting period, IGADF received notification of, and DSIR commenced reviews into, 43 deaths of ADF members.

IGADF finalised 23 reviews of deaths in service; 18 related to deaths that occurred in previous years and five were from deaths in this reporting period. Of those 23 deaths, 10 (44 per cent) were due to medical issues, six (26 per cent) were suicides and five (22 per cent) were the result of motor vehicle accidents.

IGADF also finalised four formal inquiries into ADF member deaths and one inquiry into a matter not involving death. Additionally, IGADF re-commenced management and coordination of support for the resumption of a CDF COI that was previously suspended until a separate civilian criminal trial was complete.

## **DIRECTORATE OF MILITARY REDRESS AND REVIEW**

The Redress of Grievance (ROG) process is a legislated process by which ADF members can submit formal complaints about matters that relate to their service, for consideration, by their chain of command and now the IGADF.

The reporting period brought significant change to the administration of ROGs in the ADF. On 01 October 2016, Part 7 of the Defence Regulation 2016 provided for a new, more flexible ROG process with a single layer of review conducted by the IGADF, in whatever manner the IGADF considers to be appropriate to the circumstances (new system ROGs).

ROGs submitted before 01 October 2016 (old system ROGs) continued to be managed in accordance with Part 15 of the Defence Force Regulations, including preservation of a member's discretion to refer their complaint to their Service Chief, and in some circumstances, the CDF. IGADF continued to inquire into these old system ROGs and provide reports to Service Chief delegates and CDF.

As noted in the previous IGADF Annual Report, it was recognised that external resources would be required to assist in dealing with an accumulation of old system ROG casework. Consequently, during the reporting period, IGADF engaged three law firms to assist with the backlog of complaints. By the end of the reporting period, one of those firms continued to assist with old system ROGs.

Defence policy is that complaints should be dealt with quickly, at the lowest possible level, and that complaint handling is routinely a function of command and line management. The process for handling new system ROGs encapsulates that policy, but importantly provides for IGADF oversight. ROG complaints must be submitted to the member's Commanding Officer or an authorised complaint recipient (ACR). However, Commanding Officers and ACR's must refer every ROG complaint to the IGADF within 14 days of receipt, unless the member has withdrawn it. IGADF is automatically sent a copy of a complaint where it is submitted via the approved, automated form. The expectation is that Commanding Officers will continue to deal with complaints, where appropriate, even after the referral to the IGADF.

IGADF considers every complaint, but has discretion to not consider any complaint in detail, or to stop considering any complaint for a variety of reasons.

The new ROG system has neither substantially altered the number of complaints submitted nor the subject matters of complaints. The flexibility and discretions provided under the new system have, however, resulted in reduced time taken to finalise complaints, which in turn has addressed previous concerns with perceptions of misuse of the ROG process to delay executive action, especially with respect to termination of service decisions.

### **ROGs submitted**

During the reporting period, 423 ROGs were submitted by ADF members, an eight per cent increase on the previous reporting period (392). Consistent with previous reporting periods, the main subjects of complaint concerned career (38 per cent), termination of service (33 per cent), and entitlements (18 per cent).

### **ROGs referred to Service Chiefs and CDF**

During the reporting period, 37 ROGs were referred to Service Chiefs and 14 to the CDF.

### **Decisions and outcomes**

ROG decision outcomes are categorised under six headings: 'complaint not reviewable'; 'withdrawn by member'; 'administrative resolution'; 'no merit'; 'some merit' (ie partially upheld); and 'has merit' (ie fully upheld).

Overall, 21 per cent of those complaints that proceeded to a substantive decision were substantiated either in whole or in part. A further 11 per cent were withdrawn by the applicant prior to substantive consideration as a ROG. Some of these withdrawals likely occurred for reasons of recognised merit and subsequent resolution.

### **ROGs finalised at unit level**

During the reporting period, 370 ROGs (Navy 78, Army 197 and Air Force 95) were finalised at unit level. Of those, 177 were found to have no merit, 49 were withdrawn by the applicants 48 were not reviewable, 30 were partially upheld, 49 were fully upheld, 15 were resolved administratively outside the ROG process and two were automatically referred to the Service Chief for consideration (under Regulation 77 of the Defence Force Regulations 1952).

The present management system for monitoring ROGs is being amended to reflect the new legislative process, including the flexibility which allows concurrent consideration by command and IGADF. Current tracking indicates that the average and median times to finalise complaints has reduced substantially under the new ROG process.

### **ROGs finalised at Service Chief and CDF Level**

During the reporting period, 16 ROGs (Navy three, Army 10 and Air Force three) were finalised at the CDF level. Of those, 10 were found to have no merit, three were partially upheld and three were fully upheld.

A further 122 ROGs (Navy 28 Army 59 and Air Force 35) were decided at the Service Chief level. Of those, 94 were found to have no merit, five were withdrawn by the applicants and five were not reviewable. Of the remaining 18, six were partially upheld, 11 were fully upheld and one was resolved administratively outside of the ROG process.

### **DIRECTORATE OF LEGAL REVIEW**

In November 2016, IGADF provided intensive training for those ADF Legal Officers seeking to gain Head Defence Legal approval to review Inquiry Officer Inquiries under the Defence (Inquiry) Regulations 1985. This training supports the

requirements contained in the *Administrative Inquiries Manual* for review by appropriately trained and endorsed officers to conduct review of such inquiries. It acts as an important element of the assurance mechanism for the wider ADF as to the quality of review being conducted.

Members of the legal team assisted in the conduct of the IGADF military justice performance audits throughout Australia.

During the reporting period the IGADF continued to be consulted and to provide input to the development or amendment to Defence policies relevant to military justice.

## **VISITS AND OTHER ACTIVITIES**

Meetings with international counterparts provide excellent opportunities for the IGADF to liaise with other agencies and authorities who share similar oversight functions and responsibilities within their military justice systems. During the reporting period, the IGADF met with delegations from China and Canada.

### **Visit by China's Auditor-General of the Military Justice Audit Office**

International Policy Division and Audit and Fraud Control Divisions jointly hosted a visit from China's Auditor-General of the Military Audit Office, Major General Guo Chunfu, and a delegation of six Officers from the People's Liberation Army on 18 January 2017.

An invitation was extended to the IGADF to meet with the Auditor-General, with the main purpose of the visit to allow the Chinese delegation to gain a broader understanding and appreciation of the ADF's military justice system, and to initiate relationships between the IGADF, as a key military justice appointment, and the Chinese delegation.

A brief highlighting the IGADF function, roles and responsibilities within the ADF military justice system was also provided to the delegation.

### **Visit by the Canadian Court Martial Comprehensive Review Team**

As noted in the previous IGADF Annual Report, the IGADF met with the Canadian Court Martial Comprehensive Review Team (CMCRT) and provided a brief on the ADF military justice practices and procedures, in particular Service Discipline. A second meeting between the IGADF and the CMCRT was held on 24 August 2016.

The discussions during this meeting focused on the comparisons between the two military justice systems, the ways in which they operate within their respective legal frameworks and the effectiveness and efficiency of each of the military justice systems.

### **Attendance at conferences**

During the reporting period, IGADF accepted invitations to attend, and present at, numerous military justice related conferences. Those conferences attended by the IGADF included: the Australian Institute of Administrative Law's National Administrative Law Conference, the one-day inaugural Fraud and Anti-corruption Congress hosted by the Defence Audit and Fraud Control Division, the annual Reserve Legal Officer Heads of Panel Workshop and the Defence Legal National Joint Legal Issues Workshop.

In addition, IGADF representatives attended the third annual Fraud and Corruption Network (FACNET) Forum in Canberra from 01 to 04 May 2017, which was hosted by the Defence Audit and Fraud Control Division. The FACNET Forum was attended by senior level representatives from the Office of the Inspector-General of the United States Department of Defense, the United Kingdom Ministry of Defence, the Canadian Department of National Defence and the New Zealand Ministry of Defence and the ADF.

Presentations delivered by the IGADF covered the functions, roles and responsibilities of the Office of the IGADF, current military justice topics and a brief analysis of military justice statistics.

### **Military justice seminars, training and forums**

During the reporting period, the IGADF was invited to attend and present on the role of the Office of the IGADF, and current military justice topics at various seminars and training courses. These courses included the Legal Training Modules run by the Military Law Centre as part of ADF legal officer's training continuum, command courses and Reserve Legal Officer training activities. In addition, the IGADF attended a number of topical forums, including the Military Justice Coordination Committee, the Military Justice Legal Forum and the Commonwealth Complaint Handling Forum.

IGADF staff also assisted the Military Law Centre in the delivery of the Inquiry Officer Training Course, which is the base competency course for ADF members who may be required to conduct inquiries into serious or complex matters in Defence.

Professional development training courses and workshops in Administrative Decision Making, Managing Unreasonable Complaint Conduct, and The Application of Military Law from a Psychological View Point - Influence by Hindsight Bias, were delivered to IGADF staff throughout the reporting period.

Due to the nature of the work undertaken within the office of the IGADF, an emerging concern is the mental wellbeing of staff. To support staff in these specific areas of IGADF, mental health training in Recognising and Responding to Vicarious Trauma and Supporting Practice with Complex Trauma Clients was administered, and an IGADF Mental Health Strategy is being developed.

### **Submissions to Parliamentary inquiries**

During the reporting period, the IGADF made two written submissions to inquiries of the Senate Foreign Affairs, Defence and Trade References Committee ('the Committee'). The first was in relation to the Committee's inquiry into matters raised by the New South Wales (NSW) Police Strike Force CIVET report, and the second concerned the Committee's inquiry into suicide in the ADF.

### **CONCLUSION**

The operating tempo of the OIGADF during this reporting period was relatively higher than in previous years. Contributing to this higher operating tempo was a 29 per cent increase on the previous year in the conduct of military justice performance audits, an eight per cent increase in the number of applications for Redress of Grievance and a five per cent increase in the number death reviews initiated by the OIGADF. The number of FOI applications also increased, and a higher demand to provide military justice statistics and analysis, from both internal and external agencies, also contributed to the higher operating tempo.

Despite the number of submissions and complaints against Service Police decreasing slightly during the reporting period, those professional standards complaints that were received generally required a more complex assessment, inquiry or investigative response. The seriousness of certain matters under inquiry generally also added to this complexity.

The commencement during the reporting period of new regulations supported the performance of IGADF's statutory role and functions and replaced previous legislative and administrative arrangements. By the end of the reporting period, it was apparent that the enhanced regulatory processes had facilitated more timely and more efficient outcomes, particularly in the management and handling of grievances under the new Redress of Grievance scheme. Additionally, considerable progress was achieved in relation to the own initiative review of the Service Police Code of Conduct and Professional Standards System.

A fair and effective military justice system is necessary for the ADF's overall operational effectiveness. The IGADF, as an independent and impartial inquiry, assurance, review and integrity office is uniquely placed to conduct inquiries into ADF matters and to observe the operation of the military justice system.





## GLOSSARY OF ACRONYMS AND ABBREVIATIONS

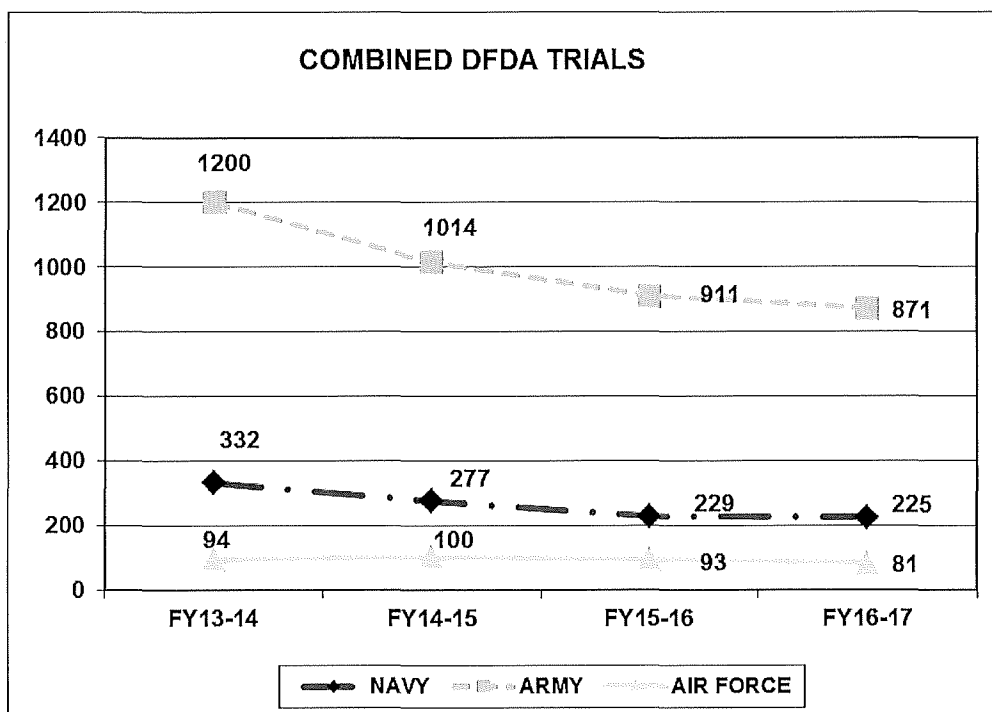
|  |         |
|--|---------|
| Australian Defence Force                             | ADF     |
| ADF Administrative Inquiry Tracking System           | ADFAITS |
| ADF Investigative Service                            | ADFIS   |
| Australian Public Service                            | APS     |
| Australian Standards on Assurance Engagements        | ASAE    |
| Chief of the Defence Force                           | CDF     |
| Commission of Inquiry                                | COI     |
| Conduct Reporting and Tracking System                | CRTS    |
| <i>Defence Force Discipline Act 1982</i>             | DFDA    |
| Directorate of Legal Review                          | DLR     |
| Directorate of Military Justice Performance Review   | DMJPR   |
| Directorate of Military Redress Review               | DMRR    |
| Directorate of Select Incident Review                | DSIR    |
| Executive Level 1                                    | EL1     |
| Inspector-General of the Australian Defence Force    | IGADF   |
| Officer Level 5 (referring to a LTCOL or equivalent) | O5      |
| Officer Level 6 (referring to a COL or equivalent)   | O6      |
| Redress of Grievance                                 | ROG     |
| <i>Defence Act 1903</i>                              | the Act |

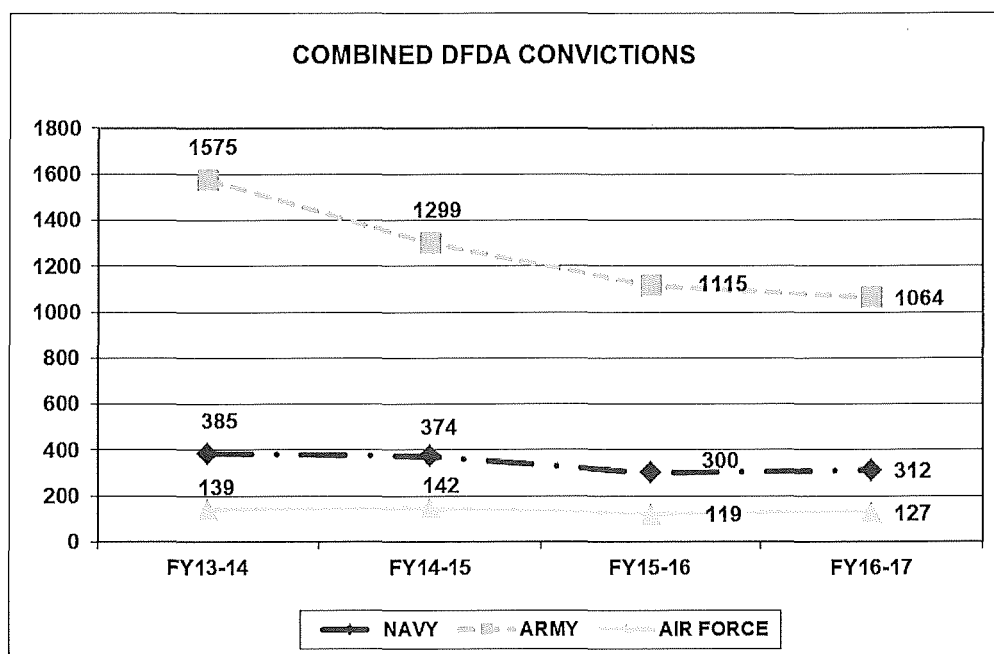


## MILITARY JUSTICE STATISTICS

### Discipline statistics

The overall offending rate across the three Services continues to steadily decrease, a trend witnessed since FY2013-14. The total number of trials (courts martial, Defence Force Magistrate trials and summary trials) decreased from a high of 1626 in FY2013-14 to a low of 1177 in this reporting period. The total number of convictions recorded across the Services has followed an almost identical trend with a high of 2099 in FY2013-14 to a low of 1503 in FY2016-17. Recent trial and conviction trends are illustrated in the below graphs.





The number of courts martial and DFM trials has decreased over the past three financial years, by approximately 17 per cent, from 42 in FY2014-15 to 41 in FY2015-16 and 34 in FY2016-17.

The decreasing offending rate witnessed at the summary trial level, over the past three financial years, continued during FY2016-17. Summary trials decreased by four per cent from 1192 (Navy 217, Army 886 and Air Force 89) in FY 2015-16 to 1142 (Navy 218, Army 854 and Air Force 70) in FY2016-17. The number of convictions across the three Services has followed a somewhat similar trend over the same period of time. During the reporting period there were 1391 (Navy 288, Army 1014 and Air Force 89) convictions recorded, a decrease of about three per cent from the 1433 (Navy 283, Army 1038 and Air Force 112) recorded in FY 2015-16.

The number of not guilty findings, from Summary level trials, totalled 68 (Navy 30, Army 30 and Air Force eight) and a further 38 (Navy 12, Army 24 and Air Force two) convictions were quashed on review. In addition, a further 15 accused persons pleaded not guilty to some or all of the charges against them, with 12 subsequently being found not guilty of some or all of those charges against them. Highlighting that fairness and transparency exists within the discipline system.

#### **Alcohol conviction statistics**

Overall disciplinary convictions where the misuse of alcohol was a contributing factor (excluding alcohol misuse whilst on deployment) totalled 134 during FY2016-17, Navy accounted for 56 (42 per cent), Army 52 (39 per cent) and Air Force 26 (19 per cent). There were a further 19 disciplinary convictions for alcohol related offences

committed on deployment during the same period. Navy accounted for 12 (63 per cent), Army 3 (16 per cent) and Air force 4 (21 per cent).

### **Discipline infringement statistics**

There were 4743 disciplinary officer infringements recorded during FY2016-17, an overall decrease of around seven per cent over the 5118 infringements recorded in FY2015-16. Navy accounted for 32 per cent of all infringements recorded during the reporting period with 1540, Army 60 per cent with 2829 infringements and Air Force eight per cent with 374 infringements.

### **Administrative sanctions statistics**

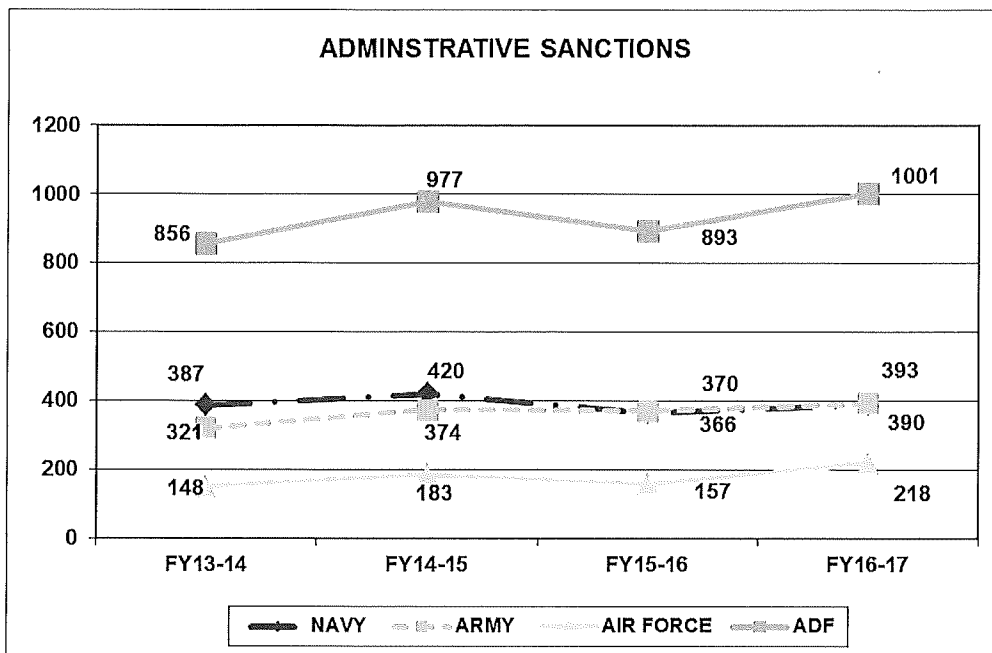
The administrative sanctions system is designed to protect the reputation of the ADF through targeting and correcting shortfalls in appropriate or acceptable behaviour, and in a member's performance and standards. The main reasons an administrative sanction were imposed during the reporting period include misuse of alcohol (252), civil offences (153), fitness test failure (280), personal qualities (189) and unsatisfactory conduct (612).

Administrative sanctions include, but are not limited to, formal warnings, censures, termination of service, reduction in rank, removal from an appointment or locality, denial or delay of promotion or revocation of provisional promotion, loss of security clearance and change of employment category.

The imposition of administrative sanctions has fluctuated over the past four financial year periods from a low of 856 in FY2013-14 to a high of 1001 in FY2016-17. Overall there was a 12 per cent rise in the use of administrative sanctions between FY2015-16 and FY2016-17 from 893 to 1001. Air Force experienced the largest increase with 39 per cent from 157 to 218, followed by Navy with a seven per cent increase from 366 to 390 and Army with a six per cent increase from 370 to 393 over the same period.

Army have imposed the most sanctions for the second straight financial year; historically, Navy use the adverse administrative system more than Army and Air Force.

Of the 1001 sanctions imposed, formal warnings (441), formal counselling (212), termination of service (190) and censures (77) account for 92 per cent of all sanctions imposed, and remain the most common form of administrative sanction imposed. The remaining 81 (eight per cent) of the sanctions imposed include, reduction in rank, suspension from duty, administrative posting and formal counselling.



#### Administrative inquiries statistics

The ADFAITS system tracks data associated with the conduct of administrative inquiries. This data is added and maintained by the units and formation level. During the reporting period, 34 inquiry officer inquiries were entered in ADFAITS. Navy accounted for two, Army 31 and Air Force one.

#### Civil conviction statistics

The civil conviction of ADF members experienced a 23 per cent increase between FY2015-16 and FY2016-17, from 101 to 124. Punishments imposed by a civil authority also increased by four percent from 119 in FY2015-16 to 124 in FY2016-17. Monetary fines (68) and the loss or suspension of motor vehicle licence (40) account for 87 per cent of the 124 punishments imposed by a civil authority.

ANNEXURE - FPS-5

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

**BEN ROBERTS-SMITH**


Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 13 pages is the annexure marked FPS-5 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

  
.....  
Witness *SOLICITOR, ACT SUPREME COURT*



**REASONS FOR RULING ON COMPLAINT CONCERNING  
CONDUCT OF A LAWYER SAID TO BE WORKING FOR  
THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE  
AFGHANISTAN INQUIRY**

**Note:** *In this public version, pseudonyms have been substituted for the names of certain witnesses in order to protect their identity.*

**INTRODUCTION**

1. On 14 December 2016, the Chief of the Defence Force directed the Inspector-General of the Australian Defence Force (IGADF), under s 110C(f) of the *Defence Act 1903* (Cth), to inquire into a matter concerning the Defence Force, in substance whether there is any substance to rumours of breaches of the Law of Armed Conflict by elements of the Special Operations Task Group in Afghanistan during the period 2005 to 2016.<sup>1</sup> As an Assistant IGADF, I was directed under s 10(2)(a) of the *Inspector-General of the Australian Defence Force Regulation 2016* to conduct the Inquiry, and a number of other Assistants IGADF, some of them lawyers and some of them not, were directed to help me do so.<sup>2</sup>

**The complaint**

2. On 28 June 2018, Mark O'Brien Legal wrote to the Inquiry, on behalf of their client Mr Ben Roberts-Smith, VC, MG, relevantly in the following terms [sic]:

*Allegations involving a lawyer working for the Inquiry*

On or about 12-13 May 2018 (the Mothers' Day weekend), a lawyer told an acquaintance of our client that "if you know anyone looking to go into business with BRS then tell them to be careful, I am working on a case against him". We understand that that lawyer is related to Ms Catherine Arnold and that the conversation occurred at a social event in Sydney.

This is a disturbing incident. We believe that the said lawyer is working for the Inquiry. The comments made by the lawyer are defamatory, embarrassing, demonstrates bias against our client and, again, raises a serious concern about the integrity of the Inquiry. It is a highly unsatisfactory that our client has been the subject of defamatory gossip by members of the Inquiry's staff.

**Please confirm by 4pm on Friday 29 June 2018 that the Inquiry will investigate this allegation and inform us of the outcome.**

If you do not investigate this allegation, my client reserves the right to report it to the Chief of the Australian Defence Force and to express his concerns as to the conduct of the Inquiry and the integrity of its staff.

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<sup>1</sup> [REDACTED] *Chief of Defence Force Direction to Inspector-General of the Australian Defence Force – Concerns regarding Special Operations Command* of [REDACTED] as amended by [REDACTED] *Amendment 1 to Chief of Defence Force Direction to Inspector-General of the Australian Defence Force – Concerns regarding Special Operations Command* [REDACTED].

<sup>2</sup> [REDACTED] *Direction to Assistant Inspector-General of the Australian Defence Force* of [REDACTED].

3. The allegation included that the lawyer was “working for the Inquiry”, and extended to “members” (in the plural) of the Inquiry’s staff. Subsequent correspondence included assertions that “The lawyer’s comments are defamatory and reveal a disturbing bias against our client”,<sup>3</sup> that “Failing to properly investigate this matter reinforces a reasonable apprehension of bias against our client”,<sup>4</sup> and a submission that “Whoever has breached their duty should be removed from the Inquiry forthwith, be made the subject of an inquiry to ascertain whatever other information has been disclosed by that person and to whom, and should be directed to apologise to our client”.<sup>5</sup>

4. This correspondence has been treated as a complaint of bias – or at least of a reasonable apprehension of bias – on the part of the Inquiry, and of misconduct (by breaching the obligations of confidence inherent in the private character of the Inquiry) by the lawyer concerned.

5. The complaint has been aired in public. On 10 August 2018, in proceedings in the Federal Court of Australia between Mr Roberts-Smith and Fairfax, counsel for Mr Roberts-Smith said:<sup>6</sup>

And, your Honour, in due course I’m going to provide you with a confidential exhibit which will show communications between those instructing me and the Inspector-General of the Australian Defence Force, concerning issues relating to publications that have occurred previously, and confirmation from the Office of the Inspector-General of three things. ... And thirdly, the fact that they are conducting their own inquiry in relation to whether a lawyer associated with that inquiry disclosed something in relation to the inquiry at a function, and secondly in relation to allegations that a particular individual who has appeared before that inquiry, as to his conduct in attempting to interfere with the evidence of witnesses who have been called before that inquiry.

6. In further proceedings on 6 September 2018, counsel for Mr Roberts-Smith said:<sup>7</sup>

There is a complaint that has been made, as self-evident on the part of the documents not redacted, by my client about potential misconduct by a lawyer working for the Inspector-General.

7. Counsel for Fairfax was more expansive:<sup>8</sup>

If your Honour goes to page 47 of MOBL1, your Honour will see, in the two paragraphs at the bottom of the page under the heading Allegations Involving a Lawyer Working for the Inquiry, that an allegation was made by Mr Roberts-Smith through Mr O’Brien that a lawyer working for the investigation told an acquaintance of Mr Roberts-Smith that, effectively, “Anyone looking to go into business with him should be careful. I am working on a case against him.”

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<sup>3</sup> Letter from Mark O’Brien Legal to IGADF of 12 July 2018; Letter from Mark O’Brien Lawyers to IGADF of 13 August 2018.

<sup>4</sup> Letter from Mark O’Brien Legal to IGADF of 13 August 2018.

<sup>5</sup> Letter from Mark O’Brien Legal to IGADF of 13 August 2018.

<sup>6</sup> *Roberts-Smith v Fairfax Media* (FCA, NSD1440/2018), Transcript, 10 August 2018, p4.11-4.24. In this and the following quotes from transcript, corrections have been made to the spelling and punctuation of names and titles.

<sup>7</sup> *Roberts-Smith v Fairfax Media* (FCA, NSD1440/2018), Transcript, 6 September 2018, p37.08-37.11.

<sup>8</sup> *Roberts-Smith v Fairfax Media* (FCA, NSD1440/2018), Transcript, 6 September 2018, p62.25-63.14.

There's then an identification of somebody to whom that lawyer is said to be related and that the conversation took place at a social event. It's described as a "disturbing incident" and various criticisms are offered in that next paragraph. If it's a lawyer working for the inquiry, criticism is offered that it is unsatisfactory that such a person would spread defamatory gossip at a social function. It indicates bias, etcetera.

That is then picked up in correspondence at page 45 where Wing Commander McKay in his letter of 3 July 2018, responds to Mr O'Brien's letter of 28 June, and your Honour will see, on page 45 under the heading Allegation Concerning an Unspecified Lawyer, that Wing Commander McKay says "Preliminary inquiries have not identified any lawyer working for the inquiry who fits the description in the 28 June letter, but please provide some more information, such as the identity of the lawyer said to be working for the investigation who engaged in the conduct alleged and the acquaintance to whom the statement was made."

Those details not having been provided. It's then picked up again in this exhibit at page 36 where Mr O'Brien refers to Wing Commander McKay's letter of 3 July and your Honour will see, in paragraph 3, refers to the request for additional information about the allegation concerning a lawyer assisting the inquiring and responds by saying:

We can't identify the lawyer to whom the allegation relates.

That is the lawyer working for the investigation who has said to have done this. Further details are given suggesting that the lawyer concerned made the comments to two people at an event in Sydney and contact details are provided, and there's a suggested inquiry that the investigation should make of lawyers working on the matter – that is, do they know the two people concerned. Then at page 28, which is the letter - - -

8. These allegations about a "lawyer working for the Inquiry" were then reported in an article entitled "Lawyer's 'smears against SAS hero'" in the Weekend Australian on 15 September 2018:<sup>9</sup>

The legal team for the country's most decorated war hero, Ben Roberts-Smith, claims a lawyer working on a secret inquiry into alleged war crimes by Australia's special forces troops has been "spreading defamatory gossip" against its client.

The claim was aired in a Federal Court battle in Sydney between the Commonwealth, Mr Roberts-Smith and Fairfax Media over whether key documents relating to the inquiry should be kept secret.

Lawyers for Mr Roberts-Smith said a complaint had been made to the Inspector-General of the Australian Defence Force after two acquaintances of Mr Roberts-Smith reported they had been approached by a lawyer at a social function. The lawyer allegedly warned them to be careful doing business with Mr Roberts-Smith because "I'm working on a case against him".

Arthur Moses SC, for Mr Roberts-Smith, said the notion that a lawyer directly involved with the two-year inquiry could "continue to contaminate" the investigation raised serious concerns for his client.

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<sup>9</sup> Deborah Cornwall, "Lawyer's 'smears against SAS hero'", *Weekend Australian*, 15 September 2018.

But Sandy Dawson SC, for Fairfax Media, said while the allegations were "disturbing", the IGADF had yet to identify "anybody working on the inquiry that fits that description".

...

The allegations of a rogue lawyer breaching the secrecy provisions follows the action against Fairfax Media over articles Mr Roberts-Smith says cast him as a war criminal, "a callous, inhumane" murderer and a domestic violence offender.

9. Because the complaint, which impugns the integrity of the small and identifiable number of lawyers working for the Inquiry, has attracted publicity, and of the need that there be public confidence in the Inquiry, it is appropriate that, despite the *in camera* nature of the proceedings of the Inquiry, this ruling and the reasons for it be published, redacted to protect the identity of witnesses and others whose names have not already been publicly disclosed.

### **Bias and Commissions of Inquiry**

10. An application for disqualification on account of bias is properly made, in the first instance, to the person whom the applicant alleges is biased or is apparently biased, whether the person in relation to whom the disqualification application is made is a judge in a court, or a member of a non-curial Tribunal, or a Royal Commissioner or a person conducting any other form of inquiry.<sup>10</sup>

11. The rules against bias which have developed in relation to judicial decision-making do not apply in their full force to commissions of inquiry.<sup>11</sup> The operation of the rule against bias in the context of investigative commissions of inquiry is necessarily limited, because such commissions necessarily have suspicions before they utilise their coercive powers.<sup>12</sup> There is nothing objectionable in the formation of suspicions, provided that they do not amount to prejudgment,<sup>13</sup> and to amount to prejudgment there must be firmly established a reasonable fear that the decision-maker's mind is so prejudiced in favour of a conclusion already formed that he or she will not alter that conclusion irrespective of the evidence or arguments presented to him or her.<sup>14</sup>

12. A commissioner of inquiry may take a more interventionist role than a judge in conducting hearings.<sup>15</sup> Thus, as has been observed by the Full Court of the Supreme Court of Tasmania:

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<sup>10</sup> Commissioner J.D. Heydon AC QC, *Royal Commission into Trade Union Governance and Corruption*, Reasons for Ruling on Disqualification Applications, 31 August 2015, [31].

<sup>11</sup> Donaghue S, *Royal Commissions and Permanent Commissions of Inquiry*, (Butterworths, 2001), citing *Karounas v CAC(SA)* (1989) 50 SASR 484 at 488-9; *R v Carter and AG (Tas)*; *ex parte Gray and McQuestin* (TasSC, Cox, Underwood and Slicer JJ, 27 Aug 1991, unreported).

<sup>12</sup> *Boys v ASC* (1998) 152 ALR 219 at 234-5; *Clements v Bower* (1990) 2 ACSR 573 at 582; *McLachlan v ASIC* (1999) 85 FCR 286.

<sup>13</sup> *Carruthers v Connolly* [1998] 1 Qd R 339 at 372.

<sup>14</sup> *Laws v ABT* (1990) 170 CLR 70 at 100.

<sup>15</sup> *R v Carter; ex parte Gray* (1991) 14 Tas R 247 (FC) at 260-263 [29]-[34]. See also *Carruthers v Connolly* [1998] 1 Qd R 339 at 358; *Keating v Morris* [2005] QSC 243 at [46]; and Commissioner J.D. Heydon QC, *Royal Commission into Trade Union Governance and Corruption*, Reasons for Ruling on Disqualification Applications, 31 August 2015, [36].

The fair minded person would not be quick to suspect bias if the Commissioner intervened in the cross-examination of certain witnesses in a robust way and on occasions to an extent in excess of that expected of a judicial officer. Similarly, the fair-minded observer would not be quick to suspect bias upon learning that the Commissioner was, in general terms, directing counsel assisting to pursue certain lines of inquiry nor even if he learnt that the Commissioner, as his inquiry progressed, began to entertain certain tentative views about key witnesses. The Commissioner's duty to inquire as well as to report and recommend is a factor which the fair-minded bystander will have to the forefront of his or her mind.<sup>16</sup>

13. Insofar as the rule against bias is applicable in inquiries, it applies to the commissioner, or the members of the board of inquiry. It does not apply to counsel assisting the inquiry.<sup>17</sup> It is commonplace for lawyers assisting an inquiry to adduce evidence, cross-examine witnesses, and make submissions in favour of or against particular positions, including in respect of the credibility of witnesses. Indeed, it is one of their essential functions to do so. That they are in that way aligned with a particular position does not infect the impartiality of the inquiry, constituted by the person or persons conducting it. Nor does it disqualify counsel assisting. Counsel assisting is not, and does not constitute, the inquiry. This is reflected in the following observations by Commissioner Heydon:

Now even though the Royal Commission has a fact-finding, 'inquisitorial', function, its public hearings are often conducted adversarially. That is so in the sense that Counsel Assisting calls evidence from some witnesses represented by lawyers which may be adverse to other persons, then calls the other persons as witnesses represented by other lawyers: the latter lawyers may then contend against the point of view of the former witnesses. Counsel Assisting may make submissions favouring one stance or the other, or argue for a different position.<sup>18</sup>

14. In this respect, the distinction between an Assistant IGADF directed under s 10(2)(a) of the Regulation to inquire into a matter, and an Assistant IGADF directed under s 10(2)(b) to help him or her to do so, is not without potential importance. Section 10 of the Regulation relevantly provides:

(2) The Inspector-General ADF may direct an Assistant IGADF, orally or in writing:

(a) to inquire into a matter; or

(b) to help the Inspector-General ADF, an inquiry officer or another Assistant IGADF to inquire into a matter.

15. The respective roles of an Assistant IGADF directed under s 10(2)(a) to inquire into a matter ("the inquiring Assistant IGADF"), and of Assistants IGADF directed under s 10(2)(b) to help the Inquiring Assistant IGADF ("the helping Assistants IGADF"), are analogous, though not necessarily identical, to those of a Commissioner of Inquiry on the one hand, and Counsel

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<sup>16</sup> *R v Carter; ex parte Gray* (1991) 14 Tas R 247 (FC) at 260-263 [29]-[34].

<sup>17</sup> I use the term "counsel assisting" in a generic sense to include all those appointed to assist an inquiry, whether or not they are lawyers.

<sup>18</sup> Commissioner Heydon, *Building Industry Royal Commission*, Reasons for Ruling on Disqualification Applications, 31 August 2015, [33].

Assisting a Commission of Inquiry on the other. Accordingly, a reasonable apprehension of bias on the part of a helping Assistant IGADF directed under s 10(2)(b) to help the conduct of the Inquiry would not necessarily have the same consequences as a reasonable apprehension of bias on the part of an inquiring Assistant IGADF directed under s 10(2)(a), as I have been, to conduct the Inquiry. However, for reasons which will appear, it is ultimately unnecessary to resolve this question at this stage.

## **THE EVIDENCE**

16. At the time of the complaint, five Assistants IGADF had been directed under s 10(2)(b) to help me to conduct the Inquiry, of whom only three were lawyers. Upon receipt of the complaint, all five were approached. Each said that they were not related to and did not know Ms Catherine Arnold, and denied having made any such comment as alleged.

17. However, the complaint letter of 28 June 2018 was expressed not as merely conveying matters of which the author was instructed, but in terms which adopted and endorsed the allegation as reflecting the author's own understanding and belief. Moreover, the complaint was made by a senior and experienced lawyer, who it would be assumed would have taken care that he had instructions to support it. In those circumstances, it was considered appropriate that further inquiries be made. The appropriateness of that course was later reinforced by reason of the allegation having been deployed in the Federal Court proceedings and published in the media, as a result of which public confidence in the Inquiry might well be affected if the complaint were not further investigated.

18. Accordingly, on 3 July 2018, the Inquiry wrote to Mark O'Brien Legal, relevantly as follows:

### **Allegation concerning an unspecified lawyer**

Preliminary inquiries have not identified any lawyer working for the Inquiry who could fit the description in your letter. So that this may be followed up, please identify:

- (a) the lawyer said to be working for the Inquiry to whom this allegation relates; and
- (b) your client's acquaintance to whom the statement was allegedly made, together with contact details for him/her.

19. On 6 July 2018, Mark O'Brien Legal responded:

You have requested additional information about the allegation concerning a lawyer assisting the Inquiry. We are instructed to respond as follows:

- 1. Our client is unable to identify the lawyer to whom the allegation relates.
- 2. The lawyer made the comments to Catherine and Gordon Arnold at an event in Sydney during the Mothers' Day weekend this year. They may be contacted at:

[email and mobile phone contact details for each were provided].

We assume you will ask all lawyers working on this matter if they know Catherine or Gordon Arnold.

20. Mr and Mrs Arnold were approached. Mr Arnold responded, on behalf of both, that they were not in Sydney, but in regional New South Wales, on the Mothers' Day weekend; that they did not know Mr Roberts-Smith personally; and (emphatically) that no such comment as was referred to in the complaint was made to them, and that no such comment was related by them to Mr Roberts-Smith (to whom they had never spoken).<sup>19</sup>

21. While, in the context of the Mark O'Brien Legal letter of 28 June (which stated that "a lawyer told an acquaintance of our client..."), and the Inquiry's letter of 3 July (which requested "please identify ... your client's acquaintance to whom the statement was allegedly made, together with contact details for him/her"), one might have been forgiven for thinking that it was implicit in the response of 6 July, which identified Gordon and Catherine Arnold as the persons to whom the statement was made, that they were "the acquaintance" referred to in the letter of 28 June, doubt about this arose from the circumstances that (1) the letter of 28 June referred to a single acquaintance, and while identifying Catherine Arnold as a person to whom the lawyer was related, did not suggest that she was the relevant "acquaintance" of Mr Roberts-Smith; and (2) the letter of 6 July, while identifying Gordon and Catherine Arnold as the persons to whom the statement was made, did not directly state that they were "the acquaintance" referred to in the letter of 28 June. Accordingly, in the light of Mr Arnold's categorical denials, on 11 July 2018, the Inquiry wrote to Mark O'Brien Legal, relevantly as follows:

Thank you for providing the contact details for Gordon and Catherine Arnold. Although, in the context of your letter of 28 June (which states that "a lawyer told an acquaintance of our client..."), and our letter of 3 July (which requested that you "identify ... your client's acquaintance to whom the statement was allegedly made, together with contact details for him/her"), it is implicit in your response of 6 July, identifying Gordon and Catherine as the persons to whom the statement was made, that they are "the acquaintance" referred to in your letter of 28 June, this is not entirely clear. This is because your letter of 28 June referred to a single acquaintance, and while identifying Catherine Arnold as a person to whom the lawyer was related, did not suggest that she was the "acquaintance" of your client; and your letter of 6 July, while identifying Gordon and Catherine Arnold as the persons to whom the statement was made, does not directly state that they are "the acquaintance" referred to in your letter of 28 June.

In order that the Inquiry can properly consider this matter, would you please confirm whether Catherine and/or Gordon Arnold, or some other person and if so who, was the acquaintance referred to in your letter of 28 June.

22. On 12 July 2018, Mark O'Brien Legal responded, relevantly as follows:

**Potential misconduct by lawyer working for IGADF**

In relation to your request for clarification, we understand that the person to whom the comments were made about our client is Gordon Arnold. We have provided you with his contact details. The lawyer who made the comments, we understand, is related to Catherine Arnold. We have provided you with her details. The acquaintance to whom we refer in our letter dated 28 June is a third person, Mark David So that there can be no further misunderstanding, we understand that

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<sup>19</sup> Telecon WGCDR McKay/Mr Arnold 7 Jul 18.

the Arnolds passed on the said lawyer's comments to David, who in turn, passed on the comments to our client.

You have the information you need to investigate this incident. We request that you do so. The lawyer's comments are defamatory and reveal a disturbing bias against our client.

23. On 13 July 2018, the Inquiry wrote to Mark O'Brien Legal, relevantly as follows:

The Inquiry is, as a matter of priority, considering the allegations you have made concerning a lawyer said to be working for the inquiry. In order to enable the fullest consideration of this matter, would you please provide contact details for Mr. Mark David.

24. An email address and mobile phone number for Mr David was provided by a response of the same day.

25. Meanwhile, a search of social media identified that the Arnolds had a "friend" with a surname (though not first name) which corresponded with an ADF Reserve lawyer, Lieutenant Colonel Geoffrey, who had served as a Legal Officer with the Special Operations Task Group, and who had on occasion in the past assisted the Office of IGADF with military justice audits, but had had nothing to do with the Afghanistan Inquiry. Enquiries of Lieutenant Colonel Geoffrey established that this "friend" was indeed his son, that Catherine Arnold is his niece, and that he had seen her and her husband Gordon Arnold on Mothers' Day 2018 at a function for his mother-in-law in regional New South Wales.

26. Further evidence was then obtained from Lieutenant Colonel Geoffrey, Mr Arnold, and Dr Mark David.

#### **Lieutenant Colonel Geoffrey**

27. Lieutenant Colonel Geoffrey is an Army Reserve Legal Officer, [REDACTED]. According to him, Catherine and Gordon Arnold know that he is an Army Reserve legal officer, as he had previously discussed Army service with Gordon, who many years ago had served as a soldier. Lieutenant Colonel Geoffrey served as [REDACTED]

[REDACTED]. In addition, he was in Afghanistan in 2010 [REDACTED] and was then based in Camp Russell, where he briefly met Mr Roberts-Smith at the Mess and in the gym.

28. Lieutenant Colonel Geoffrey is not and has never been part of the IGADF Afghanistan Inquiry team. He has not (at least yet) been interviewed for the Inquiry. More than 18 months ago he was contacted by a member of the Inquiry Team, for the purposes of trying to schedule an interview. That interview has not yet proceeded, and he has not been contacted since. He has not spoken to any of the Inquiry team within the last 18 months, and has not represented any witness before the Inquiry. He was contacted in connection with the present matter on Saturday, 7 July 2018.

29. Lieutenant Colonel Geoffrey has no specific recollection of any conversation about Mr Roberts-Smith on Mothers' Day 2018 or at any other time. While he could not exclude the possibility that Mr Roberts-Smith was discussed, he said that if there was any such conversation it was not memorable, and if he had said anything about Mr Roberts-Smith it would have been



to the effect that he had met him briefly when he was in Afghanistan in 2010 and that he seemed to be a nice guy and “a massive unit” - as that was his impression of him. In particular, Lieutenant Colonel Geoffrey did not and could not have said anything to the effect that Mr Roberts-Smith was ‘under inquiry’ by IGADF, as he did not know that to be so, at least before about 6 July 2018.<sup>20</sup>

### The Arnolds

30. After it was ascertained that Lieutenant Colonel Geoffrey was related to Ms Arnold and was present at a family function in regional New South Wales on the Mothers’ Day weekend, Mr Arnold was further questioned. According to him,<sup>21</sup> neither Lieutenant Colonel Geoffrey, nor anyone else at the Mothers’ Day weekend event in regional New South Wales, had a conversation with either him or his wife which referred to Mr Roberts-Smith. He emphatically denied that anyone said anything along the lines: *“If you know anyone looking to go into business with BRS then tell them to be careful. I am working on a case against him”*. Neither he nor his wife know Mr Roberts-Smith, or have ever met him, and they did not report any such conversation to him.

31. Then, after it emerged that the “acquaintance” referred to in the complaint was not the Arnolds but Dr David, Mr Arnold was further questioned. This established<sup>22</sup> that Mr Arnold and his wife Catherine are good friends of Mark David and his family, and stayed with the David family when travelling back to Queensland after the Mothers’ Day weekend, as they occasionally do when passing through. They all chatted over dinner, and then Mr Arnold sat with Dr David and they discussed business and family matters. In the course of that conversation, Dr David made mention that he knew Mr Roberts-Smith (Mr Arnold thinks they meet in the gym). In the course of a wide-ranging discussion, Dr David made mention that there was a person (Mr Arnold thinks, but is not sure, a reporter) trying to gather some “dirt” on Mr Roberts-Smith - a person who was once friendly with Mr Roberts-Smith but had since fallen out.

32. After Dr David mentioned Mr Roberts-Smith, Mr Arnold reminded him that he had himself also served in the Army, and had family with military connections - Grant Healey and his wife who is a solicitor, and Nicholas Geoffrey who he believed was a Reservist. But Mr Arnold is adamant that there was no mention at all that Nicholas Geoffrey had worked for IGADF, and Mr Arnold does not know who or what IGADF is. There was nothing said about any comments made by Mr Geoffrey, or anyone else, about Mr Roberts-Smith. Mr Arnold, who says he has been a business consultant for approximately 20 years, said to Dr David something along the lines, “You need to be careful mate who you do business with”, but this was in the context of a software program Dr David had developed and was having trouble with. Emphatically, Mr Arnold said nothing along the lines that he had been told by a lawyer that he was working on a case against Mr Roberts-Smith, and/or that now would not be a good time to go into business with him, or anything like it.

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<sup>20</sup> Statement of LTCOL Nicholas Geoffrey of 10 Jul 18.

<sup>21</sup> Mr Arnold’s response of 9 Jul 17.

<sup>22</sup> Mr Arnold’s response of 1 Aug 17.

## Dr David

33. Dr David is the [REDACTED] Queensland and also a business consultant. According to him,<sup>23</sup> Gordon Arnold is a family friend whom he has known for approximately eight years. Mr Arnold and his wife Catherine Arnold stayed with him at his residence in Queensland on their return trip from NSW earlier this year, though he cannot recall the precise date. During their stay, Dr David had a one-on-one conversation with Mr Arnold, in a social environment which included the consumption of alcohol, loosely around business matters as they are both consultants. In the course of that conversation, they discussed the value of doing a Master of Business Administration (MBA) over experience, and Dr David referred to "a good friend of mine, Ben Roberts-Smith who had previously studied a MBA". Dr David also mentioned that a journalist was trying to "gather some dirt" on Mr Roberts-Smith and potentially tarnish his reputation; he was aware of some articles in the media, including by Chris Masters.

34. According to Dr David, there was in the course of the conversation some mention of someone working on a case against Special Forces. He recalls that Mr Arnold was aware of such a case against Special Forces. However, there was certainly no mention by Mr Arnold that he knew a lawyer, or was related to a lawyer – let alone one who was working on that case.

35. Dr David was aware of Mr Arnold's service in the Defence Force, but does not know his extended family and was not aware of any family members that worked for IGADF. However, he said, Mr Arnold regularly "rattles off the people that he is acquainted with, and is difficult to follow as names or business are not discussed, more so the idiosyncrasies of business".

36. According to Dr David, there was no mention of any lawyer or any other person who worked for IGADF, and no discussion of IGADF. Nor did Mr Arnold at any stage "warn me off Ben or suggest I should not do business with him, or go into business with him". In the course of the conversation, there was discussion about Dr David's current business partners, in both his practice and a software program he had developed, with whom he was having significant difficulties, and Mr Arnold advised him that he needed to be careful who he decided to go into business with, regardless of who they were. This was a generic comment, and was not specifically referable to Mr Roberts-Smith.

37. Since that conversation with Mr Arnold, Dr David has had a number of conversations with Mr Roberts-Smith. He describes them as "good friends", who often meet at the gym or socially at barbecues or children's events. According to Dr David, Mr Roberts-Smith only knows Gordon Arnold as "my [REDACTED] mate", which is how he refers to Mr Arnold. He gives as an example that he would say something to Mr Roberts-Smith along the lines "Last week I caught up with my [REDACTED] mate", or "this weekend I'm seeing my [REDACTED] mate". He does not know how Mr Arnold's name and family events were obtained by Mr Roberts-Smith, but surmises that his name and connection to him has been obtained via social media or other methods by those acting on his behalf.

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<sup>23</sup> Statement of Dr Mark David of 12 Sep 18.

38. Dr David says that he has never discussed with Mr Roberts-Smith any advice Mr Arnold has given him about his business interests. He recalls having made a comment to Mr Roberts-Smith that he had dinner with “a mate of mine” and that in conversation he had heard that a case was being worked on, in and around the Special Forces. He assumed, given what he had seen in the papers, that this might involve Mr Roberts-Smith. The only aspect of the conversation he had had with Mr Arnold which was relayed to Mr Roberts-Smith, was a recollection around a case which they had speculated may involve Mr Roberts-Smith – nothing about Mr Arnold knowing or being related to a lawyer, or anything about someone working for IGADF. Dr David is adamant that Mr Arnold never advised him not to go into business specifically with Mr Roberts-Smith, and that he made that deduction for himself, which he eventually relayed to Mr Roberts-Smith.

### **Invitation to provide further evidence**

39. In the light of what had so far been elicited, it was considered that the complainant should be invited to provide any further evidence or submissions he might wish to adduce in connection with the complaint. Thus on 18 September 2018, the Inquiry wrote to Mark O’Brien Legal, relevantly as follows:

The allegation you have raised concerning a lawyer said to be working for the Inquiry is in a different category, because it is a discrete matter which goes directly to the present constitution and procedural fairness of the Inquiry, and no doubt impacts on your client’s and potentially the public’s confidence in the Inquiry. For that reason, as indicated in my letter of 13 July 2018, priority has been given to collecting and considering evidence in relation to this allegation, and it is proposed that upon completion of that consideration to issue a ruling in respect of it, and to inform you of the outcome.

Subject to what follows, the collection of evidence relevant to this allegation is practically complete. In this respect, it has been assumed that the material you and your client wish to submit in connection with this allegation comprises:

- Your letter of 28 June 2018, and in particular the two paragraphs appearing under the heading “Allegations involving a lawyer working for the Inquiry”;
- Your letter of 6 July 2018, providing contact details for Mr and Mrs Arnold;
- Your letter of 12 July 2018, and in particular the two paragraphs appearing under the heading “Potential misconduct by lawyer working for IGADF”, in which some details of the allegation were clarified;
- Your letter of 13 July 2018, providing contact details for Mr David; and
- Your letter of 13 August 2018, and in particular the last two paragraphs, in which *inter alia* you state the outcomes sought.

While the Inquiry considers that that information is sufficient to enable it to investigate and consider the allegation, it is also appropriate that you and your client be afforded an opportunity to submit any further material that you may have relevant to the allegation. If the material listed above is not the entirety of the material you wish to submit to the Inquiry in respect of this allegation, you are invited to provide any further evidence that your client may have relevant the allegation – including, if so desired, a statement by your client of the relevant facts within his knowledge. If you wish to provide further material, please let me know by Thursday 28 September 2018, including when you anticipate that you will be in a position to provide such

material. Otherwise, it will be assumed that the correspondence listed above constitutes the entirety of the material you wish to submit in this respect.

40. By letter dated 28 September 2018, Mark O'Brien Legal confirmed: "You have been provided with all the information in our client's possession in relation to the allegations concerning a lawyer working for the Inquiry".

## CONSIDERATION

41. The Inquiry has not been provided with any detailed statement of the factual basis for the complaint. Insofar as its content must be deduced from the complaint letter and subsequent correspondence, it is affected by inaccuracies and inconsistencies, which raise doubts as to its reliability. *First*, Ms Arnold and Mr Arnold were not in Sydney, but in regional New South Wales, at the time of the Mothers' Day function. *Secondly*, while it was initially asserted (in the Mark O'Brien Legal letter of 28 June) that "a lawyer told an acquaintance of our client...", and in response to the Inquiry's letter of 3 July (which requested that Mark O'Brien Legal "identify ... your client's acquaintance to whom the statement was allegedly made, together with contact details for him/her"), Gordon and Catherine Arnold as the persons to whom the statement was made, it was later said that Mark David was "the acquaintance" referred to in the letter of 28 June and that the statement was related by Gordon Arnold to him.

42. There is no evidence that Lieutenant Colonel Geoffrey mentioned Mr Roberts-Smith or anything about him to the Arnolds. Mr Arnold is adamant that he did not. Lieutenant Colonel Geoffrey does not recall doing so, though he would not exclude the possibility. But even if Mr Roberts-Smith was mentioned, it is not possible that Lieutenant Colonel Geoffrey said anything about working on a "case against" him, as he was not aware before 6 July 2018 that Mr Roberts-Smith might have anything to do with the Inquiry, and Lieutenant Colonel Geoffrey does not, and never has, worked for the Inquiry.

43. There was some reference, in the conversation between Mr Arnold and Dr David, to a journalist trying to "gather some dirt" on Mr Roberts-Smith and potentially tarnish his reputation. Both say that in their conversation, Dr David mentioned that Mr Roberts-Smith was a friend, and that a journalist was trying to "gather some dirt" on him and potentially tarnish his reputation. This was something Dr David had learnt from media reporting, not from Mr Arnold.

44. There was also reference in that conversation to someone working on "a case against Special Forces" in which Mr Roberts-Smith might be involved. This could well have been a reference to the Inquiry. Again, this was something Dr David and/or Mr Arnold had learned of from open sources, not from Lieutenant Colonel Geoffrey (let alone any one working for the Inquiry). The existence of the Inquiry, into matters concerning the Special Forces in Afghanistan, is a matter of public record and has been extensively reported in the media. Both Mr Arnold and Dr David are adamant that there was no mention in the conversation between them of any lawyer or any other person who worked for IGADF, and no discussion of IGADF, and that at no stage did Mr Arnold warn Dr David against going into business with Mr Roberts-Smith specifically.

45. Dr David subsequently told Mr Roberts-Smith that he had dinner with his "mate" and that in the course of conversation he had heard that a case was being worked on concerning the Special Forces which he assumed, given what he had seen in the papers, may involve Mr Roberts-Smith. At some stage he told Mr Roberts-Smith that he would not go into business with him, a decision which he had made for himself. He may (although he does not admit it) have also mentioned that his "mate's" wife had a relative who was a Defence lawyer. However, he did not and could not have conveyed to Mr Roberts-Smith that that lawyer - or anyone else associated with the Inquiry - had told anyone anything to the effect "If you know anyone looking to go into business with BRS then tell them to be careful, I am working on a case against him". This conclusion is based not only on Dr David's denial, and the absence of any probative evidence to the contrary, but on the impossibility of such a statement given that Lieutenant Colonel Geoffrey was not and never has worked on the Inquiry, and did not then know of any involvement of Mr Roberts-Smith in the Inquiry.

46. If there was any evidence to found the serious allegations made against members of the Inquiry's staff in the letter of Mark O'Brien Legal of 28 June 2018, it has not been provided to the Inquiry, and it is a fair inference from the statement in the Mark O'Brien Legal letter of 28 September 2018, that "You have been provided with all the information in our client's possession in relation to the allegations concerning a lawyer working for the Inquiry", that it does not exist. In short, there is no evidence of any impropriety by any lawyer or other person working for or associated with the Inquiry. In particular:

- There is no evidence that any lawyer or other person working for or associated with the Inquiry has made any statement of the kind referred to in the complaint adverse to or which could conceivably be defamatory of Mr Roberts-Smith.
- There is no evidence that any lawyer or other person working for or associated with the Inquiry has made any statement about Mr Roberts-Smith or the Inquiry in the context described in the complaint, such as to breach any obligation of confidentiality.

### **Disposal**

47. It is unclear to what if any extent the terms of the complaint are directly attributable to Mr Roberts-Smith, as distinct from being assumptions or surmise on the part of his lawyers. For that reason, while the inaccuracies and inconsistencies in the complaint detract from its reliability, they do not of themselves reflect adversely on Mr Roberts-Smith's credit, and the conclusion that the complaint is unsubstantiated by any evidence involves no adverse reflection on Mr Roberts-Smith's character or credibility.

48. Full investigation of the complaint has revealed no evidence to support the allegations in the complaint. Ultimately, there is no evidence whatsoever that any lawyer or other person working for or associated with the Inquiry made any statement to the effect alleged, or anything like it. The complaint is dismissed.

15 October 2018

ANNEXURE – FPS6

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

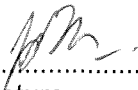
**BEN ROBERTS-SMITH**

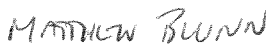
Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 4 pages is the annexure marked FPS-6 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

  
.....  
Witness *MATTHEW BUNN* *AT SUPREME COURT*



## **Office of the Inspector-General of the Australian Defence Force**

IGADF/BN15645503

**Major General Greg Melick AO, RFD, SC (retd)**  
National President, Returned Services League of Australia

**Lieutenant Colonel Peter Fitzpatrick AO, AM (Mil) (retd)**  
National Chairman, Australian SAS Association

Dear General Melick and Colonel Fitzpatrick

### **IGADF AFGHANISTAN INQUIRY**

Thank you for your letter of 21 January 2020, which I received, by email, on 22 January. I have taken some time to reply because I wanted to let you have a comprehensive response, and also because of competing demands.

I welcome your interest in the welfare of persons who may be affected by the Inquiry, in particular as witnesses, and the opportunity to explain the measures that the Inquiry has adopted in that respect.

In your letter you express concern about the impact of any potential adverse findings against those who have previously served as members of the Special Forces, as well as the widows of the fallen and their families. As you will no doubt be aware, the essential task of the Inquiry, which is being conducted at the direction of the Chief of the Defence Force, is to ascertain whether there is any substance to rumours and reports of breaches of the laws of armed conflict by elements of the Special Operations Task Group in Afghanistan between 2005 and 2016. It is the duty of the Inquiry to inquire into those matters, without fear or favour, affection or ill-will, so as to uncover the truth. As General Melick would appreciate from his experience in the conduct of inquiries, this requires the rigorous and comprehensive collection, evaluation and testing of all available evidence, and this sometimes means that robust examination of witnesses cannot be avoided. Given the nature of the Special Forces community, in which the bulk of relevant witnesses reside, this is especially so in this Inquiry. It is also inevitable that, in discharging its duty, the Inquiry has to raise with witnesses events which occurred during their deployments and which may have been traumatic. In that respect, the position is little different from many trials, in which witnesses will have to revisit, and in a sense relive, incidents which have traumatised them.

From the outset, the Inquiry has been conscious of the potential for its proceedings to have an impact on the mental health of witnesses (and others who may be affected or involved). You would understand that it is not the function of the IGADF or Inquiry to provide direct welfare support to persons who are witnesses. For serving personnel, that is the responsibility of Defence, through the chain-of-command, which provides or coordinates medical, psychological, welfare, pastoral and other support services as required. Former members can, if they wish, be supported by Department of Veterans' Affairs (DVA) who provide access to support services including mental health, medical and in some cases legal support. Ex-Service Organisations, such as yours, also fulfil an important role in supporting former ADF members and their families.

The Inquiry is also conscious that many, both serving personnel and ex-Service personnel, will not spontaneously or proactively reach out to the relevant sources for assistance, and for that reason, the Inquiry has put in place a number of measures to assist witnesses and other affected persons to access appropriate support.

First, the Inquiry conducts its proceedings so as to minimise the impact on witnesses and ensure they have access to appropriate legal and welfare support. All witnesses, whether current serving ADF members or not, are informed of their legal right (under the IGADF Regulation 2016) to be accompanied by a lawyer. While maintaining the necessary degree of separation and independence, the Inquiry assists with coordinating legal support through Defence Legal if required, including Legal Assistance at Commonwealth Expense (LACE) for ex-serving members who request it in connection with an appearance before the Inquiry. In addition to legal representation, and although witnesses are not legally entitled to a support person as a matter of right, the Inquiry has invariably exercised its discretion to permit one whenever requested, and witnesses are routinely advised that they may bring one. So far as practicable, interviews are conducted in locations and at times convenient to witnesses. Particularly in the case of potentially fragile or vulnerable witnesses, interviews are conducted where the witness' support network is readily available to them. Where sought, in the case of a fragile witness, the Inquiry has also permitted the witness's psychologist to be present.

Secondly, the Inquiry has routinely provided to witnesses, before an interview, not only information about their rights and obligations, but also the welfare support options available to them. A copy of the current form is attached for your information; and I draw your attention in particular to the box outlined in red on the last page. In addition, serving and former members are encouraged to seek support if they need it. The standard non-disclosure direction given at the conclusion of each interview contains an exception, which is emphasised, that the witness may discuss the interview not only with a lawyer for the purpose of obtaining legal advice, but also with a psychiatrist, psychologist, padre, social worker or other professional counsellor, so long as the consultation is on a strictly confidential basis. If there is any sign or suspicion that a witness may have been distressed as a result of an interview, the Inquiry immediately notifies the witness's chain of command (in the case of serving personnel), so that a check can be made on the witness's welfare. For persons (such as those no longer serving) for whom that is not possible, a member of the Inquiry team follows up with the witness.

Thirdly, as the number of witnesses increased, a Witness Liaison Officer was added to the Inquiry team in September 2018 in order to expand the support for witnesses. This position is filled by an Army Reserve Warrant Officer Class 1, who has a Special Air Service Regiment background. For many, though not all interviews, he greets and meets the witness and any support person before an interview and speaks to them again at its conclusion. When he is not present, witnesses are provided at the end of an interview with the contact details for the Witness Liaison Officer and an Inquiry team member, and encouraged to make contact as required. In any event, the Witness Liaison Officer engages the witness after interview to ascertain their immediate well-being, and provides an ongoing point-of-contact. (There are a few exceptions to this, in circumstances where the witness is legally represented and the lawyers request that all communications be through them). If the Witness Liaison Officer has any concerns as to the witness's welfare or wellbeing, immediate advice is provided to the Inquiry team for action. Further follow up is undertaken if appropriate or requested, according to the particular circumstances of the witness. Bearing in mind that the Inquiry cannot itself act as a welfare delivery service, the action taken is ordinarily referral to an appropriate agency. In one exceptional case, the Inquiry has offered to facilitate access to an in-country psychiatrist for a former Special Forces member who is currently domiciled overseas.



In the last couple of months, in response to the increasing number of witnesses being interviewed, the Inquiry has expanded its witness support program with the appointment of additional Witness Liaison Officers, drawn from each of Special Air Service Regiment, 1<sup>st</sup> Commando Regiment and 2nd Commando Regiment. These members are Reservists who were former permanent members and have been selected because of their long connection with the respective units, the regard in which they are held locally, and their ability to relate to soldiers at all levels. They are not privy to the evidence before the Inquiry, and their function is to maintain contact with and monitor the welfare of witnesses from their respective units.

Your point about the need for proactive engagement with those no longer serving is well made. It was similar thinking that prompted the Inspector-General of the Australian Defence Force to communicate recently with all Inquiry witnesses by an email which reaffirmed the various welfare support services available to them, as you are I am sure aware. The purpose of this was to ensure that, although witnesses had been provided with details of available welfare support services at the time of their interviews, they were given it a second time and continue to have it available. As you would expect, and as was foreseen at the time, this has produced a mixed reaction, and while we have received many positive responses, there have been some negative ones. Essentially this was a measure which would be criticised by some if taken, and by others if it were not; but on balance it was better to ensure that everyone had ready access to the relevant information should they need it, rather than to risk that they might not. These emails are to be followed up by telephone calls from the Witness Liaison Officers, except in the case of those witnesses who have indicated that they do not wish to be contacted.

Your point about the desirability of families being aware of the services available is also well made, and you are right in identifying privacy issues as being an impediment to achieving this, by limiting the provision of information to families and ESOs. For my part, I would welcome the involvement of your associations in the provision of information about the available support services through your communications to your members, families and wider audiences. If you have any other ideas as to how you might be able to assist, I would be very happy to receive them.

The prospect that the Inquiry's report will occasion distress to some who may be referred to in it cannot be completely avoided. That is inevitable given the task of the Inquiry, and it is probably so of any Inquiry. However, I can confirm that before the final report is delivered, persons who are potentially the subject of any adverse finding or recommendation will be afforded procedural fairness. That is likely to be a stressful time for some, and at that time, they will again be reminded of the available welfare support services. For serving personnel, their chain of command will be informed, so that appropriate support measures can be in place. This is more challenging for ex-serving personnel, but it is here I think you and your Associations may be able to assist. It would be helpful if you could nominate suitable points of contact within your Associations, who ex-serving members could consult for advice regarding accessing appropriate support. Given the demographics of those concerned, preferably these points of contact would be veterans with a Special Forces background, and ideally there would be at least one former member of each of the Special Air Service Regiment, 1 Commando Regiment and 2 Commando Regiment. I would be very happy to discuss this further.

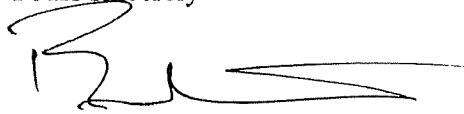
The requirement for access to appropriate welfare support by both serving and ex-serving members will continue beyond the completion of the Inquiry. In this respect, you may also consider engaging with Chief of Army. I am also aware that Defence, and in particular Army, are currently planning for the continued provision of welfare support to witnesses and their families following the submission of the Inquiry Report to the Chief of the Defence Force. I

expect that the Inquiry witness support program will remain in place for some time after delivery of the report, but engagement between your Associations also may generate an opportunity for your Associations to assist in the development and implementation of a seamless and coordinated approach to the provision of appropriate welfare support to our serving and ex-serving members and their families.

As I think you know, your letter received an unintentionally wide distribution. However, there is nothing in this letter which cannot be published, and I have in mind providing a copy to those who received your letter. I have no objection to you distributing it.

The Inspector-General, Mr James Gaynor, has read and agrees with this letter.

Yours sincerely

A handwritten signature in black ink, appearing to be 'P. Brereton', with a long horizontal stroke extending to the right.

**Paul Brereton, AM, RFD**

Major General

Assistant Inspector-General of the Australian Defence Force

BP25-4-43

PO Box 7924

Canberra BC ACT 2610

AUSTRALIA

16 April 2020

**ANNEXURE – FPS7**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL**

**NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018**

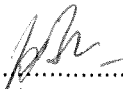
**BEN ROBERTS-SMITH**

Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 2 pages is the annexure marked FPS-7 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

*MATTHEW BUNN, SOLICITOR AT SUPREME COURT*  
.....  
Witness

## Notice to produce

No. NSD1485 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith**

Applicant

**Fairfax Media Publications Pty Ltd & Ors**

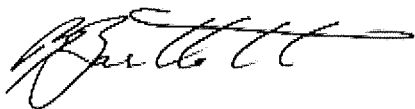
Respondents

To the Applicant

The Respondents require you to produce the following documents at the next hearing at 10:00am on Wednesday 15 July 2020:

1. Any notice received from the Inspector General of the Australian Defence Force (IGADF) indicating that the Applicant is a potentially affected person (PAP notice);
2. All documents accompanying the PAP notice; and
3. Any response by the Applicant to the PAP notice.

Date: 3 July 2020



Signed by Peter Bartlett  
Lawyer for the Respondent

### *Note*

If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

|  |   |
|--|---|
| Filed on behalf of (name & role of party)                  | Fairfax Media Publications Pty Ltd, Nick McKenzie, Chris Master and David Wroe, the Respondents |
| Prepared by (name of person/lawyer)                        | Dean Levitan, Lawyer for the Respondents  |
| Law firm (if applicable)                                   | MinterEllison   |
| Tel  | 03 8608 2152  |
| Fax  | -   |
| Email  | dean.levitan@minterellison.com  |
| <b>Address for service</b><br>(include state and postcode) | Level 19, 525 Collins St Melbourne, VIC 3000  |

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

ANNEXURE – FPS8

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

**BEN ROBERTS-SMITH**

Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD** and others

Respondents

The following 16 pages is the annexure marked FPS-8 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

*MATTHEW BLUNN, SOLICITOR AT SUPREME COURT*  
.....  
Witness

# MinterEllison

24 September 2019

By email: Paul.Svilans@markobrienlegal.com.au

Paul Svilans  
Principal  
Mark O'Brien Legal  
Level 19  
68 Pitt Street  
SYDNEY NSW 2000

Dear Mr Svilans

**Fairfax Media and The Age ats Ben Roberts-Smith  
Federal Court proceeding numbers NSD 1485, 1486 and 1487 of 2018**

We refer to the orders of the court made on 2 August 2019 and the recent correspondence between the parties.

**Categories for discovery by the Applicant**

We confirm that the following categories of documents by way of discovery from the Applicant are now agreed:

1. All documents referring to or concerning the Applicant being identified as the person named 'Leonidas' in the first to fourth matters complained of (first to third matters complained of in proceedings 1478 of 2018).
2. All documents referring to or concerning the matters particularised in the particulars of identification in the Statement of Claim.
3. All documents referring to or concerning:
  - a. requests for the Applicant to engage in public speaking in the period from 2012 to date;
  - b. bookings for the Applicant to engage in public speaking in the period from 2012 to date;
  - c. the fee received by the Applicant or any entity for the Applicant's public speaking engagements in the period from 2012 to date.
4. All documents comprising:
  - a. financial statements/reports;
  - b. annual profit and loss statements;
  - c. income tax returns,

for RS Group Australia Pty Limited for the period 2012 to date.



5. All documents comprising:
  - a. financial statements/reports;
  - b. annual profit and loss statements;
  - c. income tax returns,for the Roberts-Smith Family Trust for the period 2012 to date.
6. A document or documents evidencing the identity of beneficiaries of the Roberts-Smith Family Trust, from time to time, during the period 2012 to date.
7. All documents comprising the Applicant's Australian Army service record, including all documents referring to or concerning the regiments in which the Applicant served, his rank from time to time and dates and locations of deployment.
8. All documents referring to or concerning the awarding to the Applicant of the Medal for Gallantry, the Victoria Cross and a Commendation for Distinguished Service including but not limited to all documents submitted in support of the application or recommendation for the award, but not including correspondence from members of the public offering congratulation on the awards.
9. All documents comprising photographs of insurgents killed during SOTG rotation III.
10. All documents referring to or concerning the mission conducted near the Chora Pass from about 31 May 2006, including, but not limited to all documents referring to or concerning:
  - a. the Applicant's conduct in connection with that mission or any allegation about the Applicant's conduct;
  - b. Person 1's conduct in connection with that mission or any allegation about Person 1's conduct;
  - c. Person 2's conduct in connection with that mission or any allegation about Person 2's conduct.
11. All documents referring to or concerning:
  - a. the Applicant's attitude or opinion of Person 1 and/or of his ability as a soldier, including any documents referring to him in a negative manner;
  - b. the matters referred to in paragraphs 32 to 25, 37 and 42 of the Applicant's outline of evidence in reply.
12. All documents referring to or concerning the matters referred to in paragraphs 81 and 82 of the Applicant's outline of evidence in reply.
13. All documents referring to or concerning any incident, fight or scuffle between the Applicant and Person 3 in about March 2009.
14. All documents referring to or concerning the practice of "blooding" in the sense described in particular of truth (44) of the Defence in these proceedings.
15. All documents referring to or concerning the mission in relation to Whiskey 108 on about 12 April 2009, including, but not limited to all documents referring to or concerning any allegation about the Applicant's conduct in connection with that mission.
16. All documents referring to or concerning the prosthetic leg retrieved from around Whiskey 108, including but not limited to all photographs and videos depicting the prosthetic leg.
17. All documents referring to or concerning a mission in an area named Deh Rafshan in about March 2010, including, but not limited to all documents referring to or concerning any allegation about the Applicant's conduct in connection with that mission.



18. All documents referring to or concerning a mission in Tizak on 11 June 2010, including, but not limited to all documents referring to or concerning:
  - a. the Applicant's conduct in connection with that mission or any allegation about the Applicant's conduct;
  - b. presentations given by the Applicant about the mission including but not limited to copies of or recordings of any presentations, and photographs shown in any presentations.
19. All documents referring to or concerning the allegation of a mock killing as described in particular of truth (65) of the Defence in these proceedings.
20. All documents referring to or concerning any "kill board" maintained by any patrol of which the Applicant was a member.
21. All documents referring to or concerning the mission conducted in the Chora Valley from about 15 July 2012, including, but not limited to all documents referring to or concerning:
  - a. the Applicant's conduct in connection with that mission or any allegation about the Applicant's conduct;
  - b. Person 10's conduct in connection with that mission or any allegation about the Applicant's conduct.
22. All documents referring to or concerning the matters referred to in paragraphs 81 and 82 of the Applicant's outline of evidence in reply.
23. All documents comprising telephone records showing telephone contact between the Applicant and Person 10 in the period 1 January 2013 to 31 March 2013.
24. All documents comprising telephone records showing telephone contact between the Applicant and Person 19 in the period 1 January 2013 to 31 March 2013.
25. All documents referring to or concerning a mission referred to in particular of truth (87) of the Defence in these proceedings, including, but not limited to all documents referring to or concerning any allegation about the Applicant's conduct in connection with that mission.
26. All documents referring to or concerning a mission conducted in Darwan on 11 September 2012, including, but not limited to all documents referring to or concerning any allegation about the Applicant's conduct in connection with that mission.
27. All documents referring to or concerning any medical treatment sought by the Applicant following the mission in Darwan, including but not limited to all documents referring to or concerning the reason why treatment was sought.
28. All documents referring to or concerning a mission conducted in Khaz Oruzgan on about 12 October 2012, including, but not limited to all documents referring to or concerning any allegation about the Applicant's conduct in connection with that mission.
29. All documents referring to or concerning the mission referred to in particular of truth (125) of the Defence in these proceedings, including, but not limited to all documents referring to or concerning any allegation about the Applicant's conduct in connection with that mission.
30. All documents referring to or concerning paragraph 161 of the Applicant's outline of evidence in reply.
31. All documents referring to or concerning any separation between the Applicant and his wife in 2017 and/or 2018.
32. All documents comprising communications between the Applicant and Neil Mooney referring to or concerning the Applicant staying at Mr Mooney's residence on the Sunshine Coast.
33. All documents referring to or concerning the Applicant moving out of the family home in 2017 or 2018, including but not limited to:
  - a. all documents referring to or concerning the Applicant staying at Mr Mooney's residence;

- b. all documents referring to or concerning the Applicant notifying any person, entity or organisation of a change of address.
34. All documents referring to or concerning the booking of flights and accommodation for travel by the Applicant and his wife to Singapore in about January 2018.
35. All documents referring to or concerning the loss of a mobile telephone by the Applicant between about 19-21 November 2017.
36. All documents referring to or concerning mail sent to the Applicant's house in about early December 2017 alleging the Applicant was having an affair.
37. All documents comprising communications with or documents provided to the Australian Federal Police in relation to Person 17's allegation that she was assaulted by the Applicant.

**Respondents' interrogatories to the Applicant**

The parties are now in agreement as to the interrogatories to the Applicant. Accordingly, please find **enclosed** the Respondents' Notice to the Applicant to Answer to Interrogatories in each of the three proceedings.

We look forward to receiving the Applicant's Answers to Interrogatories and verified discovery by 25 October 2019.

We would be grateful if you could please provide a finalised list of the categories of documents for discovery by the Respondents and a finalised Notice to Answer to Interrogatories.

**Your client's application for our clients to answer interrogatory 2**

We repeat our clients' position as set out in our letter dated 20 September 2019, namely, it is a matter for your client how he proceeds in relation to his application in this regard.

Yours faithfully  
**MinterEllison**



Contact: Dean Levitan T: +61 3 8608 2152  
F: +61 3 8608 1088 peter.bartlett@minterellison.com  
Partner: Peter Bartlett T: +61 3 8608 2677  
OUR REF: PLB 1183220

## Respondents' Notice to the Applicant to Answer to Interrogatories

No. NSD1485 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith**

Applicant

**Fairfax Media Publications Pty Limited** and others named in the Schedule

Respondents

The Applicant is required to answer with verification the following interrogatories:

1. Did you separate from your wife at any time in the period October 2017 to April 2018?
2. If your answer to the preceding interrogatory is in the affirmative:
  - a. On what date did you separate from your wife?
  - b. What steps did you take to give effect to the separation?
  - c. Did you tell any person about the separation? If so, specify who you told, when you told them and what words in substance you said to them.
  - d. During the period of separation did you reside separately to your wife? If so specify where you resided and the period you resided there. If at more than one location answer this interrogatory with respect to each residence.
  - e. If the answer to (d) is in the affirmative, did you notify any person, entity or organisation of your change of address? If so specify who you so notified and when you notified them.
  - f. On what date did you reconcile with your wife?

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Filed on behalf of  
Prepared by  
Law firm  
Tel +61 3 8608 2037  
Email Peter.Bartlett@minterellison.com  
**Address for service**

---

Fairfax Media Publications Pty Limited, Nick McKenzie, Chris  
Masters and David Wroe, Respondents  
Peter Bartlett  
Minter Ellison  
Fax +61 3 8608 1088  
Level 23, Rialto Towers, 525 Collins Street, Melbourne VIC 3000  
[Form approved 01/08/2011]

3. Did you travel with your wife and family on a holiday to Singapore in about January 2018?
4. If your answer to the preceding interrogatory is in the affirmative specify the dates of the trip and when it was booked.
5. Did you give an interview to a journalist with *The Australian*, Brendan Nicholson, in about April 2011?
6. If the answer to the preceding interrogatory is in the affirmative, did you tell Mr Nicholson in substance that during the battle of the Chora Pass your rifle was damaged by a bullet? If so, what in substance did you say to Mr Nicholson?
7. Did you have any involvement in the tactical planning of the mission in the Chora Valley on about 14 and 15 July 2012?
8. If the answer to the preceding interrogatory is in the affirmative, describe the nature of your involvement.
9. Following the mission in the Chora Valley on about 14 and 15 July 2012 was there any investigation or quick assessment as to what occurred during the mission? If so, did you give any information or statement to any investigator or superior during the investigation or quick assessment?
10. If the answer to the preceding interrogatory is in the affirmative:
  - a. Did you inform the investigator/superior that Person 55 had fired shots at your patrol?
  - b. Did you inform the investigator/superior that Person 10 had fired at women and children?
  - c. If your answer to the either of (a) or (b) is in the affirmative, specify who you informed of this, when and what in substance you said. If this was included in a document please attach a copy to your answers to these interrogatories.
11. At any time following the mission in the Chora Valley on 14 and 15 July 2012, did you have a conversation with Person 10 about a statement that he was to prepare in relation to the mission?
12. If your answer to the preceding interrogatory is in the affirmative, specify where and when the conversation occurred and what in substance was said.
13. Did you attend a medical centre in the days following the mission in Darwan on about 11 September 2012?

14. If your answer to the preceding interrogatory is in the affirmative:
- a. What was the purpose of your attendance?
  - b. Did you see a doctor? If yes, what in substance did you say to the doctor?
  - c. Did you see Person 7 at the medical centre?
  - d. If your answer to (c) is in the affirmative, did you have a conversation with him? If so, specify the substance of the conversation.
15. Please state the name of the interpreter that you spoke with on 11 September 2012 during the Darwan mission, as referred to in paragraph 160 of your Outline of Evidence dated 12 July 2019?
16. Please look at paragraph 161 of your Outline of Evidence dated 12 July 2019 and answer the following questions:
- a. Who informed you that Person 12 had been stood down and replaced as Commander of the NDS soldiers?
  - b. What in substance was said in this regard?
  - c. Where was the command group meeting held?
  - d. Who attended the command group meeting?
  - e. State the name of the person who replaced Person 12 as Commander of the NDS soldiers.

Date: 23 September 2019



---

Signed by Peter Bartlett  
Lawyer for the Respondents

**Schedule**

No. NSD 1485 of 2018

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Ben Roberts-Smith**

Applicant

**Fairfax Media Publications Pty Limited ACN 003 357 720**

First Respondent

**Nick McKenzie**

Second Respondent

**Chris Masters**

Third Respondent

**David Wroe**

Fourth Respondent

## Respondents' Notice to the Applicant to Answer to Interrogatories

No. NSD 1486 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### Ben Roberts-Smith

Applicant

**The Age Company Pty Ltd** ACN 004 262 702 and others named in the Schedule

Respondents

The Applicant is required to answer with verification the following interrogatories:

1. Did you separate from your wife at any time in the period October 2017 to April 2018?
2. If your answer to the preceding interrogatory is in the affirmative:
  - a. On what date did you separate from your wife?
  - b. What steps did you take to give effect to the separation?
  - c. Did you tell any person about the separation? If so, specify who you told, when you told them and what words in substance you said to them.
  - d. During the period of separation did you reside separately to your wife? If so specify where you resided and the period you resided there. If at more than one location answer this interrogatory with respect to each residence.
  - e. If the answer to (d) is in the affirmative, did you notify any person, entity or organisation of your change of address? If so specify who you so notified and when you notified them.
  - f. On what date did you reconcile with your wife?

---

Filed on behalf of  
Prepared by  
Law firm  
Tel +61 3 8608 2037  
Email Peter.Bartlett@minterellison.com  
**Address for service**

---

The Age Company Pty Ltd, Nick McKenzie, Chris Masters and  
David Wroe, Respondents  
Peter Bartlett  
Minter Ellison  
Fax +61 3 8608 1088  
Level 23, Rialto Towers, 525 Collins Street, Melbourne VIC 3000  
[Form approved 01/08/2011]

3. Did you travel with your wife and family on a holiday to Singapore in about January 2018?
4. If your answer to the preceding interrogatory is in the affirmative specify the dates of the trip and when it was booked.
5. Did you give an interview to a journalist with *The Australian*, Brendan Nicholson, in about April 2011?
6. If the answer to the preceding interrogatory is in the affirmative, did you tell Mr Nicholson in substance that during the battle of the Chora Pass your rifle was damaged by a bullet? If so, what in substance did you say to Mr Nicholson?
7. Did you have any involvement in the tactical planning of the mission in the Chora Valley on about 14 and 15 July 2012?
8. If the answer to the preceding interrogatory is in the affirmative, describe the nature of your involvement.
9. Following the mission in the Chora Valley on about 14 and 15 July 2012 was there any investigation or quick assessment as to what occurred during the mission? If so, did you give any information or statement to any investigator or superior during the investigation or quick assessment?
10. If the answer to the preceding interrogatory is in the affirmative:
  - a. Did you inform the investigator/superior that Person 55 had fired shots at your patrol?
  - b. Did you inform the investigator/superior that Person 10 had fired at women and children?
  - c. If your answer to the either of (a) or (b) is in the affirmative, specify who you informed of this, when and what in substance you said. If this was included in a document please attach a copy to your answers to these interrogatories.
11. At any time following the mission in the Chora Valley on 14 and 15 July 2012, did you have a conversation with Person 10 about a statement that he was to prepare in relation to the mission?
12. If your answer to the preceding interrogatory is in the affirmative, specify where and when the conversation occurred and what in substance was said.
13. Did you attend a medical centre in the days following the mission in Darwan on about 11 September 2012?



14. If your answer to the preceding interrogatory is in the affirmative:
- a. What was the purpose of your attendance?
  - b. Did you see a doctor? If yes, what in substance did you say to the doctor?
  - c. Did you see Person 7 at the medical centre?
  - d. If your answer to (c) is in the affirmative, did you have a conversation with him? If so, specify the substance of the conversation.
15. Please state the name of the interpreter that you spoke with on 11 September 2012 during the Darwan mission, as referred to in paragraph 160 of your Outline of Evidence dated 12 July 2019?
16. Please look at paragraph 161 of your Outline of Evidence dated 12 July 2019 and answer the following questions:
- a. Who informed you that Person 12 had been stood down and replaced as Commander of the NDS soldiers?
  - b. What in substance was said in this regard?
  - c. Where was the command group meeting held?
  - d. Who attended the command group meeting?
  - e. State the name of the person who replaced Person 12 as Commander of the NDS soldiers.

Date: 23 September 2019



---

Signed by Peter Bartlett  
Lawyer for the Respondents

**Schedule**

No. NSD 1486 of 2018

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Ben Roberts-Smith**

Applicant

**The Age Company Pty Ltd ACN 004 262 702**

First Respondent

**Nick McKenzie**

Second Respondent

**Chris Masters**

Third Respondent

**David Wroe**

Fourth Respondent

## **Respondents' Notice to the Applicant to Answer to Interrogatories**

No. NSD1487 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### **Ben Roberts-Smith**

Applicant

**The Federal Capital Press of Australia Pty Ltd ACN 008 394 063** and others named in the  
Schedule

Respondents

The Applicant is required to answer with verification the following interrogatories:

1. Did you separate from your wife at any time in the period October 2017 to April 2018?
2. If your answer to the preceding interrogatory is in the affirmative:
  - a. On what date did you separate from your wife?
  - b. What steps did you take to give effect to the separation?
  - c. Did you tell any person about the separation? If so, specify who you told, when you told them and what words in substance you said to them.
  - d. During the period of separation did you reside separately to your wife? If so specify where you resided and the period you resided there. If at more than one location answer this interrogatory with respect to each residence.
  - e. If the answer to (d) is in the affirmative, did you notify any person, entity or organisation of your change of address? If so specify who you so notified and when you notified them.
  - f. On what date did you reconcile with your wife?

---

Filed on behalf of  
Prepared by  
Law firm  
Tel +61 3 8608 2037  
Email Peter.Bartlett@minterellison.com  
**Address for service**

The Federal Capital Press of Australia Pty Ltd, Nick McKenzie,  
Chris Masters and David Wroe, Respondents  
Peter Bartlett  
Minter Ellison

Fax +61 3 8608 1088

Level 23, Rialto Towers, 525 Collins Street, Melbourne VIC 3000

[Form approved 01/08/2011]

3. Did you travel with your wife and family on a holiday to Singapore in about January 2018?
4. If your answer to the preceding interrogatory is in the affirmative specify the dates of the trip and when it was booked.
5. Did you give an interview to a journalist with *The Australian*, Brendan Nicholson, in about April 2011?
6. If the answer to the preceding interrogatory is in the affirmative, did you tell Mr Nicholson in substance that during the battle of the Chora Pass your rifle was damaged by a bullet? If so, what in substance did you say to Mr Nicholson?
7. Did you have any involvement in the tactical planning of the mission in the Chora Valley on about 14 and 15 July 2012?
8. If the answer to the preceding interrogatory is in the affirmative, describe the nature of your involvement.
9. Following the mission in the Chora Valley on about 14 and 15 July 2012 was there any investigation or quick assessment as to what occurred during the mission? If so, did you give any information or statement to any investigator or superior during the investigation or quick assessment?
10. If the answer to the preceding interrogatory is in the affirmative:
  - a. Did you inform the investigator/superior that Person 55 had fired shots at your patrol?
  - b. Did you inform the investigator/superior that Person 10 had fired at women and children?
  - c. If your answer to the either of (a) or (b) is in the affirmative, specify who you informed of this, when and what in substance you said. If this was included in a document please attach a copy to your answers to these interrogatories.
11. At any time following the mission in the Chora Valley on 14 and 15 July 2012, did you have a conversation with Person 10 about a statement that he was to prepare in relation to the mission?
12. If your answer to the preceding interrogatory is in the affirmative, specify where and when the conversation occurred and what in substance was said.
13. Did you attend a medical centre in the days following the mission in Darwan on about 11 September 2012?

14. If your answer to the preceding interrogatory is in the affirmative:
- a. What was the purpose of your attendance?
  - b. Did you see a doctor? If yes, what in substance did you say to the doctor?
  - c. Did you see Person 7 at the medical centre?
  - d. If your answer to (c) is in the affirmative, did you have a conversation with him? If so, specify the substance of the conversation.
15. Please state the name of the interpreter that you spoke with on 11 September 2012 during the Darwan mission, as referred to in paragraph 160 of your Outline of Evidence dated 12 July 2019?
16. Please look at paragraph 161 of your Outline of Evidence dated 12 July 2019 and answer the following questions:
- a. Who informed you that Person 12 had been stood down and replaced as Commander of the NDS soldiers?
  - b. What in substance was said in this regard?
  - c. Where was the command group meeting held?
  - d. Who attended the command group meeting?
  - e. State the name of the person who replaced Person 12 as Commander of the NDS soldiers.

Date: 23 September 2019



---

Signed by Peter Bartlett  
Lawyer for the Respondents

**Schedule**

No. NSD 1487 of 2018

Federal Court of Australia

District Registry: Victoria

Division: General

**Ben Roberts-Smith**

Applicant

**The Federal Capital Press of Australia Pty Ltd ACN 008 394 063**

First Respondent

**Nick McKenzie**

Second Respondent

**Chris Masters**

Third Respondent

**David Wroe**

Fourth Respondent

ANNEXURE – FPS9

FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL

NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018

**BEN ROBERTS-SMITH**

Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 8 pages is the annexure marked FPS-9 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

*MATTHEW BLUNN, SOLICITOR AT SUPREME COURT*  
.....  
Witness

**Amended List of Documents**

No. NSD 1485 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith VC MG**

Applicant

**Fairfax Media Publications Pty Ltd and others**

Respondents

Pursuant to the order for discovery made on 2 August 2019, the Applicant makes this Amended List of Documents and affidavit.

**Affidavit**

On 13 July 2020, I Ben Roberts-Smith VC MG say on oath:

1. I am the Applicant.
2. I have made reasonable enquiries as to the existence and location of the documents specified in the order.
3. To the best of my knowledge, there are no further documents specified in the order that are or have been in my control, other than the documents specified in this Amended List of Documents.
4. The documents set out in Part 1 are in my control and I do not claim privilege from production for any of these documents.
5. The documents set out in Part 2 are in my control, but I claim privilege from production of each of these documents on the grounds set out in Part 2. The facts relied upon as establishing the existence of the privilege are as follows:

a. the documents constitute or record:

|  |  |
|--|--|
| Filed on behalf of (name & role of party)                  | Ben Roberts-Smith VC MG, Applicant                                       |
| Prepared by (name of person/lawyer)                        | Paul Svilans   |
| Law firm (if applicable)                                   | Mark O'Brien Legal   |
| Tel  | +61 9216 9828  |
| Fax  | -  |
| Email  | paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au |
| <b>Address for service</b><br>(include state and postcode) | Level 19, 68 Pitt Street, Sydney NSW 2000                                |



- i. a confidential communication made between me and a lawyer; or
  - ii. a confidential communication made between two or more lawyers acting for me; or
  - iii. the contents of a confidential document (whether delivered or not) prepared by me, a lawyer or another person;
- for the dominant purpose of the lawyer or one or more of the lawyers, providing me with legal advice; or

- b. the documents at number 67 of this Amended List of Documents may constitute or record matters which are subject to the provisions of the Inspector General of the Australian Defence Force Regulation 2016;
- c. the documents at number 68 of this Amended List of Documents may constitute or record matters which are matters of state pursuant to s130 of the Evidence Act (Cth).

6. The documents set out in Part 3 have been but are no longer in my control. Details of when each document was last in my control and what became of it are set out in Part 3.

Sworn by the deponent )  
 via AV link pursuant to the Electronic )  
 Transactions Amendment (COVID-19) )  
 Witnessing Documents Regulation )  
 on 13 July 2020 )  
 Before me:

\_\_\_\_\_  
 Signed by deponent

\_\_\_\_\_  
 Signed by witness  
 Monica Allen, Lawyer for the Applicant  
 Name and qualification of witness

### Inspection of documents

The documents set out in Part 1 may be inspected at Level 19, 68 Pitt Street, Sydney NSW 2000 on business days between the hours of 9:00am and 5:00pm.

Date: 13 July 2020

\_\_\_\_\_  
 Signed by Monica Allen  
 Lawyer for the Applicant

**Part 1 - Documents in the control of Applicant**

| No. | Description of document(s) / category   | Number of documents in category | Date/period                 |
|-----|---|---------------------------------|-----------------------------|
| 1   | Sydney Morning Herald print article 'SAS's Day of Shame by Nick McKenzie and Chris Masters  | 1                               | 9-10 June 2018              |
| 2   | Sydney Morning Herald online article 'Abdul's brother went out to buy flour. He never came home' by Nick McKenzie and Chris Masters           | 1                               | 8 June 2018                 |
| 3   | Sydney Morning Herald print article 'Special forces rookie 'blooded' by executing an unarmed man' by Chris Masters and Nick McKenzie          | 1                               | 10 June 2018                |
| 4   | Sydney Morning Herald online article 'Special forces rookie 'blooded' by executing an unarmed man' by Chris Masters and Nick McKenzie         | 1                               | 9 June 2018                 |
| 5   | Sydney Morning Herald online article 'VC winner Ben Roberts-Smith among subjects of defence investigation' by Nick McKenzie and Chris Masters | 1                               | 6 July 2018                 |
| 6   | Sydney Morning Herald print article 'War hero fires back over abuse claims' by Nick McKenzie, David Wroe and Chris Masters                    | 1                               | 11-12 August 2018           |
| 7   | Sydney Morning Herald online article 'Beneath the bravery of our most decorated soldier' by Nick McKenzie, David Wroe and Chris Masters       | 1                               | 10 August 2018              |
| 8   | Screenshot of Google search   | 1                               | 15 August 2018              |
| 9   | RS Group Tax Invoices for the financial year 2014/2015  | 28                              | 1 July 2014 to 30 June 2015 |
| 10  | RS Group Tax Invoices for the financial year 2015/2016  | 19                              | 1 July 2015 to 30 June 2016 |
| 11  | RS Group Tax Invoices for the financial year 2016/2017  | 7                               | 1 July 2016 to 30 June 2017 |
| 12  | RS Group Tax Invoices for the financial year 2017/2018  | 16                              | 1 July 2017 to 30 June 2018 |
| 13  | RS Group Tax Invoice for an engagement on 20 February 2019  | 1                               | 26 February 2019            |
| 14  | Bundle of email requests and bookings for the Applicant to engage in public speaking in the period from 2015 to date                          | Numerous                        | 2015 to 2018                |
| 15  | Email from Saxton Speakers Bureau to RS Group   | 1                               | 13 August 2018              |

| No. | Description of document(s) / category                                | Number of documents in category | Date/period                   |
|-----|--|---------------------------------|-------------------------------|
| 16  | Email from ICMI Speakers & Entertainers                              | 1                               | 14 August 2018                |
| 17  | Emails between ICMI and RS Group                                     | 1                               | 15 August 2018-17 August 2018 |
| 18  | RS Group Financial Statements and Taxation Return                    | 2                               | 1 July 2011 to 30 June 2012   |
| 19  | RS Group Financial Statements and Taxation Return                    | 2                               | 1 July 2012 to 30 June 2013   |
| 20  | RS Group Financial Statements, Taxation Estimate and Taxation Return | 3                               | 1 July 2013 to 30 June 2014   |
| 21  | RS Group Financial Statements, Taxation Estimate and Taxation Return | 3                               | 1 July 2014 to 30 June 2015   |
| 22  | RS Group Financial Statements, Taxation Estimate and Taxation Return | 3                               | 1 July 2015 to 30 June 2016   |
| 23  | RS Group Financial Statements, Taxation Estimate and Taxation Return | 3                               | 1 July 2016 to 30 June 2017   |
| 24  | RS Group Financial Statements, Taxation Estimate and Taxation Return | 3                               | 1 July 2017 to 30 June 2018   |
| 25  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2011 to 30 June 2012   |
| 26  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2012 to 30 June 2013   |
| 27  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2013 to 30 June 2014   |
| 28  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2014 to 30 June 2015   |
| 29  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2015 to 30 June 2016   |
| 30  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2016 to 30 June 2017   |
| 31  | Roberts-Smith Family Trust Financial Statements and Taxation Return  | 2                               | 1 July 2017 to 30 June 2018   |
| 32  | Discretionary Trust Deed establishing the Roberts-Smith Family Trust | 1                               | 2 August 2011                 |
| 33  | Citation for the Medal for Gallantry                                 | 1                               | 22 November 2006              |
| 34  | Citation for the Victoria Cross                                      | 1                               | 23 January 2011               |
| 35  | Citation for the Commendation for Distinguished Service              | 1                               | 26 January 2014               |
| 36  | Letter from the Official Secretary to the Governor-General           | 1                               | 13 December 2010              |
| 37  | Letter from Christopher Marr   | 1                               | 23 January 2011               |

| No. | Description of document(s) / category                                  | Number of documents in category | Date/period                              |
|-----|--|---------------------------------|--|
| 38  | Letter from the Official Secretary to the Governor-General             | 1                               | 8 October 2013                           |
| 39  | Letter from Person 33 to the Applicant and others regarding the AAR    | 1                               | Undated                                  |
| 40  | Character Reference for the Applicant from Person 60                   | 1                               | June 2007                                |
| 41  | Part 2E – Assessment of performance in current job                     | 1                               | 3 September 2007                         |
| 42  | Statement from Person 36   | 1                               | 26 August 2013                           |
| 43  | Letter from Person 33  | 1                               | 2 September 2013                         |
| 44  | Statement of Conduct: Corporal Robert-Smith During 2006 from Person 37 | 1                               | 6 September 2013                         |
| 45  | Statement of Conduct: Corporal Robert-Smith During 2006                | 1                               | 16 September 2013                        |
| 46  | Quick Assessment Brief for Co SASR                                     | 1                               | 14 August 2013                           |
| 47  | Response to Quick Assessment Brief                                     | 1                               | 4 September 2013                         |
| 48  | Record of Conversation   | 1                               | 22 November 2013                         |
| 49  | Letter from Person 23  | 1                               | 10 May 2017                              |
| 50  | Photographs of a prosthetic leg retrieved on 12 April 2009             | 9                               | Various                                  |
| 51  | Statement by Person 15   | 1                               | 3 August 2013                            |
| 52  | Statement by Person 4  | 1                               | 26 August 2013                           |
| 53  | Statement by Person 11   | 1                               | 1 September 2013                         |
| 54  | Letter from Person 58  | 1                               | 15 September 2013                        |
| 55  | Department of Defence Outpatient Clinical Record                       | 3                               | 12 September 2012 –<br>14 September 2012 |
| 56  | Emails between Emma Roberts-Smith and Virgin Australia                 | 1                               | 9 November 2019                          |
| 57  | Emails between Emma Roberts-Smith and Sofitel Sentosa Resort and Spa   | 3                               | 9 November 2012                          |
| 58  | Emails between L Atkinson and C Parsons                                | 1                               | 21 November 2012                         |

| No. | Description of document(s) / category                                       | Number of documents in category | Date/period       |
|-----|---|---------------------------------|-------------------|
| 59  | Letter from Telstra to C Morgan   | 1                               | 22 November 2012  |
| 60  | Letter sent to the Applicant's family residence on or about 6 December 2017 | 1                               | December 2017     |
| 61  | Letter from Mark O'Brien Legal to the Australian Federal Police             | 1                               | 14 August 2018    |
| 62  | Letter from the Australian Federal Police to Mark O'Brien Legal             | 1                               | 21 September 2018 |
| 63  | No Front Line, by Chris Masters   | 1                               | 2017              |

**Part 2 – Documents in the control of Applicant for which privilege from production is claimed**

| No. | Description of document  | Date of document | State grounds of privilege  |
|-----|--|------------------|---|
| 64  | Documents to which client legal privilege applies relating to legal advice | Various          | Documents that constitute and/or record:<br>(a) a confidential communication made between the Applicant and a lawyer, or<br>(b) a confidential communication made between two or more lawyers acting for the Applicant, or<br>(c) the contents of a confidential document (whether delivered or not) prepared by the Applicant, a lawyer or another person,<br>that was made or prepared for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the Applicant, and in respect of which privilege has not been waived. |
| 65  | Documents to which client legal privilege applies relating to litigation   | Various          | Documents that constitute and/or record:<br>(a) a confidential communication between the Applicant and another person, or between a lawyer acting for the Applicant and another person, or<br>(b) the contents of a confidential document (whether  |

| No. | Description of document  | Date of document | State grounds of privilege  |
|-----|--|------------------|---|
|     |  |                  | delivered or not),<br>that was made or prepared for the dominant purpose of the Applicant being provided with professional legal services relating to proceedings (including these proceedings), or anticipated or pending proceedings, in which the Applicant is or may be, or was or might have been, a party, and in respect of which privilege has not been waived. |
| 66  | After Action Report  | June 2006        | <del>The document constitutes and/or records matters which may be subject to the provisions of the National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth).</del>   |
| 67  | <u>Documents to which the <i>Inspector General of the Australian Defence Force Regulation 2016</i> applies</u>   | <u>Various</u>   | <u>Production of the documents would constitute an offence under s21 of the Regulation</u>  |
| 68  | <u>Documents concerning the Australian Federal Police to which s130 of the <i>Evidence Act</i> (Cth) applies</u> | <u>Various</u>   | <u>The documents constitute or record matters of state pursuant to s130 of the <i>Evidence Act</i> (Cth)</u>  |

### Part 3 – Documents that have been but are no longer in the control of Applicant

| No. | Description of document   | Date of document          | What became of document   |
|-----|---|---------------------------|---|
| 69  | Communications received by the Applicant referring to or concerning the Applicant being identified as 'Leonidas' in the first to fourth matters complained of | Various                   | The Applicant, after making due search, cannot locate the documents, but assumes that they were deleted in the ordinary course. |
| 70  | Requests and bookings referring to or concerning the Applicant's public speaking engagements  | 2012 to June 2015         | The Applicant no longer has access to the computer(s) on which those records were stored.                                       |
| 71  | RS Group Tax Invoices for the Applicant's public speaking engagements   | 2012 to June 2014         | The Applicant no longer has access to the computer(s) on which those records were stored.                                       |
| 72  | Communications to and/or from the Applicant referring to or concerning matters now relevant to an issue in dispute in these                                   | June 2006 to January 2017 | The communications were deleted at or around the time of receipt.   |

| No. | Description of document    | Date of document | What became of document   |
|-----|----------------------------|------------------|---|
|     | proceedings.               |                  |   |
| 73  | <u>After Action Report</u> | <u>June 2006</u> | At the request of the Department of Defence, the Applicant's copies of the AAR were surrendered to Defence on 16 December 2019. |

**ANNEXURE – FPS10**

**FEDERAL COURT OF AUSTRALIA  
DISTRICT REGISTRY: NEW SOUTH WALES  
DIVISION: GENERAL**

**NO NSD 1485 OF 2018  
NO NSD 1486 OF 2018  
NO NSD 1487 OF 2018**


**BEN ROBERTS-SMITH**

Applicant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD and others**

Respondents

The following 11 pages is the annexure marked FPS-10 referred to in the affidavit of Fiona Peta Sneath made 7 August 2020 before me:

  
.....  
Signature

*MATTHEW BLUM, SOLICITOR AT SUPREME COURT*  
.....  
Witness



# MinterEllison

5 March 2020

## BY PERSONAL SERVICE

The Proper Officer  
Australian War Memorial  
Treloar Crescent  
CANBERRA ACT 2612

To the Proper Officer

**Ben Roberts-Smith (Applicant) v Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe (Respondents) - Federal Court of Australia Proceedings NSD 1485 of 2018 (Proceedings)**

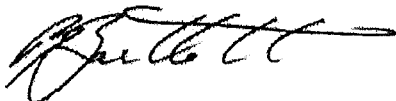
We act for the Respondents in the Proceedings.

We enclose, by way of service, a sealed copy of the subpoena to produce to documents addressed to the Australian War Memorial.

The Subpoena requires you to produce documents to the Federal Court of Australia on or before **18 March 2020**.

Please contact the writer if you have any questions in relation to the subpoena.

Yours faithfully  
**MinterEllison**



Contact: Dean Levitan T: +61 3 8608 2152  
E: dean.levitan@minterellison.com  
Partner: Peter Bartlett T: +61 3 8608 2677  
OUR REF: 1183220

## NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 4/03/2020 4:01:16 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

### Filing and Hearing Details

|                            |   |
|----------------------------|---|
| Document Lodged:           | Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)                               |
| File Number:               | NSD1485/2018  |
| File Title:                | BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD<br>(ACN 003 357 720) & ORS         |
| Registry:                  | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF<br>AUSTRALIA                                  |
| Reason for Listing:        | Return of Subpoena  |
| Time and date for hearing: | 18/03/2020, 9:30 AM   |
| Place:                     | Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens<br>Square, Sydney |



*Sia Lagos*

Dated: 5/03/2020 9:25:42 AM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

LAST DAY FOR SERVICE IS 11 MARCH 2020.



**Subpoena – Declaration by addressee  
Notice to addressee**

No. NSD 1485 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith**

Applicant

**Fairfax Media Publications Pty Limited and others**

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

**You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.**

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

|                    |  |         |   |
|--------------------|--|---------|---|
| Filed on behalf of | Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents |         |   |
| Prepared by        | Peter Bartlett   |         |   |
| Law firm           | Minter Ellison   |         |   |
| Tel                | +61 3 8608 2037  | Fax     | +61 3 8608 1088   |
| Email              | Peter.Bartlett@minterellison.com   |         |   |
| Address            | for  | service | Level 23, Rialto Towers, 525 Collins Street<br>Melbourne VIC 3000 |

[Version 2 form approved 02/05/2019]



**Declaration by addressee (subpoena recipient)**

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

---

---

---

Date:

\_\_\_\_\_  
Signed by The Proper Officer  
Australian War Memorial  
Addressee

Form 43B  
Rule 24.13(1)(b)



## Subpoena to produce documents

No. NSD 1485 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Ben Roberts-Smith**

Applicant

**Fairfax Media Publications Pty Limited** and others named in the Schedule  
Respondents

To: The Proper Officer  
Australian War Memorial  
Treloar Crescent  
Canberra ACT 2612

**You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.**

**Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.**

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 11 March 2020. (See Note 1)

Date: 4 March 2020

A handwritten signature in black ink, appearing to read "Peter Bartlett".

Signed by an officer acting with the authority  
of the District Registrar

Issued at the request of Respondents, whose address for service is:

|                     |  |
|---------------------|--|
| Filed on behalf of  | Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents |
| Prepared by         | Peter Bartlett   |
| Law firm            | Minter Ellison   |
| Tel                 | + 61 3 8608 2037   |
| Fax                 | + 61 3 8608 1088   |
| Email               | Peter.Bartlett@minterellison.com   |
| Address for service | Level 23, Rialto Towers, 525 Collings Street<br>Melbourne VIC 3000                               |

Place: MinterEllison, Rialto Towers, 525 Collins Street, Melbourne VIC 3000

Email: [Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)





### Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to a Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date: 18 March 2020

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, 184 Phillip St Queens Square Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar  
Federal Court of Australia  
New South Wales District Registry  
Level 17, Law Courts Building  
184 Phillip St  
Queens Square, Sydney  
NSW 2000



### **Schedule of documents**

In this schedule "document" has the meaning ascribed to it in the *Evidence Act 1995* (Cth).

The documents and things you must produce are as follows:

1. Copies of all documents referring to and/or evidencing the interview between Ben Roberts-Smith and Australian War Memorial historian Peter Pederson in 2011, including but not limited to audio recordings, transcripts, handwritten notes, text messages and emails.
2. Copies of all correspondence between Ben Roberts-Smith and Australian War Memorial Director Dr Brendan Nelson in or around March – August 2017 in relation to Ben Roberts-Smith's interview with Peter Pederson in 2011.





## **Notes**

### **Last day for service**

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

### **Informal service**

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

### **Addressee a corporation**

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

### **Conduct money**

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

### **Production of subpoena or copy of it and documents or things by delivery or post**

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to a Registrar:
  - (a) at the address specified in the subpoena for the purpose; or
  - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify a Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, a Registrar may permit the parties to the proceeding to inspect the document or thing.



### **Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by a Registrar, produce a list of the documents or things produced.

### **Production of copy instead of original**

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.
- 9A. The copy of a document may be:
- (a) a photocopy; or
  - (b) in an electronic form in any of the following electronic formats:
    - .doc and .docx – Microsoft Word documents
    - .pdf – Adobe Acrobat documents
    - .xls and .xlsx – Microsoft Excel spreadsheets
    - .jpg – image files
    - .rtf – rich text format
    - .gif – graphics interchange format
    - .tif – tagged image format

### **Applications in relation to subpoena**

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
  - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

### **Loss or expense of compliance**

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

### **Contempt of court - arrest**

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

## Schedule



No. NSD 1485 of 2018

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### Respondents

|                    |               |
|--------------------|---------------|
| Second Respondent: | Nick McKenzie |
| Third Respondent:  | Chris Masters |
| Fourth Respondent: | David Wroe    |

Date: 4 March 2020