

Appendix 6

Department of Defence

Answers to questions taken on notice – 19 June 2006

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE COMMITTEE'S
REVIEW OF REFORM TO AUSTRALIA'S MILITARY JUSTICE SYSTEM**

**DEPARTMENT OF DEFENCE RESPONSES TO QUESTIONS TAKEN ON NOTICE
FROM 19 JUNE 2006 HEARING**

INDEX

QUESTION	TOPIC
1	Ombudsman's auditing/monitoring function
2	Army Aviation maintenance records investigation
3	Military Police Secondment and Exchanges
4	IGADF Reporting to the Minister
5	Psychiatric Assessment of ADF Personnel
6	Amendments to the Administrative Inquires Manual

Question 1**Senator Payne****Hansard 19 June 2006, p. 14****(see also page 5)****Ombudsman's auditing/monitoring function**

Could you please indicate whether Defence will adopt the Ombudsman's proposal in relation to him undertaking a more routine auditing and monitoring of the way in which cases are handled?

RESPONSE

Defence welcomes the Defence Force Ombudsman's (DFO's) proposal for a more routine audit and monitoring role in respect of the management of complaints. The finer detail and practical implementation of the necessary arrangements will be addressed as part of the broader enhancements to the military justice system being progressed in accordance with the Government response to the Senate Report.

Question 2

Senator Payne

Hansard 19 June 2006, p. 15

Army Aviation maintenance records investigation

The Joint Standing Committee on Foreign Affairs, Defence and Trade's hearing into the *Defence Annual Report 2004-05* on 16 June 2006 included a discussion on an investigation into an alleged forgery of work logs. Could you please comment on the discussion on the training and qualifications of the officer appointed to carry out the investigation?

RESPONSE

The investigation referred to was instigated by the Appointing Authority, Lieutenant Colonel Bryce Titcume, Chief of Staff, Headquarters 16th Brigade (Aviation), to investigate matters relating to the alleged falsifications of documents recording the attainment of trade competencies by aircraft technicians.

The allegations raised potential aircraft safety issues which the Brigade Commander wished to have resolved as soon as possible. The matter was originally referred to Military Police for action. Delays in the progress of the Military Police investigation led to the Commanding Officer's decision to progress the matter quickly by ordering an Administrative Inquiry.

The terms of reference for the Administrative Inquiry were primarily focussed on systemic training and maintenance implications arising from the alleged falsification of documentation that could compromise technical airworthiness, rather than any potential disciplinary aspects.

Consistent with the technical focus of the inquiry, the Inquiry Officer, Captain (now Major) Andrew Kelly, was selected for the task because of his particular trade background as an aviation technician. He had received some training on investigation techniques as part of a six-week aircraft accident investigation course, but had received no training specific to the conduct of Administrative Inquiries.

The facts of the alleged forgeries were not at issue given the admissions made by those involved. Nor were the technical and systemic issues in the terms of reference dependent on the evidence of Mr Nancarrow. Although it would have been preferable, and consistent with standard practice, for the Inquiry Officer to interview the complainant, Mr Nancarrow, this omission was not fatal to the objectives of the inquiry.

Question 3

Senator Hutchins

Hansard 19 June 2006, p. 21

Military Police Secondment and Exchanges

What progress has been made in military police secondments and exchanges with civilian police authorities, including the number of personnel who have participated in such exchanges and the period of time involved?

RESPONSE

On average, 14 ADF Service police undertake training with the Australian Federal Police (AFP) or NSW Police annually. These courses range in length from one to seven weeks and, in the case of the [seven week] NSW Police Scenes of Crime Course, involves a three week attachment to the NSW Police for confirmatory training on completion of the formal course. Defence also has in place long-standing arrangements at the operational level with the Australian Federal Police (AFP) and NSW Police for the provision of specialist instructional support to key courses. Additionally, the recent 2006 Australian Police Commissioner's Conference agreed to the formation of a working group to best coordinate Federal and State Police support, including for training, to the Service Police.

The requirement for, and nature of, future secondments and exchanges to Australian civilian police authorities, including for the provision of specialist training, will be informed by the outcomes of the current tri-Service audit of Service police.

Question 4

Senator Hutchins

Hansard 19 June 2006, p. 21

IGADF Reporting to the Minister

Can the IGADF make an annual report to the minister on his operations independent of the requirement to report to the CDF?

RESPONSE

Part VIII B of the *Defence Act 1903* deals with the Inspector General ADF statutory functions. Section 110A states, inter alia, that the object of Part VIII B is to provide the Chief of the Defence Force with a mechanism for internal audit and review of the military justice system, independent of the ordinary chain of command.

Reporting by the Inspector General ADF is provided for under Part VIII B of the *Defence Act 1903*, Section 110R, which is in the following terms: "*The Inspector General ADF must prepare and give to the Chief of the Defence Force such reports on the operations of the Inspector General ADF as the Chief of the Defence Force directs.*"

No express provision is made for the Inspector General ADF to make reports on the operations of his office independently of the requirements of this section. However, Part VIII B should be read in the context of the Act as a whole, including the powers of the Minister under Part II of the Act. Accordingly, it is possible for the Minister to direct CDF to require an annual report from the IGADF.

Question 5

Senator Hutchins

Hansard 19 June 2006, p. 24

Psychiatric Assessment of ADF Personnel

Can an ADF member be compelled to undergo psychiatric assessment?

RESPONSE

The ADF can direct a member to present for medical treatment (as a general order) but can not compel them to undertake the treatment. A failure to undertake the treatment however may then have administrative consequences, such as the member not being fit to deploy.

Question 6

Senator Payne

IN CAMERA Hansard 19 June 2006, p. 5

Amendments to the Administrative Inquiries Manual

Can the amendments to the Administrative Inquiries Manual please be provided to the Committee?

RESPONSE

The relevant pages of *Australian Defence Force Publication 06.1.4* (ADFP 06.1.4) the *Administrative Inquiries Manual* (AIM), Edition 2 dated June 2006, showing the amendments made as a result of the Government Response to the Committee's report are attached. The amendments made are as follows:

- a. Recommendation 26 – Amend the AIM to specify that quick assessments, while mandatory, should not replace the appropriate use of other forms of Administrative Inquiries.
 - (1) Chapter 2 paragraph 2.3 and Chapter 5 paragraph 5.18 provide for the required amendment.
- b. Recommendation 27 – Amend the AIM to improve guidance to commanders who are responsible for the selection of Inquiry Officers to carry out Administrative Inquiries, such as Routine Unit Inquiries or those appointed as Investigating Officers under the Defence (Inquiry) Regulations. (*Note the Defence (Inquiry) Regulations have been separately amended to replace Investigating Officer with Inquiry Officer*).
 - (1) Chapter 4 (Routine Inquiries) paragraphs 4.3 to 4.6 provides guidance on the selection of Routine Inquiry Officers, including impartiality and independence and requisite 'core skills'.
 - (2) Chapter 5 (Appointing Authorities and Appointing Officers under the Defence (Inquiry) Regulations) paragraphs 5.7 and 5.28 – 5.34 provides guidance on the selection of Inquiry Officers and Inquiry Assistants, including: criteria for persons selected to inquire into complaints of unacceptable behaviour; requisite core skills and impartiality and independence.
- c. Recommendation 28 – Amend the AIM to require that Investigating Officers must provide statements of independence, and that following receipt of the statement of independence, the complainant must alert the Appointing Authority to any potential conflict of interest or objection to an Investigating Officer. Resolution of any conflict would then occur prior to the commencement of the investigation.
 - (1) Chapter 4 paragraph 4.6 and Chapter 5 paragraph 5.31 provide for a mandatory statement of independence and impartiality. Annex N to Chapter 5 is an example statement of impartiality and independence by an Inquiry Officer.

- d. Recommendation 31 – Amend the AIM to require the President to ensure that a copy of the relevant evidence is provided to a person whom the President considers is an affected person but who is not present at the hearings. It will be a matter for the President to determine what evidence should be made available to an affected person having regard to all the circumstances of each case.
 - (1) Chapter 7 paragraph 7.65 provides for the required amendment.
- e. Recommendation 32 – Amend the AIM to reflect the requirement that a person who comes before the board late in proceedings will be allowed a reasonable opportunity to familiarise themselves with the evidence that has already been given.
 - (1) Chapter 7 paragraph 7.58 provides for the required amendment.

Attachment:

- 1. Extracts from ADFP 06.1.4 (Administrative Inquiries Manual)

CHAPTER 2
QUICK ASSESSMENT

2.1 Quick Assessments are not inquiries under the Defence (Inquiry) Regulations and derive their authority from the inherent power of military rank and command.¹ Any commander may initiate a Quick Assessment into matters in connection with issues under their command and control.

Purpose of the Quick Assessment

2.2 The purposes of the Quick Assessment are:

- a. To enable a commander to determine the nature and gravity of the occurrence, the nature and extent of information required and the opportunity to decide what type of administrative inquiry, if any, is most likely to provide that information and is the most appropriate in the circumstances.
- b. To provide the Australian Defence Force (ADF) and commanders with a complete observable and auditable record of the initial details of an occurrence and the reasons underpinning any action taken with respect to that occurrence.
- c. To identify context management issues.

2.3 The Quick Assessment is not to be used as a vehicle for outcomes such as adverse findings, or to circumvent the need for further inquiry or investigation where such action would otherwise be necessary. Its primary purpose is to determine the manner in which the subject of the inquiry is most appropriately progressed, dealt with or finalised. It is not to be used to replace an administrative inquiry. The Quick Assessment is only the first part of the administrative inquiry process.

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Quick Assessment mandatory

2.4 Following the notification of an occurrence, incident or complaint, it is mandatory to conduct a Quick Assessment before taking any further action.

Appointment

2.5 Any ADF member may be directed to conduct a Quick Assessment. Instruments of Appointment are not required. The officer initiating the Quick Assessment should verbally brief the member and an outline of that brief should be documented by the officer conducting the Quick Assessment. Speed is essential in the conduct of a Quick Assessment. Both the Quick Assessment and the report to the officer initiating the Quick Assessment should be completed the same day.

2.6 The selection of a Quick Assessment officer must be consistent with paragraph 1.37(b) of this manual. Personnel selected to conduct a Quick Assessment must be free from bias and conflict of interest. The Quick Assessment officer must be able to conduct the assessment in a state that is impartial.

2.7 Tracking : All administrative inquiries conducted under the Defence (Inquiry) Regulations must be tracked using the ADF Administrative Inquiry Tracking System (ADFAITS). ADFAITS is an electronic real time tracking system for administrative inquiries. Its purpose is to serve as a management tool for Appointing Authorities/ Officers and Inquiry Officers. It is designed to assist in the review and approval processes of inquiry recommendations and in the oversight of the implementation of approved recommendations. Tracking the Quick Assessment is at the discretion of the commander or superior commander. Tracking on ADFAITS will usually be done by the Quick Assessment Officer. ADFAITs can be accessed via the DEFWEB under 'Online Tools'.

Quick Assessment and other investigations

2.8 In response to an incident or accident other investigations may be initiated, for example police or coroners investigations. A Quick Assessment can be conducted while other investigations are underway. The Quick Assessment

¹ See Section 9 of the Defence Act 1903

RESPONSIBILITIES OF APPOINTING AUTHORITIES AND APPOINTING OFFICERS
Quick Assessment

5.17 It is important that an Appointing Authority /Officer does not appoint an inquiry under the Defence (Inquiry) Regulations without first conducting a Quick Assessment.¹ The proper course to be followed for dealing with a matter cannot be determined until the preliminary issues and the context management issues² have been identified and there is some indication as to the expectations of complainants or affected persons. In all cases, this will involve inquiries of witnesses and affected persons, the collection of evidence and careful evaluation of the resulting report before deciding on the appropriate course of action. The matrix in annex E to chapter 2 provides guidance in selecting the most appropriate type of inquiry.

5.18 Any ADF member or an appropriate civilian may be directed to conduct a Quick Assessment. A Quick Assessment must not be used to replace other forms of administrative inquiry. It is the first part of the administrative inquiry system. See Chapter 2 for further advice in relation to Quick Assessments.

5.19 From the Quick Assessment report it should be possible to identify the allegations of the complainant or the issues for the inquiry. The next step is to consider the desired outcomes of the inquiry. The Terms of Reference must focus on these outcomes, ie the reason why the Appointing Authority/Officer wants the information.

Alternative Applications of Administrative Inquiries

5.20 Current policy and legislation³ regarding the conduct of administrative inquiries provides commanders with some flexibility in terms of selection of an administrative inquiry process. The intent is to allow commanders to select an inquiry format or combination of formats suitable to the incident. In this respect experience in the conduct of inquiries reveals that good results can be achieved where the inquiry process is modified to best meet the circumstances of the inquiry at hand. An inquiry need not be progressed in conventional BOI or Inquiry Officer form. For example, the circumstances may suit the appointment of an Inquiry and a series of Assistant Inquiry Officers⁴ rather than the appointment of a Board of Inquiry, or the appointment of a series of Inquiry Officers to collate material in respect of defined areas of responsibility and report back to a Board of Inquiry.⁵ In both these circumstances the purpose of the inquiry format is to enable effective use of resources to efficiently collate, analyse and present a broad range of material for the inquiry in a timely manner.

5.21 The appropriate combination and format of inquiry will depend on the circumstances at hand. Appointing Authorities/Officers should discuss appropriate options for the format of an inquiry with a Legal Officer prior to finalising Terms of Reference and Appointment instruments as direction for the procedure of the inquiry will be contained in this documentation.

Tracking, Scoping and Planning the Inquiry

5.22 Tracking: All administrative inquiries conducted under the Defence (Inquiry) Regulations must be tracked using the ADF Administrative Inquiry Tracking System (ADFAITS). ADFAITS is an electronic real time tracking system for administrative inquiries. Its purpose is to serve as a management tool for Appointing Authorities/Officers and Inquiry Officers. It is designed to assist in the review and approval processes of inquiry recommendations and in the oversight of the implementation of approved recommendations. Tracking the inquiry on ADFAITS will usually be done by an Inquiry Officer, Board Member or Board Secretary. ADFAITs can be accessed via the DEFWEB under 'Online Tools'.

5.23 The Appointing Authority/Officer must ensure that scoping and planning are conducted. Scoping and planning are discrete tasks conducted at different points of the inquiry process which are essential to ensuring the inquiry proceeds effectively and efficiently.

5.24 Scoping: Prior to finalising the Terms of Reference for an inquiry the Appointing Authority/Officer is to arrange for scoping of the inquiry in order to ensure that the format and procedure to be followed by the Board or Inquiry Officer(s) is

¹ See chapter 2 – Quick Assessment

² See annex B to chapter 2

³ ADFP 6.1.4 , DGTDLS Directive 2/2003, TDLS Reserve Legal Officer standard Operating Procedures, Determination 2000/1 and the D(I)Rs

⁴ The Burchett Inquiry is an example of an inquiry progressed in this way.

⁵ The F1-11 Reseal Deseal Board of Inquiry was run in this format.

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CHAPTER 4

ROUTINE INQUIRIES

4.1 The purpose of this chapter is to provide guidance to commanders and Routine Inquiry officers on inquiries into the broad range of matters, which arise in a unit from day-to-day. These inquiries are conducted with as little formality as possible, free from the constraints and legal requirements of inquiries under the Defence (Inquiry) Regulations. The majority of inquiries conducted in units should be Routine Inquiries. Inquiries under the Defence (Inquiry) Regulations conducted by Inquiry Officers and Boards of Inquiry should be the exception rather than the rule. Annex E to Chapter 2 provides guidance on the selection of an appropriate type of inquiry.

Quick Assessment

4.2 A Routine Inquiry is not to be conducted until a Quick Assessment has been completed. The Quick Assessment is not to be used as a vehicle for outcomes such as adverse findings, or to circumvent the need for further inquiry where such inquiry would otherwise be necessary. After a Quick Assessment is completed, a commander must decide what further inquiry, if any, is appropriate. Annex E to chapter 2 provides guidance as to whether or not it is appropriate to conduct a Routine Inquiry.

Selection of personnel

4.3 If it is determined that a Routine Inquiry is the most appropriate type of inquiry to conduct, the commander must ensure that the member or civilian nominated to conduct that inquiry is the most suitable. Any member of the Defence Force who is an officer, warrant officer or senior non-commissioned officer may be directed to conduct a Routine Inquiry. Particular care should be taken in the selection of the person to inquire into allegations of unacceptable behaviour, however minor. The selection should be made having regard to the capability, standing and expertise of the person. An experienced, mature and well-respected person should be chosen. The selection of the right person may facilitate the resolution of the incident or occurrence without the matter escalating to an inquiry under the Defence (Inquiry) Regulations.

4.4 Impartiality and independence. The following guidance must be adhered to in selecting a Routine Inquiry Officer.

- a. The person or persons selected must be free from bias and conflict of interest. Bias may arise as a result of a relationship between the inquiry officer and a party; such as a close family relationship, a close personal friendship (although not mere acquaintance) or strong personal animosity. Persons selected must be able to carry out the investigation in an independent manner. They are to be reminded of these obligations by the Appointing Authority.
- b. A member of the same unit must not be selected if they are directly responsible in the chain of command for the personnel or activities under inquiry.
- c. A commander (who by definition is likely to be involved in the implementation of recommendations with respect to members under their command) is not to be appointed to inquire into the conduct of any member under their command.
- d. Issues relating to the impartiality or independence of the inquiry officer must be resolved prior to the inquiry commencing.

4.5 The requisite skills, knowledge, experience and rank required of a Routine Inquiry Officer or Inquiry Assistant will differ depending on the role of the appointee and the circumstances of the inquiry. Core skills suited to the discharge of duties as a Routine Inquiry Officer include:

- a. prior experience in administrative processes or inquiries (dependent on the complexity of the matter under inquiry);
- b. relevant training in administrative inquiry processes (dependent on the complexity of the matter under inquiry);
- c. research skills;
- d. analytical skills;
- e. communication skills; and

- f. report writing skills.

Mandatory Statement of Independence and Impartiality

4.6 In addition to the guidance set out above, the guidance below must be adhered to in relation to Routine Inquiry Officers

- a. The person(s) selected as a Routine Inquiry Officer must sign a statement confirming their independence and ability to inquire into the matter in an unbiased manner. (See Annex N Chapter 5 for example statement.)
- b. Prior to an inquiry commencing a copy of that statement must be provided to the Appointing Officer, the complainant(s) and the respondent(s).
- c. If accepted the complainant(s) and respondent(s) shall endorse the statement of the Routine Inquiry Officer.
- d. If the complainant(s) or the respondent(s) has concerns relating to the impartiality or independence of the Routine Inquiry Officer they are not to endorse the statement and must inform the Appointing Officer.
- e. Issues relating to the impartiality or independence of the Inquiry Officer must be resolved prior to the inquiry commencing.

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Terms of Reference

4.7 The preparation of Terms of Reference for the conduct of Routine Inquiries is optional and is left to the discretion of the commander having regard to the circumstances of the case. Where no Terms of Reference are provided an appropriate briefing should be given and the Routine Inquiry officer should retain a written record of this briefing. Where no Terms of Reference are raised, the Instrument of Appointment should refer to the nature and scope of the inquiry. A form of Instrument of Appointment is in annex A for the guidance of commanders who wish to issue an Instrument of Appointment.

Tracking

4.8 All administrative inquiries conducted under the Defence (Inquiry) Regulations must be tracked using the ADF Administrative Inquiry Tracking System (ADFAITS). ADFAITS is an electronic real time tracking system for administrative inquiries. Its purpose is to serve as a management tool for Appointing Authorities and Inquiry Officers. It is designed to assist in the review and approval processes of inquiry recommendations and in the oversight of the implementation of approved recommendations. Tracking the Routine Inquiry is at the discretion of the commander or superior commander. Tracking on ADFAITS will usually be done by the Inquiry Officer. ADFAITS can be accessed via the DEFWEB under 'Online Tools'.

ROUTINE INQUIRY¹

Principles applicable to a Routine Inquiry

- 4.9** Whilst the advantage of a Routine Inquiry is its informality, the following principles must be observed:
- a. The matter should be dealt with seriously, sensitively and swiftly.
 - b. The inquiry should be conducted without bias and with objectivity.
 - c. The inquiry should be conducted so that any perception of bias is avoided.
 - d. Assumptions should not be made about either a complainant or the person who is the subject of the complaint.

¹ Further guidance on the conduct of an inquiry is in chapter 6—'Inquiry Officer Inquiries'

- f. scoping of the inquiry and development of an inquiry plan;
- g. proper monitoring of the inquiry including the use of scoping and inquiry plans as a performance framework;
- h. information briefs for inquiry appointees; and
- i. engagement and support for NoK and potentially affected parties; and
- j. provision of appropriate levels of resources and administrative support.

Additionally, for Boards of Inquiry, legal officers should brief Appointing Authorities on the nature of their general responsibilities. This briefing will vary depending on the previous experience of the Appointing Authority. Legal officers should also brief Appointing Authorities on the factors which will influence the selection of personnel for BOI appointment (see paras 5.35 to 5.49)

5.6 Consideration must be given to the needs and positions of complainants, respondents and Potentially Affected Parties, the need to preserve discipline and the need to act without delay in order to:

- a. preserve evidence,
- b. preserve documents,
- c. avoid harm to an individual,
- d. prevent a recurrence of the matters complained of,
- e. separate parties in conflict and act fairly to the respondent,
- f. prevent a recurrence of an accident especially where death, serious injury or damage or loss of Defence property is involved, and
- g. generally act for the good of the Service.

5.7 Unacceptable behaviour. Complaints of unacceptable behaviour require particular skills. The principal criteria to be taken into account when selecting personnel to inquire into allegations of unacceptable behaviour are:

- a. freedom from any form of bias and the ability to carry out the inquiry in an independent manner;
- b. that personnel who are direct supervisors, personnel who have a close working relationship or a friendship with any of the parties or witnesses shall not be involved;
- c. an understanding of the advantages and disadvantages of ADR in resolving complaints;
- d. maturity and ability to conduct an inquiry, establish the facts, understand the nature of the allegations and be able to understand how to deal with the complainant and respondent, particularly where the complainant or respondent may be under the age of 18; and
- e. an ability to quickly identify the facts and solutions, which should be focused on the following outcomes:
 - (1) preserving a complainant's and respondent's safety, wellbeing and dignity;
 - (2) ensuring that any early signs of more serious situations, such as entrenched discrimination or harassment within a unit, are recognised and addressed; and
 - (3) ensuring that the objectives of military discipline and the integrity of the chain of command are preserved.

Powers of Appointment

5.8 An officer with authority to appoint a Board of Inquiry is referred to as the *Appointing Authority*. An officer with authority to appoint an Inquiry Officer Inquiry is referred to as the *Appointing Officer*.

5.9 Courts of Inquiry. In the case of a Court of Inquiry, the Minister will be the Appointing Authority.

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5.27 The Inquiry Plan is the means by which the Appointing Authority/ Officer is able to monitor and manage the inquiry process. The President of a Board of Inquiry or the Inquiry Officer is to present the Inquiry Plan to the Appointing Authority/Officer for the Appointing Authority/ Officer's approval. The President or Inquiry Officer is to ensure that the timetable set out in the Inquiry Plan is met.

Selection of personnel for Inquiry Officer Inquiries and Boards of Inquiry

5.28 It is vital that appropriately qualified and experienced personnel be selected for the conduct of inquiries. Accepting that operational constraints may often work against commanders in this regard, this chapter contains general guidance designed to ensure that all necessary considerations are covered in the selection of personnel for Inquiry Officer Inquiries and Boards of Inquiry. The selection of appropriately qualified civilians for appointment to Boards of Inquiry should be considered.

5.29 Poor selection of personnel to conduct inquiries may result in:

- a. failure to adhere to the Terms of Reference,
- b. unnecessary delay,
- c. flawed processes leading to the inquiry being set aside,
- d. bias,
- e. failure to appreciate the gravity or sensitivity of complaints,
- f. intimidation and pressure upon complainants and witnesses,
- g. attempts to resist or hamper inquiries by outside agencies, or
- h. lack of adequate documentation.

5.30 Impartiality and independence. The following guidance must be adhered to in selecting appropriate personnel for inquiry duties.

- a. The person or persons selected must be free from bias and conflict of interest. Bias may arise as a result of a relationship between the inquiry officer or member of a Board of Inquiry and another person involved in the inquiry. The types of relationships that may result in actual or perceived bias include; a close family relationship, a close personal friendship (although not mere acquaintance) or strong personal animosity. Persons selected must be able to carry out the inquiry in an independent manner. They are to be reminded of these obligations by the Appointing Authority.
- b. A member of the same unit must not be selected if they are directly responsible in the chain of command for the personnel or activities under inquiry.
- c. A commanding officer will usually be responsible for the implementation of recommendations with respect to members under their command. Accordingly, a Commanding Officer is not to be appointed to inquire into the conduct of any member or incident under their command.

5.31 Mandatory Statement of Independence and Impartiality. In addition to the guidance set out above, the guidance below must be adhered to in relation to Inquiry Officer Inquiries.

- a. The person(s) selected as an Inquiry Officer must sign and provide the Appointing Authority a statement of impartiality and independence and make known any potential conflict of interest. (See Annex N for an example statement.)
- b. Prior to an inquiry commencing a copy of that statement must be provided to the Appointing Officer, the complainant(s) and the respondent(s) or other party as appropriate in the circumstances.
- c. If accepted the complainant(s) and respondent(s) is to endorse the statement of the Inquiry Officer.
- d. If the complainant(s) or the respondent(s) has concerns relating to the impartiality or independence of the Inquiry Officer they are not to endorse the statement and must inform the Appointing Officer.

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- e. Issues relating to the impartiality or independence of the Inquiry Officer must be resolved by the Appointing Authority prior to the inquiry commencing.

5.32 Consideration should be given to appointing an inquiry officer from a unit other than that to which the personnel under inquiry belong in serious or sensitive matters and/or matters involving unacceptable behaviour. Such action will also be appropriate where there is likely to be media interest and potential for criticism of and embarrassment for the Australian Defence Force (ADF), where it is practical to do so. If a suitably qualified inquiry officer can not be identified, the Appointing Officer should consult their superior Commander.

Selection of an Inquiry Officer or Inquiry Assistant

5.33 An Appointing Authority may appoint an Inquiry Officer and one or more Inquiry Assistants to inquire into a matter. The D(I)Rs provide that an Inquiry Officer and any Inquiry Assistants must be :

- a. an officer;
- b. a warrant officer,
- c. an ongoing member of the APS performing duties at or above the classification of APS 4⁶, or
- d. any other person approved by the CDF, CN, CA or CAF.

5.34 The requisite skills, knowledge, experience and rank required of an Inquiry Officer or Inquiry Assistant will differ depending on the role of the appointee and the circumstances of the inquiry. Core skills suited to the discharge of duties as an Inquiry Officer or Inquiry Assistant include:

- a. prior experience in administrative processes or inquiries;
- b. relevant training in administrative inquiry processes;
- c. research skills;
- d. analytical skills;
- e. communication skills; and
- f. report writing skills.

Selection of Personnel for Boards of Inquiry

5.35 There are five key areas of appointment which need to be considered by the Appointing Authority in respect of a BOI. These are:

- (i) the board president
- (ii) the board members;
- (iii) counsel assisting;
- (iv) secretary or secretariat; and
- (v) counsel representing affected parties.

5.36 The requisite skills, knowledge and experience will differ depending on the role of the appointee and the circumstances of the inquiry. Further guidance is provided below.

5.37 The Board President. Regulation 27 provides that the Appointing Authority shall appoint one of the board members to be President of the Board.⁷The Board President is responsible to the Appointing Authority for the

⁶ Regulation 70 Defence (Inquiry) Regulations

- c. to identify persons who may be adversely affected.

7.57 Proceeding without statements. There may be cases where Counsel Assisting will advise the Board that preliminary statements need not be taken. This would be unusual, but there may be cases where Counsel Assisting and the Board consider that they are more likely to get to the truth of the matter by examining a witness without having first afforded them the opportunity to reduce their version of the evidence to writing in the form of a statement.

Affected persons

7.58 It may be possible to identify affected persons from the scoping of the inquiry, from the Terms of Reference, or from preliminary statements taken in anticipation of the Board sitting. Affected persons are authorised to appear before the Board and to be represented by another person who may be a legal practitioner. Whether a person may be affected, is a matter of judgment for the President to be exercised in conjunction with advice from Counsel Assisting. On the one hand, the more people who are represented before the Board, the more cumbersome the proceedings and the longer the inquiry will take to complete. On the other hand, the Board cannot make adverse findings against a person who has not been given the opportunity to be heard. If an affected person is notified of their PAP status late in proceedings, they will, if they request, be granted an adjournment to allow a reasonable opportunity to familiarise themselves with the evidence. Further, they may require witnesses to be recalled so that additional matters can be put to them. This will cause significant delays, if there are a number of witnesses involved. Fewer delays will occur if affected persons can be identified early in the proceedings or before proceedings commence.

7.59 Legal representation. An affected person may appoint another person (who may be a legal practitioner) to represent them before the Board.²⁰

7.60 Legal representation—deceased persons. A deceased member may be an affected person. In that event, a single representative of the deceased member can appear before the Board or choose to be represented by another person (who may be a legal practitioner) before the Board. Should the representative wish the deceased member to be represented by a civilian legal practitioner, this is to be at their own expense.

Possible adverse findings—natural justice

7.61 The rules of natural justice require that where the Board contemplates making findings which are adverse to the interests of any person, the Board must give that person the opportunity to put before it any material which might deter it from reaching that conclusion or making that finding²¹. The Board will be required, at the conclusion of the evidence, to give notice to any individual against whom it is contemplated that adverse findings may be made. The Board should be alert to this so that there is no significant delay in compiling the notices at the end of the taking of evidence. If the affected person has been present or represented throughout the proceedings, the issue need only be identified in broad terms²².

7.62 The term 'interests' with respect to a person likely to be adversely affected by the Board's findings includes the person's career or reputation, not just the possibility of administrative action or a recommendation that a disciplinary investigation be conducted.

7.63 A person who is likely to be adversely affected is limited to making submissions and putting material before the Board with respect to the matters that may be the subject of the Board's adverse findings with respect to them. They are not entitled to make submissions on the general subject matter before the board²³. In making submissions, persons are

²⁰ Defence (Inquiry) Regulation 33(3).

²¹ The majority in *Annetts & Others v McCann & Ors* (1990) 97 ALR 177 held that:

'The issues in respect of which findings adverse to the appellants may possibly be made can be isolated and, once isolated, counsel for the appellants is not entitled to address the Coroner on matters which are not relevant to those issues. At the same time, the Coroner has a responsibility to define the issues in respect of which there exists a possibility that he may make findings adverse to the appellants. By defining those issues he can effectively assist the identification of the topics on which counsel can relevantly and usefully address and limit the scope of that address.'

²² It is recommended that the affected person be sent a minute worded as follows:

'The issues contained in annex A are within the contemplation of the Board and it is possible that an adverse finding affecting you may be made. You are invited to put any submissions with respect to items contained in annex A to the Board however, you are not obliged to do so.'

²³ *Legal Officers See Annetts & Others v McCann & Ors* (1990) 97 ALR 177.

222

32

not limited simply to denials or assertions and are entitled to put every rational argument open on the evidence and where necessary, to refer to and analyse the evidence to support their submissions.

7.64 No bias rule. The rules of natural justice require that any decision that affects a member will be made by impartial and unbiased decision makers. The courts have adopted the position that a person cannot sit in judgment where their own interests may be affected by the outcome of the case; for example, if they have had a professional association with an affected person or any witness has in the past expressed hostility to the views being put by an affected person or that the findings of the Board may affect the career of a member of the Board. Any person who is a member of a Board where there is a real or potential conflict of interest should disqualify themselves. The general standard used by the courts is to ask whether a reasonable person would have suspected that the decision made by the body was not free from bias, that is to say, that the decision maker could not be seen to bring an open and impartial mind to the making of the decision.

7.65 Evidence affecting a person not present Where the President of a Board of Inquiry considers that any evidence given before the Board may affect a person who was not present or represented before the Board when the evidence was given, the President is to forward a copy of the relevant evidence to the person. The President is to inform the person that they have a right to apply to appear before the Board and to submit any written statement.

7.66 Orders to appear. Members of the ADF (except reservists who are not on duty) may be ordered to give evidence and refusal to attend may be an offence. A request for the attendance of an ADF witness is to be made in the first instance to the person's commanding officer. Any difficulty in securing the attendance of a witness should be referred to the Appointing Authority.

7.67 Summons. The President may summons civilians and reservists (who are not on duty) (See annex D). It is an offence for a person who has been summonsed to fail, without reasonable excuse, to appear and report at the time and place specified in the summons, and then from day-to-day, unless excused by the President, provided that they have been given reasonable travel costs.

7.68 Production of documents. Members of the Defence Force (except reservists who are not on duty) may be ordered to produce documents or articles to the Board of Inquiry but civilians and reservists not actually rendering military service must be summonsed (See annex D). It is an offence for a person who has been summoned to appear as a witness and to produce a document or article relevant to the Board of Inquiry which is within their custody or control, to fail, without reasonable excuse, to do so. Where the Board of Inquiry is held in public, it may be an excuse if the witness considers, on reasonable grounds, that the production might disclose a secret process of manufacture or be prejudicial to the defence of the Commonwealth. The President should decide whether the grounds claimed for refusal are reasonable; if they are not, the President should again order the witness to produce the document or article.

7.69 Taking of oath or affirmation. Where the Appointing Authority directs that evidence is to be taken on oath or affirmation, the Secretary to the President is to administer to each witness the oath or affirmation in accordance with annex E. The President may, however, allow a person to take the oath in such form as they declare to be binding upon their conscience.

7.70 Refusal or failure to take the oath or to affirm. When a Board has been directed to take evidence on oath or affirmation, it is an offence for a witness, without reasonable excuse, to refuse or fail to be sworn or make affirmation when called upon to do so by the President.

7.71 Refusal or failure to answer questions. All witnesses appearing before a Board of Inquiry are required to answer all questions put to them by the President, or approved by them, unless they have a reasonable excuse not to do so. It is no excuse before a Board of Inquiry to refuse to answer questions on the grounds that the answer to the question might incriminate the witness²⁴ but in such a case the answer may not be used in any subsequent civil or criminal proceedings, or proceedings before Service tribunals against that person, except when the witness is charged with giving false evidence to the Board of Inquiry²⁵. Where the Board of Inquiry is held in public it may be an excuse if the witness considers, on reasonable grounds, that the answering of the question in public might disclose a secret process of manufacturer or be prejudicial to the defence of the Commonwealth. Whether the Board is held in public or private, it may be an excuse if the witness considers, on reasonable grounds, that the question is one that is not relevant, having regard to the Terms of Reference of the Board of Inquiry. The President should decide whether the grounds claimed for refusal are reasonable; if they are not, the President should cause the question to be put again. Refusal or failure to answer a question may be an offence²⁶.

²⁴ Defence (Inquiry) Regulation 32(5).

²⁵ Defence Act 1903 section 124.

²⁶ Defence (Inquiry) Regulation 32(3).

Rec

31

EXAMPLE STATEMENT OF IMPARTIALITY AND INDEPENDENCE BY INQUIRY OFFICER

Pursuant to Appointment of (date) I (insert name, rank and service number or APS details as appropriate) have been appointed to inquire into (general statement of incident) and to collect evidence, make findings and recommendations and submit a written report in relation to that matter.

I confirm that I am able to undertake this inquiry in an impartial, unbiased and independent manner.

I confirm I have no personal or professional affiliation or other relationship with the complainant or respondent, or any other person involved in the inquiry with any potential interest in the outcome of this inquiry, which may impact my impartiality or independence.

* I have had minor personal affiliation with the complainant / respondent / witness or other person as listed below but believe that the listed affiliation/s will not affect my impartiality or independence:

(a) (list nature of previous affiliations including timing and duration of affiliation and general nature of relationship)

(b)

* delete as appropriate

I undertake to immediately advise the Appointing Officer at any stage at which my impartiality or independence may be impacted.

.....

(complainant signature)

.....

(respondent signature)

(signature and address block Inquiry Officer)

.....

(signature and address block Appointing Officer)

R22

28