Legal framework for Defence administrative inquiries into a ‘matter concerning the Defence Force’: a quick guide

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Introduction

The Minister for Defence and the Chief of the Defence Force (CDF) have broad powers, incidental to their statutory functions under the *Defence Act 1903* (*Defence Act*), to inquire into any matter concerning the Defence Force. The framework for these general administrative inquiries was significantly overhauled in 2018 after more than a decade of intense scrutiny and review.¹

General administrative inquiries are very valuable to Australian Defence Force (ADF) commanders. Their *purpose* is to determine the facts and circumstances surrounding an incident or situation and assist commanders in making decisions about further action.² They are not intended to be an external or public accountability mechanism.³

This paper sets out the four different methods of conducting a general administrative inquiry into ‘a matter concerning the Defence Force’. The first two methods are internal inquiries used by, and subject to, the ordinary chain of command. The last two methods are independent inquiries external to the ordinary chain of command.

1. A **Commission of Inquiry** (COI) conducted under the *Defence (Inquiry) Regulations 2018* (2018 DI Regs).
2. An **Inquiry Officer Inquiry** (IO Inquiry) conducted under the 2018 DI Regs.
3. An inquiry conducted by the **Inspector-General ADF (IGADF)** at the direction of the Minister or the CDF under section 110C of the *Defence Act* and the *Inspector-General of the Australian Defence Force Regulation 2016* (2016 IGADF Reg) (a **directed IGADF inquiry**).

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2. Replacement Explanatory Statement, *Defence (Inquiry) Regulations 2018*, p. 1. See also A D’Amico, Defence General Counsel, *Administrative inquiries manual*, Department of Defence, Canberra, June 2017 at p. [1.1]–[1.4]. Note that this edition of the Administrative Inquiries Manual does not incorporate significant legislative changes enacted in 2018 and is currently of limited utility. Neither this edition nor an updated edition were available online at the time of writing.
4. An inquiry conducted by an Assistant IGADF who is a judicial officer at the direction of the Minister or the CDF under section 110C of the Defence Act and Division 4A of Part 4 of the 2016 IGADF Reg (a directed IGADF Division 4A inquiry).

Common attributes

Inquiries under both Regulations are designed to establish facts and make recommendations. In legal terms, they are administrative inquiries and may not investigate criminal conduct. If an inquiry uncovers conduct which may be criminal, that conduct is referred to an investigating authority.4

Jurisdiction for investigating offences by ADF members can be complex. The ADF investigating authority for military and criminal offences is the ADF Investigative Service (ADFIS) within the Joint Military Police Unit. In some circumstances, criminal conduct may instead be referred to the Australian Federal Police (AFP).

Inquiries may be conducted in or outside Australia.5 This is useful when an incident occurs overseas, and particularly if it occurs in an operational area or on a ship. An IO who is qualified to safely enter an operational area or ship can be appointed and sent immediately to the relevant location to collect evidence and witness statements.

Some ADF administrative inquiry reports which have been made public can be found on the Department of Defence (Defence) website page ‘Inquiry Reports’.

2018 DI Regs—Internal inquiries subject to ordinary chain of command

The purpose of these inquiries is to facilitate the making of decisions relating to the ADF. The 2018 DI Regs prescribed new forms of general administrative inquiries, reducing the previous system of five separate types of ADF administrative inquiry to just two flexible methods of inquiry:

- a COI, which would usually be used for higher level matters that are particularly complex and/or sensitive
- an IO Inquiry, which is used in the ordinary course of ADF management for lower level or urgent matters.

Inquiries conducted under the 2018 DI Regs are firmly under the control of the appointing authority, who can prescribe procedure and give directions. Reports are rendered to the appointing authority, and the Minister controls the release of reports, evidence, findings and recommendations of those inquiries.

Further instructions to Defence personnel on the conduct of internal inquiries are contained in the Defence Administrative Inquiries Manual. This manual is not registered as a notifiable instrument in the Federal Register of Legislation and is not available on the public Department of Defence website. As of the end of June 2019, an updated edition incorporating the 2017 revised legislative framework was not available to the public.

5. 2016 IGADF Reg, section 18; 2018 DI Regs, sections 17 and 52.
1. Commissions of Inquiry

A COI can be directed to inquire into any matter concerning the Defence Force. The broad legislative scope is limited to specific matters for investigation by the instrument of appointment. **A COI inquiry is firmly under the control of the appointing authority, who can prescribe the inquiry’s procedure and give directions.** Reports are rendered to the appointing authority, and **the Minister controls the release of reports, evidence, findings and recommendations of those inquiries.**

COI are governed by Part 2 of the 2018 DI Regs. A **COI consists of at least a President** and may have additional members. It can be appointed by:

- the Minister
- the CDF or
- the CDF and the Secretary of the Department of Defence acting jointly.

The power to appoint a COI can also be delegated to ADF officers holding senior rank not below naval commodore or equivalent (one star grade).

The appointing authority may also appoint **COI assistants** and **legal practitioners** to assist the COI.

**Powers and procedure**

The appointing authority may **give directions** about how the inquiry is to be conducted; however, evidence must be **given on oath or affirmation** and hearings must be held in **private** unless the appointing authority specifically directs otherwise. Section 16 also specifies certain other requirements:

(2) A Commission:

(a) must conduct its inquiry fairly, economically, quickly and informally; and

(b) must comply with the rules of procedural fairness; and

(c) is not bound by the rules of evidence, legal forms or technicalities; and

(d) may inform itself on any matter relevant to its inquiry in such manner as the President of the Commission thinks fit.

The President of a COI has significant powers of compulsion reinforced by the offences in Division 5 of Part 2 the 2018 DI Regs. The President may, by notice in writing, **require a person to appear**, to give information or to **produce a document or thing**. It is an offence under sections 29–35 to, among other things: **fail to appear, refuse or fail to answer questions, fail to produce a document or thing, give false evidence, commit contempt, or take reprisals**. The powers of compulsion and offences are not limited to ADF members. Each offence carries a maximum penalty of 20 penalty units (currently $4,200).

**Self-incrimination** is not a sufficient ground for refusal to give evidence unless an individual is concurrently facing related charges; however, evidence given cannot be used in civil or criminal proceedings, or proceedings before a service tribunal, against the person who gave it.
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Report of COI to appointing authority
Once the President is satisfied that all relevant information has been obtained, he or she must prepare a report setting out the findings and any recommendations arising from the findings of the COI. Dissenting reports from other members are permitted. The President must give the report, and the records of the COI, to the appointing authority.

Disclosure of COI reports and evidence
The President may give a written direction prohibiting disclosure of certain information or documents (commonly called a suppression order) and it is an offence to disclose that information. It is also an offence for an ADF member or Commonwealth employee, who obtains COI information, records or reports in the course of their duties, to disclose that material without permission (note that they have legislative permission to use and disclose material in the course of their duties).

The Minister may nevertheless use, copy or disclose any part of the COI report or COI records or authorise in writing a Commonwealth employee or ADF member to do so, including material subject to a suppression order under subsection 25(1).

COI reports and records are exempt from disclosure under the Freedom of Information Act 1982.

2. Inquiry Officer Inquiry
An Inquiry Officer (IO) can be directed to inquire into any matter concerning the Defence Force. The broad legislative scope is limited to specific matters for investigation by the instrument of appointment. An IO Inquiry is firmly under the control of the appointing authority, who can prescribe the inquiry’s procedure and give directions. Reports are rendered to the appointing authority, and the Minister controls the release of reports, evidence, findings and recommendations of those inquiries.

Unlike a COI, an IO may only make findings, not recommendations, unless they are specifically authorised to do so in the instrument of appointment. IO Inquiries are governed by Part 3 of the 2018 DI Regs.

An IO may be appointed by the CDF, but this power may also be delegated to an ADF officer holding a rank not below naval lieutenant or equivalent (O3 grade). The appointing authority may also appoint IO assistants.

Powers and procedure
The appointing authority may give directions about how the inquiry is to be conducted; outside those directions the IO may inform himself or herself on any relevant matters in any manner he or she thinks fit. IO Inquiries are designed to be quick and informal. The IO must ensure inquiries:

• are conducted fairly, economically, quickly and informally
• comply with the rules of procedural fairness
• are not bound by rules of evidence, legal forms or technicalities.

Unlike a COI, evidence must not be taken on oath or affirmation.

An IO only has powers of compulsion over ADF members; they may be ordered to attend and give evidence or produce a document or thing. It is an offence under sections 61–65 to, among other things, fail to comply with an order to appear, refuse or fail to answer a question, give false
evidence, commit contempt or take reprisals. Each offence carries a maximum penalty of 20 penalty units (currently $4,200).

Self-incrimination is not a sufficient ground for refusal to give evidence unless an individual is concurrently facing related charges; however, evidence given cannot be used in civil or criminal proceedings, or proceedings before a service tribunal, against the person who gave it.

Report of IO to CDF
Once the IO is satisfied that all relevant information has been obtained, the IO must prepare a report setting out the findings and any recommendations (if authorised to make recommendations by the CDF) and give the IO report, and copies of any IO records, to the CDF.

Disclosure of IO reports and records
An ADF member or Commonwealth employee has legislative permission to use and disclose information, records and reports from an IO Inquiry in the course of their duties. It is an offence for an ADF member or Commonwealth employee to otherwise copy or disclose that material without authorisation.

However, the Minister may use, copy or disclose any part of the IO Inquiry report or records for any purpose, or authorise in writing a Commonwealth employee or ADF member to do so.

IO reports and records are exempt from disclosure under the Freedom of Information Act 1982.

Some IO Inquiry reports which have been made public can be found on the Defence website page 'Inquiry Reports'.

2016 IGADF Regs—Independent inquiries by IGADF outside ordinary chain of command

The office of the IGADF
The Minister, after considering any recommendation made by the CDF, appoints the IGADF to full-time statutory office for five years (the IGADF may be reappointed). It is mandatory that the IGADF have experience in military justice issues and an understanding of their relevance to the role of the Defence Force. The purpose of the IGADF is to:

... provide the Chief of the Defence Force with:

(a) a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and

(b) an avenue, independent of the ordinary chain of command, by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.

The IGADF may appoint an Assistant IGADF to help the IGADF on an ongoing basis carry out his or her functions. The IGADF also has a staff of ADF and Australian Public Service (APS) officers and is able to engage consultants. The IGADF and staff are protected from civil proceedings in relation to performance of their duties. The IGADF must provide an annual report on his or her operations to the Minister for presentation to Parliament.
The IGADF may conduct an inquiry:

- on his or her own initiative
- at the request of an individual or
- at the direction of the Minister or the CDF.

The IGADF may only conduct inquiries at his or her own initiative, or at the request of an individual, into certain matters specified in the Defence Act or in the 2016 IGADF Regs. However, under the Defence Act, the Minister or the CDF may direct the IGADF to inquire into or investigate any matter concerning the Defence Force. This paper only describes this latter type of inquiry done by the IGADF at the direction of the Minister or the CDF.

The direction is given to the IGADF; it is for the IGADF to decide whether to personally conduct, or appoint another person to conduct, the inquiry. The IGADF may:

- personally conduct a directed inquiry with or without the assistance of an inquiry officer or an Assistant IGADF who is not a judicial officer (A-IG) (a directed IGADF inquiry) or
- appoint an Assistant IGADF who is a judicial officer (JO-IG) to independently conduct the directed inquiry under Part 4, Division 4A of the 2016 IGADF Reg (a directed Division 4A inquiry).

Division 4A inquiries are designed to be used for investigation of sensitive, grave and complex issues. They may be used, at the discretion of the IGADF, for directed inquiries or other IGADF inquiries.

The IGADF 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 Brereton Inquiry) is a Division 4A inquiry being conducted by Major General Justice Paul Brereton, a NSW Court of Appeal judge and Army Reserve infantry officer.

### 3. Directed IGADF Inquiries

| A directed IGADF inquiry is not subject to ordinary ADF command or ministerial control, however, inquiry officers and A-IG are subject to the direction and control of the IGADF when conducting their inquiries. Inquiry reports are made to the IGADF who must give a report to the person who directed the inquiry. Public release of the report is controlled by CDF or the Minister, whoever directed the inquiry. |

Key provisions for the conduct of IGADF inquiries, including reporting obligations, are found in Part 4 of the 2016 IGADF Reg. The IGADF is permitted to take part personally in a directed IGADF inquiry. The IGADF may also appoint an inquiry officer or an A-IG to conduct the inquiry. This power of appointment may be delegated to an officer holding a rank not below the naval rank of captain or equivalent (O6 grade).

An inquiry officer is appointed to inquire into a particular matter. The inquiry officer must inquire into the matters directed and report to the IGADF. An inquiry officer must conduct their inquiry in private and may only make recommendations if authorised in writing to do so.

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6. Defence Act 1903, section 110C(1)(f).
The IGADF may also appoint an A-IG on an ongoing basis to help the IGADF with his or her functions. The appointment is not confined to any particular matter or length of time. An A-IG may be directed orally or in writing to conduct inquiries and must provide their report to the IGADF. They may be authorised orally or in writing to make recommendations.

An inquiry assistant may be appointed to assist in the conduct of, and the collection of evidence for, any IGADF inquiry. Any evidence collected by the assistant must be given to the person conducting the inquiry.

There are a number of offences contained in the 2016 IGADF Reg. All carry a maximum fine of 10 penalty units (currently $2,100). This does not align with the penalty for equivalent offences under the 2018 DI Regs which all carry maximum fines of 20 penalty units.

**Powers and procedure**

Inquiry officers and A-IG are subject to the direction and control of the IGADF when conducting their inquiries, including whether inquiries are conducted in public or private. However, in other respects they are free to determine their procedure and are not bound by the rules of evidence. An inquiry may be conducted within or outside Australia.

The IGADF may, with at least 14 days written notice, require a person to give information, produce a document or thing, or appear before an inquiry to answer questions. These powers of compulsion may only be exercised by an inquiry officer or A-IG if the IGADF authorises them in writing to do so.

Failure to comply with the notice is an offence. There are also offences in the 2016 IGADF Reg for contempt and taking reprisals. Contempt means conduct insulting the person conducting the inquiry; conduct disturbing or interrupting the inquiry; and conduct that would, if the inquiry were a court of record, constitute a contempt of that court. Persons attending inquiries to answer questions may have legal assistance.

Self-incrimination is not a sufficient ground for refusal to give evidence unless an individual is concurrently facing related charges; however, evidence given cannot be used in civil or criminal proceedings, or proceedings before a service tribunal, against the person who gave it.

**Report of inquiry officer or A-IG**

Once the inquiry officer or A-IG is satisfied that all relevant information has been obtained, the inquiry officer or A-IG must prepare a report setting out the findings and, if authorised, any recommendations and give the report, and copies of any records, to the IGADF. The IGADF may direct further inquiry by the inquiry officer or A-IG take place.

Once the IGADF is satisfied, he or she must make a record of the findings and include with the record any documents or transcripts of evidence collected by the inquiry. Then the IGADF must make a report about the inquiry, including any findings or recommendations that the IGADF thinks appropriate, to the person who directed the inquiry. It is clear the IGADF is intended to exercise independent judgment and make whatever report the IGADF thinks fit. The IGADF is not required to hand up the entire report of the inquiry officer or A-IG.

A directed IGADF inquiry is complete when the IGADF has given the Minister or CDF a report including any findings or recommendations.

**Disclosure of reports, evidence and information to other persons**

The IGADF may give directions restricting disclosure of evidence, information and documents in certain circumstances (a suppression order). Contravening such a direction is an offence.
The person who directed the IGADF conduct the inquiry, that is, the Minister or CDF, may publicly release all or part of the IGADF report. The IGADF does not have power independently to release this kind of report.

4. Directed IGADF Division 4A Inquiries

An Assistant IGADF who is a judicial officer, conducting a Division 4A inquiry, has almost complete freedom in the conduct of their inquiry. This includes freedom from direction by the IGADF. He or she may also independently release his or her reports, evidence, findings and recommendations.

In October 2018, amendments to the 2016 IGADF Reg introduced the concept of an Assistant IGADF who is a judicial officer (JO-AIG) and prescribed a new kind of inquiry in Division 4A of Part 4 of the 2016 IGADF Reg. Division 4A includes the unusual provision that ‘This Division has effect despite any other provision of this instrument’ indicating that JO-AIG have their own separate rules for conducting inquiries.

A JO-AIG has more extensive powers and more independence than any other form of Defence administrative inquiry; in fact, their powers and independence are comparable to a Royal Commission.

A JO-AIG is appointed only to conduct a specific inquiry into a matter as directed by the IGADF; they are not permitted to assist the IGADF with his or her functions more generally.

Independence

The IGADF must not take part personally in a Division 4A inquiry. The IGADF must not give directions about the conduct of the inquiry, or vary or add to the terms of the inquiry.

The JO-AIG may independently decide to publicly release his or her report; the CDF must be consulted but does not control that decision.

A JO-AIG has the same immunity and protection as a Justice of the High Court and is not subject to the chain of command.

Powers and procedure

A JO-AIG who is appointed by the IGADF to conduct an inquiry:

- must conduct the inquiry in the manner they think appropriate
- may add to or vary the terms of the inquiry and
- may consult with any person in relation to the inquiry.

The JO-AIG is authorised to use the powers of compulsion in sections 22 and 23 to require, by notice in writing, a person to appear, to give information or to produce a document or thing. A JO-AIG does not need to be authorised by the IGADF to use those powers.

The offences in the 2016 IGADF Reg for failure to comply with a notice, contempt and taking reprisals apply for Division 4A proceedings. Contempt means conduct insulting the person conducting the inquiry; conduct disturbing or interrupting the inquiry; and conduct that would, if the inquiry were a court of record, constitute a contempt of that court. Persons attending inquiries to answer questions may have legal assistance.
Self-incrimination is not a sufficient ground for refusal to give evidence unless an individual is concurrently facing related charges; however, evidence given cannot be used in civil or criminal proceedings, or proceedings before a service tribunal, against the person who gave it.

Report of findings
The JO-AIG must prepare a report if satisfied that all relevant information has been obtained. The report must be given to the IGADF as soon as practicable and must set out the findings and make any appropriate recommendations. It must be accompanied by transcripts of evidence and convey control of things produced to the inquiry.

If the IGADF was directed to carry out the inquiry by the Minister or CDF, the IGADF must give the JO-AIG’s full original report and accompanying documents to the Minister or CDF as the case may be. The IGADF does not exercise any independent control over the report of the JO-AIG. The IGADF must not direct the JO-AIG to inquire further or to prepare a further report.

Disclosure of reports, evidence and information to other persons
If the IGADF was directed to carry out the inquiry by the Minister or CDF, that person may publicly release all or part of the JO-AIG report given to them. The IGADF may publicly release the report, but must not do so without first consulting the JO-AIG.

In directed inquiries conducted under Division 4A, the IGADF does not have power to release the findings or report to individuals and to the public; instead the JO-AIG exercises that discretion. The JO-AIG may independently inform the following persons of the JO-AIGs findings or give them a copy of the report, including:

- the Minister
- the CDF
- a service chief
- an employee of the Department
- a member of the ADF
- a person who is affected by a submission or the inquiry or
- any other person.

The JO-AIG may redact information from the copy of the report given to a person if that information would be inappropriate due to:

- considerations of privacy
- the person’s responsibilities
- the person’s interest in the matter or
- the information being classified or relating to national security.

The JO-AIG is not required to consult any other person before releasing a copy of the report or findings to any individual. If the JO-AIG gives a person a report, the JO-AIG may, after consultation with CDF, publicly release all or part of the report (including a redacted version of the report).