

AUSTRALIAN DEFENCE FORCE LEGAL SERVICES

LEGAL TASK JOURNAL

ADMINISTRATIVE LAW

LEVEL – COMPETENT

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Qualification

1. In order to satisfy the Legal Task Journal qualification criterion in Administrative law at the Competent level ADF Legal Officers are to have assessed as satisfactory completion of the Task criterion set out below.

Competent Level Criterion

2. Within the Administrative Law Task Journal – Competent Level, a total of 35 tasks provided there is a minimum of 10 tasks in each Part.
3. Assessment is to be by self-assessment and assessment by an assessor of each completed task.

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Part A

Military Administrative Law

1. Demonstrate knowledge of the scope, nature, content and effect of administrative law, and its application to the ADF.

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Judicial Review

2. Demonstrate knowledge of the judicial review of administrative decisions by courts. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that judicial review is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures;
- b. the fact that applications for judicial review of administrative decisions may be made to the Federal Magistrates Court or Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* and to the High Court under s 75(v) of the Constitution.

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3. **Administrative Decisions (Judicial Review) Act 1977.** Demonstrate knowledge of the *Administrative Decisions (Judicial Review) Act 1977*. Where relevant, the demonstration of knowledge should include an explanation of the grounds for judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, namely:

- a. that a breach of the rules of natural justice occurred in connection with the making of the decision;
- b. that procedures that were required by law to be observed in connection with the making of the decision were not observed;
- c. that the person who purported to make the decision did not have jurisdiction to make the decision;

- d. that the decision was not authorised by the enactment in pursuance of which it was purported to be made;
- e. that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made (and how this ground is extended);
- f. that the decision involved an error of law, whether or not the error appears on the record of the decision;
- g. that the decision was induced or affected by fraud;
- h. that there was no evidence or other material to justify the making of the decision;
- i. that the decision was otherwise contrary to law.

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4. Demonstrate knowledge of available remedies. Where relevant, the demonstration of knowledge should include an explanation of:

- a. Certiorari,
- b. Prohibition,
- c. Mandamus,
- d. Injunction,
- e. Declaration,
- f. setting a decision aside,
- g. making a new decision,
- h. remitting a decision for reconsideration,
- i. order requiring action of administration,
- j. restraint of action,
- k. postponing action,
- l. declaration of law, and
- m. action for damages.

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Human Rights

5. Demonstrate knowledge of the legislative framework for Harassment, Discrimination, Fraternisation and other unacceptable behaviour in the workplace. Where relevant, the demonstration of knowledge should include an explanation of the content and effect of the:

- a. *Racial Discrimination Act 1975;*
- b. *Sexual Discrimination Act 1984;*
- c. *Disability Discrimination Act 1993;*
- d. *Human Rights and Equal Opportunities Commission Act 1986.*

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6. Demonstrate knowledge of the contents and effect of:

- a. *DI(G) PERS 34-2 – Complaints of Discrimination and Harassment Through the Human Rights and Equal Opportunity Commission;*
- b. *DI(G) PERS 35-2 – Application of the Sex Discrimination Act to the Australian Defence Force;*
- c. *DI(G) PERS 35-3 – Management and Reporting of Unacceptable Behaviour; and*
- d. *DI(G) PERS 35-7 – Defence Equity Adviser Network.*

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Delegations

7. Demonstrate knowledge of the practice of delegating powers and functions and the limitations on delegations.

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8. Demonstrate knowledge of the concept and source of ‘powers’ and ‘functions’ and the exercise of discretion.

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Freedom of Information

9. Demonstrate knowledge of the *Freedom of Information (FOI) Act 1982*. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that the FOI Act enables a person to obtain access to government documents. It requires agencies to publish information about their operations and powers affecting members of the public as well as their manuals and other documents used in making decisions and recommendations affecting the public. Agencies are also required to provide access to documents in their possession unless the document is within an excepted or exempted category under some legislation.

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10. Demonstrate knowledge of the presumption in favour of disclosure under the FOI Act.

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11. Demonstrate knowledge of the procedure for processing FOI applications.

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12. Demonstrate knowledge of the costs and time limits associated with the processing of FOI requests.

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Privacy

13. Demonstrate knowledge of the aim and operations of the *Privacy Act 1988*. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that the *Privacy Act 1988* provides protection for personal information handled by Commonwealth agencies. It covers the collection, use and disclosure, quality and security of personal information.

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14. Demonstrate knowledge of the Privacy Principles.

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Archives

15. Demonstrate knowledge of the aims and operation of the Archives Act 1983. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that the Act prohibits the destruction, disposal, or altering of Commonwealth records without the permission of the National Archives of Australia and, as a result of the operation of the *Archives Act 1983*, Commonwealth agencies have responsibilities in relation to record-keeping.

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16. Demonstrate knowledge of the policy concerning access to material covered under the Archives Act 1983. Where relevant, the demonstration of knowledge should include an explanation of the provisions of DI(G) ADMIN 27-2 – *Implementation of the access provisions of the Archives Act 1983 in the Department of Defence*.

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Part B

Adverse Administrative Action

17. Demonstrate knowledge of the legislative and policy framework applicable to adverse administrative action in the ADF.

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18. Demonstrate knowledge of the content and effect of the Defence (Personnel) Regulations 2000.

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19. Demonstrate knowledge of the content and effect of DI(G) PERS 03-4 – Management Initiated Early Retirement and Termination of Service in the ADF.

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Initiating Adverse Administrative Action

20. Demonstrate knowledge of the procedures involved in issuing formal warnings and censures and other administrative sanctions. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the requirements of DI(G) PERS 35-6 – Formal Warnings and Censures;
- b. notice to show cause;
- c. disclosure of evidence and other relevant materials;
- d. delivery of the notice;
- e. opportunity for the member to reply;
- f. response;
- g. decision of the initiating authority;
- h. submission to the imposing authority;

- i. decision of the imposing authority;
- j. recording and notification of the decision;
- k. imposition of the formal warning or censure in accordance with DI(G) PERS 35-6 – Formal Warnings and Censures.

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21. Demonstrate knowledge of the right of an ADF member to procedural fairness if adverse administrative action is brought against the member. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that natural justice imposes upon decision-makers an obligation to flexibly adopt fair procedures, appropriate and adapted to the circumstances of the particular case;
- b. the fact that there are two main aspects to the concept of natural justice, namely:
 - (1) An opportunity to be heard before a decision that may affect him/her adversely in an individual way is made. This is called the hearing rule.
 - (2) A decision-maker must not be biased. The fact that bias may be actual or perceived and it may manifest itself in the decision-maker's personal associations, interests or in the structure of the decision-making process.

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22. Demonstrate knowledge of the relationship between adverse administrative action and disciplinary action.

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23. Demonstrate knowledge of the action required of an initiating officer when issuing a notice to show cause. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the proposed action;
- b. the disclosure and attachment of evidence, policy, statements, and other information relied upon for action;
- c. the requirement to afford the member an opportunity to respond.

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24. Demonstrate knowledge of the matters that need to be considered by the imposing authority when deciding whether to impose adverse administrative action. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the seriousness of the issue giving rise to the proposed action;
- b. the evidence disclosed to the member on the balance of probabilities, to warrant the imposition of the proposed action;
- c. the member's subsequent conduct;
- d. the rank, appointment and service experience of the member;
- e. the consequences of the proposed action on the member.

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Response to a Notice to Show Cause

25. Demonstrate knowledge of assisting an ADF member to prepare a response to a notice to show cause for adverse administrative action. Where relevant, the demonstration of knowledge should include an explanation of:

- a. facts and conclusions to be drawn from the evidence;
- b. disclosure and attachment of any relevant facts, evidence or other relevant material that could include:
 - (1) a denial of the facts;
 - (2) new evidence;
 - (3) an explanation of the circumstances;
 - (4) character references.
- c. a request for extensions of time;
- d. what action, if any, the decision-maker should take.

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Decision Making

26. Demonstrate knowledge of the content and effect of ADFP 06.1.3 as it relates to administrative decision-making in the ADF.

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Notification of Review Rights

27. Demonstrate knowledge of the legal obligation of decision-makers to inform a person of their review rights. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that although there is no general common law obligation to notify persons of their review rights, it is required by the Administrative Appeals Tribunal Act 1975.

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Statement of Reasons

28. Demonstrate knowledge of the requirement of a decision-maker to provide a statement of reasons for a decision. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that although there is no common law obligation to provide reasons for decisions, reasons have to be provided in the following situations:
 - (1) if there is a right to a merits review by the AAT;
 - (2) if there is a right of judicial review by the Federal Court under the AD(JR) Act;
 - (3) if the legislation under which the agency makes its decision requires it to give reasons when notifying the person affected by the decision.

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29. Demonstrate knowledge of the format, style and content of a statement of reasons. Where relevant, the demonstration of knowledge should include:

- a. The name, title and appointment of the decision-maker;
- b. Source/authority for the decision;
- c. The decision;
- d. What was taken into account in making the decision, for example:
 - (1) The facts and evidence considered and relied upon;
 - (2) Recommendations;
 - (3) Specialist advice;
 - (4) Matters referred to in the member’s response;
 - (5) What findings were made on relevant or important facts;
 - (6) Policy relied upon;
 - (7) What weight was given to the factors;
 - (8) An explanation of the reasoning process.

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Defective Administration and Act of Grace Payments

30. Demonstrate knowledge of the legislative and policy framework of defective administration claims and act of grace payments. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the content and effect of the Financial Management and Accountability Act 1997;
- b. the content and effect of Chief Executive Instructions – Defence

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Contracting

31. Demonstrate knowledge of the application of administrative law to the processes of contracting. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the content and effect of the Financial Management and Accountability Act 1997;
- b. the content and effect of Chief Executive Instructions – Defence;
- c. the content and effect of the Defence Procurement Policy Manual.

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Part C

Redress of Grievance

32. Demonstrate knowledge of the various internal options for making a complaint. Where relevant, the demonstration of knowledge should include the following matters:

- a. the chain of command;
- b. harassment hotline;
- c. alternate dispute resolution; and
- d. lodgement of a redress of grievance in accordance with DI(G) PERS 34 – 1 – *Redress of Grievance – Tri-Service Procedures.*

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33. Demonstrate knowledge of the law concerning and the effect of dissuading another member from making a complaint.

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34. Demonstrate knowledge of providing assistance to an ADF member in preparing a redress of grievance.

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35. Demonstrate knowledge of the requirement for a decision-maker to issue a statement of reasons on a redress of grievance.

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Administrative Inquiries

36. **Purpose.** Demonstrate knowledge of the objectives of an administrative inquiry. Where relevant, the demonstration of knowledge should include an explanation of the following objectives:

- a. establishing facts;
- b. making recommendations;
- c. in a non-adversarial environment.

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37. **General.** Demonstrate knowledge of the legislative and policy framework of military administrative inquiries, including ADFP 06.1.4 and Defence (Inquiry) Regulations.

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38. **Quick Assessment.** Demonstrate knowledge of the law and policy applicable to a quick assessment. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the purpose and requirement to conduct a Quick Assessment;
- b. the application of administrative law to Quick Assessments;
- c. appointment;
- d. limits on a Quick Assessment;
- e. 'context management issues';
- f. reporting requirements involved in a Quick Assessment.

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39. Demonstrate knowledge of follow up options after a Quick Assessment.

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40. Demonstrate knowledge of a legal review of a Quick Assessment.

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Routine Inquiries

41. Demonstrate knowledge of the law and policy applicable to a routine inquiry. Where relevant, the demonstration of knowledge should include an explanation of:

- a. planning and conducting a routine inquiry;
- b. the powers of the person conducting the inquiry;
- c. administrative law principles
- d. rules of evidence;
 - a. interviewing skills and techniques;
 - b. impartiality;
 - c. confidentiality;
 - d. Standard of Proof;
- i. action on identifying possible civil or DFDA offences;
- j. legal representation;
- k. privilege against self-incrimination;
- l. warnings and support to witnesses;
- m. findings of fact;
- n. recommendations;
- o. the format and content of a routine inquiry report.

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42. Demonstrate knowledge of the preparation of terms of reference for a routine inquiry.

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43. Demonstrate knowledge of a legal review of a routine inquiry report.

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Inquiry Officer Inquiry

44. Demonstrate knowledge of the law and policy applicable to an inquiry by an Inquiry Officer. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the requirements for procedural fairness in Inquiry Officer inquiries;
- b. application of rules of evidence;
- c. rights and obligations of witnesses;
- d. privilege against self-incrimination;
- e. legal assistance to witnesses and support;
- f. assessing evidence;
- g. the format and content of an Inquiry Officer report.

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45. **Instruments of Appointment and Terms of Reference.** Demonstrate knowledge of the drafting and reviewing of instruments of appointment and terms of reference for an Inquiry Officer inquiry. Where relevant, the demonstration of knowledge should include an explanation of:

- a. the fact that the specimen terms of reference contained at Annexes F to K of Chap 5 ADFP 06.1.4 – *Administrative Inquiries Manual* should not be followed blindly, but considered and adapted appropriately for the circumstances of the inquiry being undertaken;
- b. the fact that previous inquiries, such as quick assessments, should be reviewed;
- c. the fact that Annex E to Chap 2 of ADFP 06.1.4 – *Administrative Inquiries Manual* should be considered, in order to make an informed recommendation as to the selection of the most appropriate type of inquiry;
- d. the fact that the terms of reference should begin with a concise statement of the task to be undertaken. This should preferably be a short statement of the mandate given to inquiry officer/s and the incident that caused the inquiry to be initiated;
- e. the fact that the matter inquired into must concern a part of the Defence Force under the command or control of the appointing officer [See Defence (Inquiry) Regulation 70A(1)]. If doubt exists, the appointing officer should seek the consent of the person who is in command or control of that part of the Defence Force;
- f. When making recommendations for the selection of an Inquiry Officer:
 - (1) the criteria set out in Defence (Inquiry) Regulations 26, 42 or 70 must be met;
 - (2) the officer needs to be suitable in terms of rank, experience, knowledge and training;

- (3) the appointment should be free of actual or perceived bias. Actual bias may be demonstrated by Inquiry Officer/s having a personal interest in the outcome of the inquiry; expressing an opinion on issues that are relevant to the inquiry; or demonstrating favouritism or hostility toward persons who may become witnesses in the inquiry. The test for determining perceived bias is whether a fair-minded lay observer may reasonably apprehend that the Inquiry Officer/s will not bring an impartial mind to the conduct of the inquiry (See *Re Refugee Review Tribunal; Ex parte H* [2001] HCA 28 at paras 27 –31);
- g. the fact that in defining the scope of an inquiry under the Defence (Inquiry) Regulations, terms of reference effectively set the boundaries for the conduct of the inquiry. It is important that the boundaries are not too broad to allow a fishing expedition to be undertaken or too narrow so as to preclude the Inquiry Officer/s from delving into issues that are germane to the inquiry. In this regard, terms of reference should identify the specific issues that are to be addressed in the inquiry with sufficient clarity to enable the Inquiry Officer/s to focus on the task;
 - h. the fact that while terms of reference should not predict the outcome of the inquiry they should nevertheless specify the end-state to be achieved. For example, if at the end of the inquiry the appointing officer is desirous of reviewing ADF policy, practice and procedure on a particular subject then this should be stated, so that Inquiry Officer/s can focus specifically on that issue;
 - i. the fact that the terms of reference and the matters in respect of which Inquiry Officer/s are authorised to make recommendations need to be relevant to the subject matter of the inquiry;
 - j. the fact that it is necessary that the terms of reference are essential, clear and concise;
 - k. the fact that the terms of reference need to follow a logical sequence (See Paras 5.24 & 5.26 of Chap 5 ADFP 06.1.4 – *Administrative Inquiries Manual*).
 - l. the fact that context management issues should be considered (Note Annex B Chap 2 ADFP 06.1.4 – *Administrative Inquiries Manual*);
 - m. the fact that there is a need for provision for documents and material to be submitted with the report.
 - n. the fact that there is a need for provision for a date for completion of the report and any progress/interim reports required;
 - o. the fact that there is a need for the issues on which the appointing officer requires information to be specifically addressed. It is important that a legal officer does not review or prepare the terms of reference in isolation from the appointing officer. The appointing officer should clearly state what it is that he/she wishes to achieve from the conduct of the inquiry;
 - p. the fact that the Defence (Inquiry) Regulations provide that appointing officers direct whether or not recommendations based on the findings of the inquiry are to be made. The need for Inquiry Officer/s to be properly empowered in the Instrument of Appointment to make

- recommendations arising from their findings. [See Defence (Inquiry) Regulations 70B (2) or 70B(3)];
- q. The fact that there is a need for the appointing officer to direct to what extent the procedural requirements of ADFP 06.1.4 – *Administrative Inquiries Manual* are to be followed;
 - r. The fact that inquiries under the Defence (Inquiry) Regulations are undertaken for the purpose of reviewing the practices and procedures of the ADF and, therefore, are fact finding in nature. Inquiries are not undertaken for the purpose of investigating disciplinary offences and should not be drafted so as to empower Inquiry Officer/s to apportion blame in a disciplinary sense. The DFDA has provision for the investigation of disciplinary matters and as such, terms of reference should not permit Inquiry Officer/s to make a recommendation as to disciplinary action. Additionally, the terms of reference should make provision for Inquiry Officer/s to cease his/her or their inquiry in circumstances where it appears that a disciplinary offence may have been committed. In these cases, the terms of reference should direct Inquiry Officer/s to report to the appointing officer for further guidance;
 - s. the fact that one of the main reasons that Inquiry Officer/s conduct their inquiries in private and disclosure of reports are authorised by the Minister is due to the importance of ensuring that the reputations of the complainants and respondents are maintained during and after the inquiry. Legal officers should consider whether the terms of reference should be drafted to include additional safeguards;
 - t. the fact that terms of reference should also be drafted to ensure that a clause is included that allows Inquiry Officer/s to obtain instructions from the appointing officer when the Inquiry Officer/s believe that a line of inquiry should be undertaken which is outside the existing terms of reference.

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46. **Inquiry Officer Report.** Demonstrate knowledge of the purpose and structure of an Inquiry Officer report. Where relevant, the demonstration of knowledge should include an explanation of the necessity to include:

- a. the background to the incident;
- b. details of the complaint;
- c. the methodology;
- d. a list of persons involved;
- e. a list of witnesses interviewed;
- f. a summary of evidence for each question of the Terms of Reference;
- g. conclusions;
- h. recommendations.

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47. **Legal Review.** Demonstrate knowledge of a legal review of an Inquiry Officer's report. Where relevant, the demonstration of knowledge should include comment upon:

- a. whether the IO was qualified for appointment under Regulation 70(1);
- b. whether the matter inquired into concerned a part of the Defence Force [Regulation 69(1)] under the command or control of the Appointing Officer [Regulation 70A(1)];
- c. whether the IO was properly appointed under Regulation 70A;
- d. whether the IO was appointed by an instrument, which conformed with ADFP 06.1.4;
- e. whether the IO was properly empowered in the Instrument of Appointment to make recommendations arising from his findings, regulation 70B (2) or 70B(3);
- f. whether the Terms of Reference and the matters in respect of which the IO was authorised to make recommendations were relevant to the subject matter of the inquiry;
- g. in the event that the appointing officer directed that the procedural requirements of ADFP 06.1.4 were to be followed, whether the requirements were followed as closely as practicable. If not, did the procedure conform to that which was directed by the appointing officer?
- h. whether a report in the required form was prepared for submission to the appointing officer;
- i. whether the IO Report was made consistently with the requirements of Regulation 75;
- j. whether the IO findings of fact and recommendations were reasonably open to him/her on the evidence;
- k. whether the IO, in arriving at findings of fact, applied the appropriate standard of proof;

- l. whether the IO findings of fact and recommendations were within the terms of reference;
- m. whether there was a failure to afford procedural fairness to any person;
- n. any legal matters arising from the report, which would require the inquiry to be reopened. (Regulation 76 and 77);
- o. whether there is any legal impediment to the Appointing Officer acting on the Inquiry Officer's findings and recommendations with which he/she agrees.

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