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Department of Defence

Minute

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See distribution

CONCURRENT ADMINISTRATIVE AND DISCIPLINARY / CRIMINAL ACTION — GUIDANCE FOR COMMANDERS

1. s42 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b. Except in unusual cases, concurrent administrative action *should not* be taken if it will prejudice ongoing disciplinary or criminal proceedings.

c. s42 [REDACTED]

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d. s42

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

b. Evidence obtained using compulsory powers can, as a general rule, be used only for the principal purpose for which it was originally obtained. For example, a document obtained under a DFDA search warrant cannot be used to support an administrative sanction. Equally, a statement obtained from a member by an inquiry officer under the authority of the Defence (Inquiry) Regulations 1985 that compel a person to answer the inquiry officer's questions cannot be used against that person in DFDA proceedings (other than for giving false evidence to the inquiry officer).

c. There is the potential to prejudice the right to a fair trial simply by sharing information gathered under administrative processes with investigators or prosecutors, even where that information is not subsequently used at trial. The concern is giving prosecutors a tactical advantage contrary to the usual adversarial (common law) trial process.

s42

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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s42

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. Provided appropriate care is taken, in most instances it will be an option to initiate administration action before the conclusion of disciplinary or criminal proceedings, especially interim administrative action. s42

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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10. s42

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

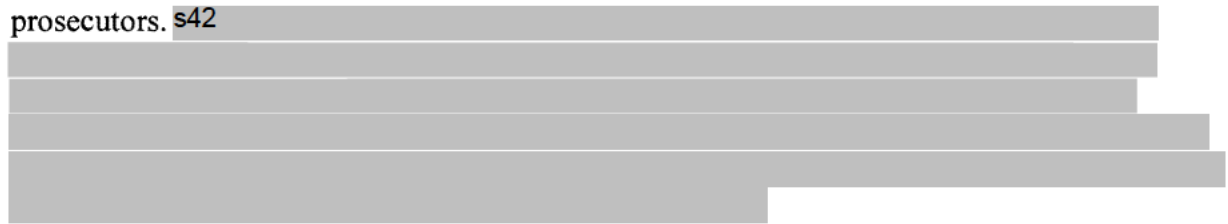
[REDACTED] administrative inquiries should not be used for the purpose of obtaining evidence for use in disciplinary or criminal proceedings, s42

16. Where an administrative inquiry was conducted for a legitimate purpose, there are still legal issues associated with providing the inquiry report and its enclosures to investigators or

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prosecutors. s42



Administrative action following disciplinary or criminal action

17. If administrative action is taken *after* a disciplinary or criminal penalty has been imposed for the same course of conduct, the purpose of the administrative action must not be to punish the member or increase the effective penalty. The purpose of administrative action is protective and reinforces ADF values and high standards of behaviour and performance.

18. If a member is acquitted, receives no conviction or is convicted but does not receive a penalty, commanders and managers should take this into account when making any subsequent administrative decision but are not precluded from taking action. This is both because a different standard of proof applies to administrative decisions, which are based on the balance of probabilities and not proof beyond reasonable doubt, and also because the two forms of proceedings are directed to different purposes.

Administrative action in lieu of disciplinary or criminal action

19. There may be circumstances where a member's established misconduct may only amount to a minor possible disciplinary or criminal offence and is not a notifiable incident as currently defined in DI(G) ADMIN 45-2 *The reporting and management of notifiable incidents*. A commander or manager may properly decide that an administrative sanction is adequate to deal with the misconduct without referring the matter for disciplinary or criminal action, taking into account single-Service policies. Similar principles apply if a notifiable incident is referred back from a Defence Investigative Authority for unit action.

Conclusion

20. A determination about whether to pursue concurrent administrative action and disciplinary or criminal proceedings is a matter of judgment. Concurrent action is permissible; however, commanders and managers should take into account the factors highlighted in this advice and the views of investigators or prosecutors.

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Adrian D'Amico
Acting Head Defence Legal

15/ September 2015

Annex

A. Additional Guidance to Service Legal Officers

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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ADDITIONAL GUIDANCE TO SERVICE LEGAL OFFICERS

1. s42

- b. if a member has been charged with an offence, or is reasonably suspected of having committed an offence, information which they have previously provided to an administrative inquiry conducted under the Defence (Inquiry) Regulations should not be provided to investigators or prosecutors to preserve the fairness of any subsequent trial of that member.² The legal issue is not just about admissibility of evidence, but also providing the prosecution with an unfair forensic advantage. s42

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s42

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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s42

- d. the impact on the accused member / respondent of having to prepare for and respond to both sets of proceedings. For example, a member may decline to respond to a notice to show cause (NTSC) on the grounds that any response may be admissible against them in a later trial. If this is the case, the commander should not draw an adverse inference against the member based on their lack of response (i.e. give significance to the member's lack of denial that they engaged in the conduct as evidence supporting a conclusion that they did engage in it). However, in not responding a member may give up the opportunity to provide additional evidence in their own favour with the consequence that the sanction is imposed. This should be weighed against the seriousness of the misconduct and the extent to which it is supported by evidence available to the administrative decision-maker.

- e. s42

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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