THE IGADF TWENTY-YEAR REVIEW

OBSERVATIONS FOR THE HONOURABLE DUNCAN KERR, Chev LH, SC

Introduction

1. The following observations are based on having worked as an assistant IGADF, chiefly for the purposes of the IGADF Afghanistan Inquiry, but also on my general military and judicial knowledge and experience.

Independence

2. In my experience and to my observation, the office of IGADF is robustly independent, and its independence is respected by the commander of the ADF. I have not encountered or observed any impediment to or fetter on the independence of the IGADF. I have worked with and for the current IGADF extensively, and have seen nothing to suggest that he is other than entirely independent of and unconstrained by command. I know from my discussions with him that he holds to that view, and is protective of the independence of his office, which is demonstrated by the circumstance that his office has not infrequently produced reports that are critical of command at diverse levels. During the course of the Afghanistan Inquiry, I encountered no hint of pressure or influence, as to the direction, subject matter or outcomes of the inquiry, from the IGADF or from command; universally I received the impression that all wanted only for the truth to be discovered, regardless of the implications. Although I did not know the previous as IGADF well, my limited observation of and encounters with him and his work – including in particular some of his reports, which I have had occasion to read in the context of subsequent inquiries - again indicates nothing other than the independence of mind, thought and attitude that the office is intended to enjoy.

The need for current familiarity with the ADF

3. It is an essential qualification for the office of IGADF that the appointee have a thorough, contemporary and current understanding of and familiarity with the ADF, its structures and processes. Organisations are usually best overseen and investigated by individuals who know them and understand how they work. This is particularly so in the case of the ADF, whose unique role, structure and functions, and tendency for closely holding information, make it difficult to penetrate even for those with familiarity but much so for those without. For example, the Afghanistan Inquiry could not have been conducted without a sound understanding not only of the applicable law, inquiry processes, and investigatory techniques, but also a thorough knowledge of the ADF, its structures and processes, and military operations. The ADF evolves continuously and change is rapid, and knowledge very quickly loses currency. In my view, the IGADF must have a background in the ADF, and a recent one. It would be a mistake to require that the IGADF not have been an ADF member, at all or for a

certain period. Recent membership of the ADF has not compromised the independence of either of those who have held the office to date.

Term of appointment

4. The independence of the IGADF would be further enhanced if the appointee were not eligible for re-appointment. This would remove any actual or perceived reluctance to make adverse findings, that might be produced by a desire, unconscious or otherwise, to secure reappointment. This consideration applies equally, regardless of whether or not the IGADF has a recent – or any – ADF background. However, particularly if the appointee is not to be eligible for re-appointment, the term of appointment should be seven rather than the current five years. Many independent statutory officer appointments are for seven-year terms. A seven-year term would support stability and consistency, particularly if an appointee were not eligible for re-appointment. It would also be more likely to attract quality applicants.

Immunities

5. Viewed from the perspective of one conducting an IGADF inquiry – and not from the perspective of one conducting a follow-up criminal investigation or prosecution – my view is that the derivative use immunity was of assistance to the IGADF Afghanistan Inquiry. To be able to assure a witness that not only could what they told us not be used in evidence against them, but also that nothing discovered directly or indirectly as a result could be used against them, in my view assisted in eliciting the truth from some individuals. Being able to provide that assurance was an important element in the Inquiry's ability to persuade some to talk frankly.

6. There is a reasonable view, expressed by Stephen Donaghue KC,[1] that in principle the proper price for removal of the privilege against self-incrimination is derivative use immunity. Conformably with this view, the uniform *Evidence Act 1995* (Cth), section 128(7), provides derivative use immunity for a witness who is compelled to give evidence in exception to the privilege against self-incrimination.

7. s47C [redacted]

8. Section 113(2) of the *National Anti-Corruption Commission Act 2022,* a copy of which is *attached* to this document,[2] provides only a direct use immunity, and as the discussion in the Explanatory Memorandum (EM) (a relevant extract of which is included in the attachment) shows, the reasons for this included concerns that a derivative use immunity might unduly hinder criminal investigations and prosecutions, as it had in the past in the context of the *National Crime Authority Act 1984*. s47C [redacted]

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1 S Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001).

2 Attachment 1.

Power to follow up recommendations

9. The effectiveness of the IGADF and recommendations made in reports would be enhanced by the introduction of a power to follow up recommendations made in inquiry reports. This could be based on section 160 of the *National Anti-Corruption Commission Act 2022,* a copy of which is *attached* to this document.[3]

An operational inquiry cell

10. The IGADF Afghanistan Inquiry included the following recommendation:

> An independent tri-service multi-disciplinary specialist operations inquiry cell be established, for the conduct of administrative inquiries into operational incidents. The cell should comprise personnel with a mix of expertise drawn from arms corps (to provide the requisite understanding of the battlespace and operations), lawyers (to provide the requisite forensic skills), investigators, and intelligence professionals, and be available as an independent resource for command in any military operation. Such a cell could reside in the Office of the Inspector-General of the ADF (IGADF), where it would have available the powers of compulsion available under the IGADF Regulation 2016 (with the associated protections).

11. From a quick review of the Afghanistan Inquiry Reform Program Update, available at AfghanistanInquiryProgramUpdate.pdf (defence.gov.au), it is not apparent that this recommendation has been addressed. The rationale for the recommendation was as follows:

> 344. Commanders at all levels were failed by oversight mechanisms provided by QAs and IOIs. ADFIS investigations, though sometimes entirely appropriate, are a blunt instrument with which to confirm or allay suspicions of wrongdoing. The Inquiry notes the suggestion that commanders could benefit for coronial-like powers with associated protections, beyond fact-findings, QAs, IOIs and ADFIS investigations that might be utilised to find the truth of matters and provide commanders with accurate information upon which to base decisions that might include administrative or disciplinary response options.
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> 345. One problem with the ad-hoc approach to inquiries was that IOs, each conducting a separate individual inquiry, did not have the opportunity to see the emergence of patterns. A standing professional inquiry agency would be better positioned to do so. Any inquiry mechanism needs to have a substantial degree of independence, an index of suspicion, and the forensic skills, experience and techniques to question the veracity of evidence and to test it.

[3] Attachment 2.

Conclusion

12. I would be happy to provide further comment on any relevant issue, if it would assist.

s22

The Honourable PLG Brereton AM RFD SC
Major General

08 January 2024

Attachments:

1. *National Anti-Corruption Commission Act 2022* (Cth), s 113.
2. *National Anti-Corruption Commission Act 2022* (Cth), s 160.

Attachment 1

NATIONAL ANTI-CORRUPTION COMMISSION ACT 2022 - SECT 113

113 Self-incrimination

(1) A person is not excused from giving an answer or information, or producing a document or thing, as required by a notice to produce or at a hearing on the ground that doing so would tend to incriminate the person or expose the person to a penalty.

(2) However, the answer or information given, or the document or thing produced, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition or recovery of a penalty; or

(c) a confiscation proceeding.

(3) Subsection (2) does not:

(a) apply to the production of a document that is, or forms part of, a record of an existing or past business; or

(b) affect whether the answer, information, document or thing is admissible in evidence against the person in:

(i) a confiscation proceeding, if the answer or information was given, or the document or thing was produced, at a time when the proceeding had not commenced and was not imminent; or

(ii) a proceeding for an offence against this Part, other than an offence against subsection 75(5) (person present at a private hearing without authority); or

(iii) a proceeding for an offence against section 137.1 or 137.2 of the *Criminal Code* (about false or misleading information or documents) that relates to a notice to produce or a hearing; or

(iv) a proceeding for an offence against section 144.1 or 145.1 of the *Criminal Code* (about forgery) that relates to a notice to produce or a hearing; or

(v) a proceeding for an offence against section 149.1 of the *Criminal Code* (about obstruction of Commonwealth public officials) that relates to this Act.

Note: For subparagraph (b)(i), the court may order otherwise (see subsection 109(4)).

(4) Paragraph (3)(b) does not, by implication, affect the admissibility or relevance of the information, document or thing for any other purpose.

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EXPLANATORY MEMORANDUM

Clause 113--Self-incrimination

This clause would abrogate the privilege against self-incrimination in the context of giving evidence at a hearing or producing material in response to a notice to produce.

The privilege provides that a person generally cannot be required to testify to the commission of an offence by that person. Nor can a person suspected of, but not charged with, an offence, generally be required to provide a statement about the commission of the offence.

The abrogation of the privilege would mean that a person would be unable to refuse to comply with a summons under clause 63, or a notice to produce under clause 58 on the grounds that doing so could incriminate them.

The abrogation would be accompanied by an important safeguard: a use immunity in relation to criminal proceedings, proceedings for the imposition or recovery of a penalty, and confiscation proceedings. This would mean that the relevant material would not be admissible as evidence in court against the person who provided the material.

The use immunity would not extend to material derived from investigation material. That is, derivative material would be admissible as evidence against the person from which the investigation material was obtained, in criminal proceedings, proceedings for the imposition or recovery of a penalty, and confiscation proceedings. This is consistent with the LEIC Act, which permits the derivative use of hearing material for a range of purposes--including use in the investigation and prosecution of the witness and other persons.

This is appropriate to ensure the Commissioner can fulfil their statutory functions of detecting, preventing and investigating corrupt conduct that could be serious or systemic. Such conduct causes significant harm, including:

- direct harm to individual victims of serious or systemic corrupt conduct;
- broader, direct harms across the Australian community and economy--for example, through the corrupt diversion of public resources; and
- harm to public confidence in government and public administration.

It is important that material derived from investigation material can be used to investigate, disrupt and--where appropriate--prosecute persons involved in serious or systemic corrupt conduct, including by prosecuting persons who have been witnesses before the Commissioner. For example, material provided by a witness in a hearing may lead the Commissioner to pursue new lines of investigation, which ultimately culminate in a brief of evidence against the witness. It is critical that such evidence can be used to disrupt corrupt conduct, including by prosecuting persons who have been witnesses.

Further, it would open court proceedings up to inappropriate delay, and be contrary to the interests of justice, if evidence referred by the NACC could not be admitted until the prosecution had established its provenance. Previous experience under the former National Crime Authority Act 1984 demonstrated that providing a derivative use immunity for examination material was inappropriate as it undermined the capacity of the National Crime Authority to assist in the investigation of serious criminal activities. Prior to its removal under the National Crime Authority Legislation Amendment Act 2001, the derivative use immunity in the National Crime Authority Act required the prosecution to prove the provenance of each piece of evidence in the trial of a person that the National Crime

Authority had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.

Importantly, the NACC Bill would preserve the inherent power of the courts to make orders that are necessary to ensure a fair trial of the witness (see clause 106). This could include orders to limit or remove any prejudice from the prosecution's lawful possession or use of investigation material or derivative material.

The use immunity would not be applicable to documents that form part of a record of an existing or past business. This is appropriate, as business records are not records of a natural person--they are records of a company or other entity. Compulsory access to business records, and the ability to rely on those records as part of an investigation and any subsequent prosecution or proceeding, does not place the fair trial of a natural person at risk and serves public interests in:

- ensuring that corporate and business structures are not used by officers, employees or agents of the business to engage in serious or systemic corrupt conduct; and
- protecting the interests of shareholders, partners and creditors (as the case may be) in a business involved in allegations of serious or systemic corrupt conduct.

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Attachment 2

NATIONAL ANTI-CORRUPTION COMMISSION ACT 2022 - SECT 160

160 Follow-up action on investigation report

(1) The Commissioner may request the head of a Commonwealth agency to whom an investigation report is given to give the Commissioner, within a specified time, details of any action that the head of the Commonwealth agency has taken, or proposes to take, with respect to a recommendation included in the investigation report.

(2) The head of the Commonwealth agency must comply with the request.

(3) If the Commissioner is not satisfied with the response of the head of the Commonwealth agency to the request, the Commissioner may refer to the person mentioned in subsection (4):

(a) the Commissioner's recommendation and the reasons for that recommendation; and

(b) the response of the head of the agency to the recommendation; and

(c) the Commissioner's reasons for not being satisfied with that response.

(4) For the purposes of subsection (3), the person is:

(a) if the Commonwealth agency is a parliamentary office:

(i) for a parliamentarian who is a senator—the President of the Senate; or

(ii) for a parliamentarian who is a member of the House of Representatives—the Speaker of the House of Representatives; or

(b) if the Commonwealth agency is a Department of the Parliament established under the *Parliamentary Service Act 1999*:

(i) for the Department of the Senate—the President of the Senate; or

(ii) for the Department of the House of Representatives—the Speaker of the House of Representatives; or

(iii) otherwise—both the President of the Senate and the Speaker of the House of Representatives; or

(c) if the Commonwealth agency is established or continued in existence by an Act and paragraph (b) does not apply—the Minister administering that Act; or

(d) if the Commonwealth agency is a Commonwealth entity and neither paragraph (b) nor paragraph (c) applies—the Minister having general responsibility for the activities of the entity.

(5) If the Commissioner refers material to a person under subsection (3), the Commissioner may also send a copy of that material to:

(a) the President of the Senate for presentation to the Senate; and

(b) the Speaker of the House of Representatives for presentation to the House of Representatives.

(6) The Commissioner must exclude the following from the copy of the material sent under subsection (5):

(a) section 235 certified information;

(b) information that the Commissioner is satisfied is sensitive information.

(7) Before sending a copy of material under subsection (5), the Commissioner must consult with the head of each Commonwealth agency or State or Territory government entity to which the material relates about whether the material contains sensitive information.

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