

EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 70

Defence Act 1903
Naval Defence Act 1910
Air Force Act 1923

Issued by the authority of the Minister for Defence

Defence (Inquiry) Amendment Regulations 2005 (No. 1)

Subsection 124(1) of the *Defence Act 1903*, subsection 45(1) of the *Naval Defence Act 1910* and section 9 of the *Air Force Act 1923*, provide that the Governor-General may make regulations not inconsistent with those Acts, prescribing all matters which by the Acts are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the good government of the Defence Force, or for carrying out or giving effect to the Acts. In particular, paragraph 124(1)(gc) of the *Defence Act 1903* provides for the appointment, procedures and powers of courts of inquiry, boards of inquiry, investigating officers and inquiry assistants.

The purpose of the Regulations is to ensure that reports of inquiries by the Military Inspector-General may be made available to all or any of the persons specified as relevant for this purpose.

In his *Report of an Inquiry into Military Justice in the Australian Defence Force - July 2001*, Mr. J.C.S. Burchett Q.C. recommended that a Military Inspector-General be appointed to provide the Chief of the Defence Force with constant scrutiny of the military justice system, independent of the ordinary chain of command. To properly fulfil this role, Mr. Burchett recommended that the Inspector-General investigate matters concerning the operation of the military justice system. To undertake these investigations it was considered that the Military Inspector-General would need to be given all the powers, authorities and protection of an Investigating Officer, appointed under the *Defence (Inquiry) Regulations 1985* (the Principal Regulations), with powers to call for documents and information.

The Principal Regulations were amended in 2003 to insert a new Part 7 to give effect to Mr. Burchett's recommendations by allowing the Inspector-General to investigate matters concerning the military justice system.

Subregulation 102(2) of the Principal Regulations requires the Inspector-General to make a record of findings of an inquiry and include a copy of the transcript or other record of oral evidence taken during an inquiry together with any other documentary evidence before the inquiry.

Subregulation 102(3) requires the Inspector-General, if he or she thinks it appropriate, to make recommendations arising from the inquiry. The Inspector-General is also to give a report of findings or recommendations to those persons specified in subparagraphs 102(3)(a)(i) to (v). The report must be accompanied by a copy of the

transcript or other record of any oral evidence taken during the inquiry as well as any documentary evidence taken during the inquiry.

Subregulation 102(4) limits the material in the report and accompanying material that may be given to a person in subparagraphs 102(3)(a)(i),(ii) or (iii) to those matters that the Inspector-General considers appropriate, having regard to-

- considerations of privacy; and
- the person's responsibilities; and
- the person's interests in the matter; and
- the relevance of matters appropriate to convey to the person.

On 12 February 2004, the Senate Committee on Regulations and Ordinances identified an anomaly in relation to subregulation 102(3) in that the subparagraphs were expressed in the alternative. The unintended effect of subregulation 102(3) is to limit the persons to whom the Inspector-General may provide a copy of the report of the findings in relation to the inquiry. There may well be instances when he or she may wish to provide copies of the report to several of the persons mentioned.

The Regulations allow the Inspector-General to make the report or parts of the report available to all or any of the relevant persons mentioned in subregulation 102(3). The Regulations re-configure regulation 102 for this purpose.

Details of the Regulations are outlined in the Attachment.

The Regulations are a Legislative Instrument for the purposes of the *Legislative Instruments Act 2003*.

The relevant Acts specify no conditions that need to be met before the power to make the Regulations may be exercised.

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ATTACHMENT

The Proposed Defence (Inquiry) Amendment Regulations 2005 (No. 1)

Regulation 1 identifies the Regulations as the *Defence (Inquiry) Amendment Regulations 2005 (No. 1)*

Regulation 2 provides that the Regulations commence on gazettal.

Regulation 3 provides that the amendments to the Principal Regulations are contained in Schedule 1, by adding a new Part 7, “Inquiries by the Inspector-General of the Australian Defence Force”.

Schedule 1 – Amendments

Insertion of a new Part 7 - Inquiries by the Inspector-General of the Australian Defence Force

Division 1 - Preliminary

Regulation 80 inserts definitions for the purposes of the Part. In particular subregulation 80(1) provides for the appointment of the “Inspector-General of the Australian Defence Force”. Regulation 80 also defines “Investigating Officer” and “Inquiry Assistant” and “Assistant Inspector-General of the Australian Defence Force”. This latter appointment is referred to in the Proposed Regulations as “Assistant IGADF”.

Regulation 81 provides that Divisions 1-6 of the Proposed Regulations will apply if either the Chief of the Defence Force directs, or a service chief requests the Inspector-General to inquire into a matter or if the Inspector General decides that it is appropriate to inquire into a matter. The note to the regulation provides that the Inspector General does not have to conduct an inquiry personally.

Subregulation 82(1) enables the Inspector-General to appoint an eligible person to be an Investigating Officer, an Inquiry Assistant or an Assistant IGADF, to assist him. Subregulation 82(2) requires the appointment to be in writing.

Subregulation 83(1) sets out the eligibility criteria for the appointment of an Investigating Officer, Inquiry Assistant or Assistant IGADF. It permits the appointment of a member of the Defence Force regardless of rank. Similarly an Australian Public Service employee of any classification may be appointed or any other person who has consented to an appointment in writing. Subregulation 83(2) provides that a person is not eligible to be appointed to an inquiry if the inquiry relates

to that person or if that person is to appear as a witness or is likely to have to produce documents to the inquiry.

Subregulation 84(1) outlines the role of the Investigating Officer. The Officer must inquire into a matter for which he or she has been appointed and report to the Inspector-General about that matter. Subregulation 84(2) enables the Inspector-General to authorise, in writing, an Investigating Officer to make recommendations resulting from that Officer's findings.

Regulation 85 outlines the role of the Assistant IGADF. An Assistant IGADF must help the Inspector-General on an on going basis. The note to the regulation states that the Assistant IGADF may help with inquiries, under direction from the Inspector General, as one of his or her functions.

Subregulation 86 (1) outlines the role of the Inquiry Assistant. He or she must assist the Inspector General, an Investigating Officer or Assistant IGADF to inquire into a matter for which he or she was appointed. Subregulation 86 (2) requires an Inquiry Assistant to collect evidence for the purposes of the inquiry and then deliver it to either the Inspector-General, an Investigating Officer or Assistant IGADF.

Subregulation 87(1) permits the Inspector-General to direct an Assistant IGADF either orally or in writing to inquire into a matter or to assist the Inspector-General, an Investigating Officer or another Assistant IGADF to inquire into a matter. Subregulation 87 (2) precludes the Inspector-General directing an Assistant IGADF to inquire into a matter involving the conduct of that Assistant IGADF or a matter for which that Assistant IGADF is likely to be giving evidence or providing documents. Subregulation 87(3) permits the Inspector-General, who has directed an Assistant IGADF to inquire into a matter, to authorise the Assistant IGADF orally or in writing at anytime to make recommendations from his or her findings. Subregulation 87(4) requires the Inspector-General to make a record of any oral direction or authorisation as soon as practicable.

Division 2 - Starting an Inquiry

Subregulation 88(1) outlines the manner in which the Inspector-General may inquire into a matter under Part 7. He or she may do it personally, by appointing an Investigating Officer or directing an Assistant IGADF to inquire into a matter. Subregulation 88(2) provides that such appointment or direction in subregulation (1) does not prevent the Inspector-General inquiring personally into the matter or an Inquiry Assistant from helping with an inquiry.

Subregulation 89(1) permits the Inspector-General to expand an inquiry that he or she is conducting by directing an Investigating Officer or an Assistant IGADF to add anything to, or vary a matter being investigated. Subregulation 89(2) provides that such a direction must be in writing, if addressed to an Investigating Officer but may be either oral or in writing if addressed to an Assistant IGADF. Subregulation 89(3) requires the Inspector-General to make a record of such a direction as soon as

practicable after giving the direction. Subregulation 89(4) requires the Investigating Officer or Assistant IGADF to extend or vary the inquiry as directed.

Subregulation 90(1) applies if the Inspector-General, an Investigating Officer or an Assistant IGADF, has commenced an investigation and considers:

- that the matter could more appropriately be dealt with other than by way of an inquiry;
- the submission is frivolous or vexatious; or
- if further continuation of the inquiry in all the circumstances, is unwarranted.

Subregulations 90 (2) and (3) provide that where the Investigating Officer or Assistant IGADF forms such a belief, they must inform the Inspector-General of their belief and the reasons for it: if the Inspector-General agrees, he or she has a discretion to end the inquiry. Subregulation 90(4) requires the Inspector-General to make a written record of his or her decision to either end or not end the inquiry, after being informed of the Investigating Officer's or Assistant IGADF's belief under subregulation 90 (2). The note to the regulation provides that a decision to end an inquiry does not prevent a new inquiry into the matter or an inquiry into something that includes the matter.

Division 3 – Procedure for an Inquiry

Regulation 91 inserts definitions for Division 3. An “Inquiry Assistant” and an “Investigating Officer” are defined and extend to including an “Assistant IGADF”.

Regulation 92 provides that the Inspector-General is to direct the procedure to be followed in conducting an inquiry, subject to the Regulations.

Regulation 93 permits the Investigating Officer to inquire into a matter or something including the matter, which is already the subject of an ongoing inquiry or an inquiry under another Part.

Regulation 94 prohibits an Investigating Officer conducting an inquiry in public.

Regulation 95 prohibits an Investigating Officer or Inquiry Assistant taking evidence on oath or affirmation.

Subregulation 96(1) requires Defence Force members, appearing as witnesses before an Investigating Officer or Inquiry Assistant to answer questions, relevant to the inquiry put to them. Failure to comply with this requirement renders the member liable to punishment of either 5 penalty units or 3 months imprisonment.

Subregulation 96(2) relieves a member of the obligation to comply with subregulation 96(1) if disclosure would disclose a secret process of manufacture or be prejudicial to the defence of the Commonwealth. The note to the regulation provides that a defendant bears an evidential onus of proof in relation to matters in subregulation 96(2) that is, the burden must be discharged on the balance of probabilities, according to subsection 13.3 (3) of the Commonwealth Criminal Code.

Subregulation 97 (1) outlines the obligations of a Defence member appearing as a witness before an Investigating Officer or Inquiry Assistant. Upon being directed to do so, he or she must produce a document or thing, relevant to the inquiry, in his or her custody or control. Failure to do so renders the member liable to punishment of 5 penalty units or 3 months imprisonment. Subregulation 97(2) provides a defence for a member who does not produce a document or thing if disclosure would reveal a secret process of manufacture or be prejudicial to the defence of the Commonwealth. The note to the regulation states that a defendant bears an evidential burden in relation to a matter in subregulation 97(2).

Subregulation 98(1) renders inadmissible in proceedings against him or her before a service tribunal, any statements or disclosures made by a Defence member while giving evidence before an Investigating Officer or Inquiry Assistant. This protection is limited by subregulation 98(2) if the member is prosecuted for an offence against the Regulations.

Division 4 – Reporting

Regulation 99 inserts a definition for Division 4. The Regulation defines an “Investigating Officer” for purposes of the Division as including an Assistant IGADF.

Subregulation 100(1) requires that where an Investigating Officer has completed his or her inquiries, is satisfied with the information obtained and the inquiry has not been terminated pursuant to subregulation 90(3), he or she must prepare a report. Subregulation 100(2) requires the report to contain findings of the Investigating Officer in relation to the inquiry and if the Investigating Officer is authorised to make recommendations because of his or her findings, any recommendations that or she thinks appropriate as a result of those findings. The note to the regulation states that authority to make recommendations may be part of the Investigating Officer’s appointment by virtue of regulation 82.

Subregulation 100(3) requires the report to be accompanied by a copy of the transcript of the evidence taken or record of any other oral evidence before the inquiry as well as a copy of all documentary evidence and a list of exhibits and their location, produced to the inquiry. Subregulation 100 (4) requires the Investigating Officer to give the report to the Inspector-General as soon as practicable.

Subregulation 101(1) covers the situation where the Inspector-General has been given a report under regulation 100 and he or she considers that the Investigating Officer should make further inquiries and provide a further report in relation to the matter. The Inspector-General may direct the Investigating Officer accordingly, however, he or she must specify in the direction the matters with which the further report is to deal. The note to the regulation refers to regulation 103 for the procedure to be followed when an Investigating Officer becomes unavailable.

Subregulation 101 (2) provides that such a direction under subregulation (1) is an additional function of the Investigating Officer and Inquiry Assistant in relation to the inquiry.

Subregulation 101(3) requires the further report to be accompanied by a copy of the transcript or other record of any oral evidence taken during that further inquiry, together with a copy of any documentary evidence taken during the further inquiry and a list and location of exhibits produced to the inquiry. Subregulation (4) requires the Investigating Officer to produce a further report to the Inspector-General as soon as practicable.

Subregulation 102(1) applies when the Investigating Officer has given the Inspector-General a report as required by regulations 100 and 101 or the Inspector-General has personally inquired into a matter and is satisfied with the information obtained and the inquiry has not been terminated under subregulation 90(3).

Subregulation 102 (2) requires the Inspector-General to make a record of findings of an inquiry and include a copy of the transcript or other record of oral evidence taken during an inquiry together with any other documentary evidence before the inquiry.

Subregulation 102(3) requires the Inspector-General, if he or she thinks it appropriate, to make recommendations arising from the inquiry. The Inspector-General is also to give a report of findings or recommendations to those persons listed, namely, (i) an official in the Department to whom the Inspector-General considers it appropriate for the report to be given; or (ii) a member of the Defence Force to whom the Inspector-General considers it appropriate for the report to be given; or (iii) a person who is affected by a submission or the inquiry, (whether or not the person made a submission); or (iv) if the Inspector-General considers it appropriate for the report to be given to Chief of the Defence Force – the Chief of the Defence Force ; or (v) if the Chief of the Defence Force has directed the Inspector-General to give him or her a report in relation to the matter – the Chief of the Defence Force. The report must be accompanied by a copy of the transcript or other record of any oral evidence taken during the inquiry as well as any documentary evidence taken during the inquiry. If subregulation (4) applies, extracts of the above must be included.

Subregulation 102 (4) limits the material in the report and accompanying material that may be given to a person mentioned in subparagraphs (3)(a)(i), (ii) or (iii) to those matters that the Inspector-General considers appropriate, given –

- considerations of privacy, and
- the person’s responsibilities; and
- the person’s interests in the matter; and
- the relevance of matters appropriate to convey to the person.

Division 5 – Change in Inquiry Personnel

Regulation 103 covers the situation where an Investigating Officer or Assistant IGADF who has been directed to inquire into a matter becomes unavailable to continue an inquiry before presenting a report to the Inspector-General.

Subregulation 103(2) permits the Inspector-General to continue an inquiry by appointing another eligible person as Investigating Officer or directing an Assistant IGADF to take over responsibilities of the unavailable Investigating Officer or Assistant IGADF. Alternatively, the Inspector-General may take over the inquiry.

Subregulations 103(3) and (4) allow account to be taken of any record of proceedings undertaken by the previous Investigating Officer and evidence collected by an Inquiry Assistant or Assistant IGADF, even where they become unavailable to assist with the inquiry. Subregulation (5) provides that an Investigating Officer has the same meaning as in Division 4.

Division 6 – Ending of Inquiry

Regulation 104 enables the Inspector-General to end an inquiry that has not been ended under subregulation 90(3), either by giving a report pursuant to subregulation 102(3) or when he or she makes a record of his or her other findings pursuant to subregulation 102(2).

Subregulation 105(1) provides for the termination of appointments of an Investigating Officer or Inquiry Assistant when they have provided a report to the Inspector-General under subregulation 100(4). Subregulation 105(2) provides that the appointment of an Investigating Officer or Inquiry Assistant who had been appointed in relation to an inquiry may be extended when they are directed by the Inspector-General to inquire further and make a further report. This continuing appointment ends when the further report is provided to the Inspector-General.

Subregulation 105(3) specifies that a direction to an Assistant IGADF given pursuant to regulation 87 in relation to an inquiry ceases to have effect according to the terms of the direction or as otherwise directed by the Inspector-General.

Division 7 – General Provisions

Regulation 106 gives immunity, from civil proceedings, to a person, acting in good faith, who makes a submission to the Inspector-General or who provides information to the Inspector-General in connection with a submission, for loss or damage or injury suffered by another person.

Subregulation 107(1) applies a number of the general provisions of the Principal Regulations such as determining times and places for the conduct of inquiries, procedures to be followed, the giving of evidence by witnesses and the remuneration of witnesses, to the Inspector-General, Investigating Officer, Inquiry Assistant and Assistant IGADF during an inquiry as if that person constituted a Court of Inquiry.

Subregulation 107(2) provides that the Inspector-General, Investigating Officer or Assistant IGADF may exercise any of the powers or functions that may be exercised by the President of a Court of Inquiry, mentioned in subregulation (1), in relation to an inquiry.

Subregulation 107 (3) applies a number of general provision in the Principal Regulations to an Inquiry Assistant or Assistant IGADF as if that person constituted a Court of Inquiry.

Subregulation 107(4) permits an Inquiry Assistant or Assistant IGADF to exercise powers or functions that may be exercised by the President of a Court of Inquiry, mentioned in subregulation (3) in relation to an inquiry.