

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2005 No. 276**

Issued by the authority of the Minister for Veterans' Affairs

*Defence Act 1903*

*Defence (Inquiry) Amendment Regulations 2005 (No. 2)*

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 Australian 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, inquiry officers and inquiry assistants.

The purpose of the Regulations is to amend the *Defence (Inquiry) Regulations 1985* (the Principal Regulations) to give effect to a number of recommendations made by the Senate Foreign Affairs, Defence and Trade References Committee in its report on the effectiveness of Australia's military justice system. The Regulations also make necessary consequential amendments to the Principal Regulations as a result of recent amendments to the *Defence Act 1903*. The amendments to the Regulations:

- ensure that an Inquiry Officer or Board of Inquiry is empowered by the Principal Regulations to make recommendations flowing from findings germane to the terms of reference;
- ensure that the Principal Regulations provide a right to Service legal representation, at Commonwealth expense, for any member of the Australian Defence Force or representative of a deceased person, who is likely to be affected by a Board of Inquiry;
- provide for the tabling in Parliament, subject to certain limitations, of the report of a General Court of Inquiry together with recommendations and subsequent action taken in relation to those recommendations;
- remove the privilege against self-incrimination provided to witnesses appearing before inquiries conducted by inquiry officers and inquiry assistants but ensure that any statements or disclosures made by them are not admissible against them in civil or criminal proceedings; and
- repeal regulations relating to self-incrimination that are now inconsistent with subsection 124(2C) of the *Defence Act 1903*, following amendments made to the Act in December 2003.

Further details on the amendments are contained in the [Attachment](#).

The relevant Acts do not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

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

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

There has been no consultation in the making of this instrument as it relates to the management of and the service of members of the Australian Defence Force.

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**Defence (Inquiry) Amendment Regulations 2005 (No. 2)**

**Regulation 1** identifies these regulations as the *Defence (Inquiry) Amendment Regulations 2005 (No. 2)*.

**Regulation 2** provides that the Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

**Regulation 3** provides that the Regulations amend the *Defence (Inquiry) Regulations 1985* (the Principal Regulations).

**Schedule 1 - Amendments**

**Tabling of Reports**

**Item 1** inserts a new regulation 20A after regulation 20 in the Principal Regulations providing for the report and recommendations of a General Court of Inquiry to be tabled in Parliament, together with a statement containing details of action taken to implement the recommendations or reasons for rejecting the recommendations. Subregulations 20A(2) & (3) provide that the Minister has a discretion on whether or not to table a report or remove material from a tabled report if considerations of privacy or secrecy require such a course. Subregulation 20A(4) provides that where the Minister decides not to table a report in Parliament or omits material from a report, he or she must table a statement explaining such a decision, although the Minister does not have to give reasons for the decision.

**Power to Make Recommendations**

**Item 2** substitutes a new regulation 25 for the existing regulation 25 to empower Boards of Inquiry to make recommendations arising from their findings.

**[Item 3- see below]**

**Item 4** amends paragraph 36(1)(b) to reflect the amendment contained in Item 2.

**Item 5** substitutes a new subregulation 36(2) for the existing subregulation 36(2). When the members of a Board of Inquiry cannot agree on the document under subregulation 36(1), the new subregulation requires all members of a Board of Inquiry to make a statement in writing, stating their individual findings and recommendations, which then constitute the report of the Board.

**Item 6** substitutes a new regulation 70B for the existing regulation which empowers an inquiry officer to make recommendations arising from his or her findings, including the findings from an additional matter referred by an appointing officer or a matter varied by an appointing officer.

**[Item 7 and 8- see below]**

**Item 9** amends paragraph 75(1)(b) to reflect the amendment contained in item 6.

### **Representation before Boards of Inquiry**

**Item 3** substitutes a new regulation 33 for the existing regulation 33. Subregulations 33(1) & (2) permit the President of a Board of Inquiry, where he considers a person may be affected by the Board's inquiry, to authorise the affected person or in the case of a deceased person, a representative of the deceased person whose reputation may be affected by the inquiry, to appear before the Board. Subregulation 33(3) permits the persons referred to in the previous subregulations to appoint a person, including a legal practitioner to represent those persons before the Board and authorises the person so appointed to appear before the Board. Subregulation 33(4) provides that where a legal practitioner, who is a member of the Australian Defence Force is appointed under the preceding subregulation, that person shall be appointed at Commonwealth expense.

### **Removing the Privilege against Self-Incrimination**

**Item 7** inserts a new subregulation 74(3A) after subregulation 74(3). The new subregulation requires a witness appearing before an inquiry officer or an inquiry assistant to answer questions notwithstanding that the answers or responses may incriminate the witness. The witness would not have to answer the question if the answer would incriminate that person if he or she is facing a current charge.

This amendment removes the distinction that currently exists between the privilege given to witnesses against self-incrimination before General Courts and Boards of Inquiry on the one hand and inquiries conducted by inquiry officers and inquiry assistants on the other.

Subsection 124(2C) of the *Defence Act 1903* (inserted by the *Defence Legislation Amendment Act 2003*) provides that such an answer or response provided by a witness is not admissible against the witness in any civil or criminal proceeding or before a Service tribunal (except that a false statement might be used, for example, in a perjury charge against a witness).

**Item 8** repeals regulation 74B as this regulation, providing for limited protection against self-incrimination, is inconsistent with the provisions of subsection 124(2C) of the *Defence Act 1903*.

**Item 10** inserts a new subregulation 96(3) after subregulation 96(2). This amendment mirrors the proposed amendment in item 7 for witnesses appearing before inquiry officers and inquiry assistants in inquiries conducted on behalf of the Inspector-General of the Australian Defence Force. The amendment is necessary as the general provisions of Part 1 to 6 of the Principal Regulation have limited application to inquiries conducted on behalf of the Inspector-General of the Australian Defence Force, under Part 7 of the Principal Regulations. The amendment requires that a witness appearing before an inquiry officer or inquiry assistant in such inquiries must answer questions, notwithstanding that the answers may be incriminating.

**Item 11** repeals regulation 98 as this regulation providing for limited protection against self-incrimination is inconsistent with the provisions of subsection 124(2C) of the *Defence Act 1903*.

### **Change of Investigating Officer to Inquiry Officer**

**Item 12** makes the necessary consequential amendments to delete reference to "Investigating Officer" and substitute the words "Inquiry Officer" wherever occurring in the Regulations. This amendment is necessary as a result of the *Defence Legislation Amendment Act (No.1) 2005* which amended paragraph 124(1)(gc) and subsections 124(2A) and 124 (2C) of the *Defence Act 1903* by omitting the word "investigating" and substituting "inquiry". The point of this amendment was to distinguish administrative inquiries conducted under these regulations from criminal inquiries conducted under the *Defence Force Discipline Act 1982*.