

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2007 No. 155**

Issued by the authority of Minister for Veterans' Affairs

*Defence Act 1903*  
*Naval Defence Act 1910*  
*Air Force Act 1923*

#### *Defence (Inquiry) Amendment Regulations 2007 (No. 1)*

Subsection 124 (1) of the *Defence Act 1903* (the Act) provides, in part, that the Governor-General may make Regulations not inconsistent with the Act, prescribing all matters which by the Act 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 Act provides for the appointment, procedures and powers of commissions of inquiry, boards of inquiry, inquiry officers and inquiry assistants. Subsection 45(1) of the *Naval Defence Act 1910* and section 9 of the *Air Force Act 1923* also provide for regulation-making powers in respect of the Navy and Air Force.

The Senate Foreign Affairs, Defence and Trade References Committee, in its report on "*The Effectiveness of Australia's Military Justice System*", delivered on 16 June 2005 recommended, inter alia, that all notifiable incidents including suicide, accidental death or serious injury should be referred to a tribunal known as the Australian Defence Force Administrative Review Board, for investigation and/or inquiry. The Government did not agree with this recommendation and instead proposed amendments to legislation to create a Chief of Defence Force Commission of Inquiry (CDF COI). The Chief of the Defence Force would appoint a mandatory Commission of Inquiry into suicide by ADF members and deaths in service. The proposed Commission would consist of one or more persons, one being a civilian with judicial experience. Where the Commission consists of more than one person, the civilian with judicial experience would be the President.

The purpose of the Regulations is to provide for the operation of such Commissions of Inquiry.

The *Defence Legislation Amendment Act 2006* (the DLA Act) amended the *Defence Act 1903* to provide for a 'CDF Commission of Inquiry' in paragraph 124(1)(gc) of the Act. The DLA Act further amended the Act by inserting the words 'a Chief of the Defence Force commission of inquiry' into subsection 124(2C) dealing with the protection of witnesses at CDF COIs.

The Regulations insert a new Part 8 into the *Defence (Inquiry) Regulations 1985* (the Principal Regulations) to give effect to the Government response to the recommendations of the Senate Foreign Affairs, Defence and Trade References Committee. The new Part 8 allows the CDF to establish a Commission of Inquiry which is intended to provide for a specialist court dealing with in service deaths and suicide, and provide for the operation of the CDF COI. The Government's intention is that the CDF COI will be seen within a group of Commissions of Inquiry, and will be in addition to the existing arrangements for appointment

of Inquiry Officers and Boards of Inquiry. The generic provisions of the Principal Regulations continue to apply to the new Part.

The Regulations also amend regulation 35 to ensure that a senior officer who was not present before a Board of Inquiry when evidence was given is to be provided with a copy of the relevant evidence and given the opportunity to appear before the Board. This amendment mirrors a similar provision in regulation 34 for other persons appearing before a Board of Inquiry.

Details of the Regulations are outlined in the Attachment.

The Acts specify no conditions that need to be met before the power to make the proposed 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.

Authority: Subsection 124(1) of the *Defence Act 1903*;

Subsection 45(1) of the  
*Naval Defence Act 1910*;

Section 9 of the  
*Air Force Act 1923*

## **Details of the *Defence (Inquiry) Amendment Regulations 2007 (No. 1)***

**Regulation [1]** identifies these Regulations as the *Defence (Inquiry) Amendment Regulations 2007 (No. 1)*.

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

**Regulation [3]** provide that the amendments to *the Defence (Inquiry) Regulations 1985* (the Principal Regulations) are contained in Schedule 1.

**Schedule 1** makes the substantive amendments to the Principal Regulations.

**Item [1]** substitutes a new subregulation for the existing subregulation 3(1) to include a Chief of the Defence Force Commission of Inquiry in the definition of Court of Inquiry.

**Item [2]** inserts the word ‘and’ after ‘evidence;’ to provide for the addition of further requirements of the President of a Commission of Inquiry.

**Item [3]** provides that in the case of a senior officer effected by the evidence who is not present or represented before the Commission when evidence was given, the President must provide such a person with a copy of the relevant evidence and inform the affected person of their right to appear or submit to the Commission any written statement they think is relevant to the inquiry.

**Item [4]** amends paragraph 35(3)(a) and substitute the words ‘higher in rank’ for the words ‘who is not lower in rank’ in order to remove the current inconsistency between regulations 34 and 35.

**Item [5]** provides for Part 8, to now refer to the Chief of the Defence Force Commissions of Inquiry. The current Part 8 Annual Report becomes Part 9.

**Subregulation (108) (1)** defines the Appointing Authority as the Chief of the Defence Force and summons as being a summons issued under regulation 118.

**Subregulation 108 (2)** provides that a Commission of Inquiry, constituted by one member, is completed when the member prepares a report under subregulation 123(1). If the Commission of Inquiry is constituted by more than one member it is completed when the members agree on a document prepared under subregulation 123(2). Paragraph 108(2)(c) would provide that if members cannot agree, each member must prepare a statement required by subregulation 123(3). The statement would not have to be in writing, signed or capable of being signed by the member who prepared it.

**Regulation 109** provides for the Appointment of a Commission of Inquiry. The appointing authority must, by instrument in writing, appoint a Commission of Inquiry into the death or suicide of a member of the Defence Force and may inquire into the serious injury of a member of the Defence Force where a service nexus appears to exist. The appointing authority is not required to appoint a Commission of Inquiry in circumstances where the Minister has, by written direction, specified that the circumstances do not require a Commission of Inquiry. The Appointing Authority may also, by instrument in writing, add a

matter to the matters into which the Commission of Inquiry may inquire; or vary those matters.

**Regulation 110** gives the Commission of Inquiry the power to make recommendations arising from its findings.

**Regulation 111** explains the constitution of a Chief of Defence Force Commission of Inquiry. The Commission of Inquiry may be constituted by 1 or more persons, but where the Commission of Inquiry is constituted by only 1 person that person must be eligible to be appointed as President under regulation 112. The appointing authority must specify in the instrument the names of the persons who constitute the Commission of Inquiry. The regulation would also provide that any subsequent appointment of members must be made in separate instruments of appointment. It also provides that except for a vacancy in the membership of the Commission of Inquiry by the President, the Commission of Inquiry is not affected by a vacancy caused by other members.

**Regulation 112** is the basis for appointing a President of a Commission of Inquiry and provides that the President must not be a member of the Permanent or Reserve member of the Defence Force and must be a civilian with judicial experience.

**Regulation 113** provides that the President of a Commission may resign as President by signed writing and delivering it to the appointing authority. He may resign as a member in a similar manner. A note at the foot of the regulation provides that the President may resign from the Commission of Inquiry as President and as a member, or only as President, and remain a member of the Commission.

**Regulation 114** provides that a non-military member of a Commission of Inquiry may resign by submitting his written resignation to the appointing authority.

**Regulation 115** provides that subject to these Regulations, the procedure of a Commission of Inquiry is the procedure directed by the appointing authority.

**Regulation 116** enables the President of a Chief of Defence Force Commission of Inquiry to inform themselves on any information relevant to an inquiry.

**Regulation 117** outlines that a Chief of Defence Force Commission of Inquiry is to be conducted in public or private, depending on whether disclosure of information in the inquiry would be in the interests of defence of the Commonwealth or in fairness to a person.

**Regulation 118** permits the President of a Commission of Inquiry to summon a person, in writing, to appear as a witness at an inquiry and to produce a document or article.

**Regulation 119** states that subject to the regulation, evidence at a Defence Commission of Inquiry must not be taken on oath or affirmation. If, however, a person is likely to be affected by an inquiry conducted by a Commission of Inquiry, the appointing authority must direct that all evidence is given on oath or affirmation. If such a direction is given, the President must administer or cause to be administered an oath or affirmation in accordance with the form specified in the Schedule. However, the President may permit a witness to take an oath in a form that the witness declares to the President to be binding upon the conscience of the witness.

**Regulation 120** provides that where a witness is served with a summons to appear before a Commission of Inquiry and reasonable travel expenses have been tendered to the witness, it is an offence for a witness not to comply with the summons and attend as required, unless excused by the President or having a reasonable excuse not to attend. Failure to comply renders a witness liable to a penalty of 5 penalty units or 3 months imprisonment. If a person appearing before a Commission of Inquiry is required by the President to be sworn or make an affirmation and fails or refuses to do so, without a reasonable excuse, the witness is also liable to a penalty of 5 penalty units or 3 months imprisonment. A note to the subregulation provides that the witness bears an evidential burden in relation to such an excuse. Such an offence is one of strict liability. A witness who refuses or fails to answer a question when appearing before a Commission of Inquiry, when required to do so, without reasonable excuse, with the onus of on the witness, also is liable to the penalties expressed above. Similar penalties also apply to a witness who has received a summons to produce a document or article in the custody of that person and which is relevant to the inquiry and who fails or refuses to do so, without a reasonable excuse. Once again the defendant bears an evidential burden in relation to the reasonableness of the excuse. It is also an offence for a witness to refuse to answer a question when required to do so on the grounds that the response may incriminate them, unless the response would incriminate the witness in a matter that is current, however a note to the regulation summarises the provisions of subsection 124(2C) of the *Defence Act 1903* in relation to the admissibility of such disclosures in civil or criminal courts or service tribunals. It is considered a reasonable excuse for not producing an article or document or answering a question if it would prejudice the defence of the Commonwealth or disclose a secret process of manufacture.

**Regulation 121** permits the President of a Commission of Inquiry to allow a person to represent a person who is absent from the inquiry and who may subsequently be affected by the inquiry. A legal practitioner may be appointed to represent such a person.

**Regulation 122** applies where the President of a Commission of Inquiry considers that evidence given before the Commission may affect a person not present or represented before the inquiry. It would require the President to furnish the person affected, a copy of the relevant evidence and a right of appearance before the inquiry and the right to submit any statement that the person thinks relevant, to the inquiry.

**Regulation 123** provides that if the Commission of Inquiry is constituted only by the President and he is satisfied that all relevant material has been obtained, he must prepare a document setting out the findings of the Commission and any recommendations arising from the findings as the report of the Commission. If the Commission consists of more than one member such a document mentioned above must be signed by all members. If members of a Commission of Inquiry cannot agree, each member is to make a signed, written statement setting out their findings and recommendations arising from the findings and those statements become the report of the Commission. The regulation also provides that the report, transcript of evidence taken during the inquiry and any documentation accepted into evidence, must be provided to the appointing authority.

**Regulation 124** demonstrates that the format of Chief of Defence Force Commissions of Inquiry can be multi-member, single member and two-member inquiries and outline the methods of dissolution and reconstitution of such inquiries. Regulation 124 would indicate that where the President, and only member, of a single member Chief of Defence Force Commission of Inquiry ceases to perform that function the inquiry is said to be dissolved. In

the instance where the President or member of a two-member or multi-member Chief of Defence Force Commission of Inquiry ceases to be President, another member can be appointed by Chief of Defence Force as President to avoid dissolution of such an inquiry, provided the new appointment satisfies the eligibility requirements in regulation 112. If a member of a two-member or multi-member Chief of Defence Force Commission of Inquiry ceases to be a member Chief of Defence Force may appoint another person to be a member of that inquiry.

**Regulation 125** obligates the Chief of Defence Force to prepare a report on the operations of the *Defence (Inquiry) Regulations* for each financial year commencing 30 June 2007 and include it as part of the annual report of the Department of Defence.