



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

Select Legislative Instrument 2007 No. 155

I, PHILIP MICHAEL JEFFERY, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Defence Act 1903*, the *Naval Defence Act 1910* and the *Air Force Act 1923*.

Dated 21 June 2007

P. M. JEFFERY
Governor-General

By His Excellency's Command

BRUCE BILLSON
Minister for Veterans' Affairs

1 Name of Regulations

These Regulations are the *Defence (Inquiry) Amendment Regulations 2007 (No. 1)*.

2 Commencement

These Regulations commence on the day after they are registered.

3 Amendment of *Defence (Inquiry) Regulations 1985*

Schedule 1 amends the *Defence (Inquiry) Regulations 1985*.

Schedule 1 Amendments

(regulation 3)

[1] Subregulation 3 (1), definition of *Court of Inquiry*

substitute

Court of Inquiry means any of the following:

- (a) a General Court of Inquiry under Part II;
- (b) a Board of Inquiry under Part III;
- (c) a Combined Board of Inquiry under Part IV;
- (d) a Chief of the Defence Force Commission of Inquiry under Part VIII.

[2] Paragraph 35 (1) (d)

omit

evidence.

insert

evidence; and

[3] After paragraph 35 (1) (d)

insert

- (e) forward to the affected person a copy of the relevant evidence; and
- (f) inform the affected person of the right of his or her right:
 - (i) to appear before the Board; and
 - (ii) to submit to the Board any written statement, relevant to the inquiry, that the affected person thinks fit.

[4] Paragraph 35 (3) (a)

omit

higher in rank

insert

who is not lower in rank

[5] Part 8

substitute

Part 8 Chief of the Defence Force Commissions of Inquiry

108 Interpretation

- (1) In this Part, unless the contrary intention appears:
 - appointing authority***, for a Commission of Inquiry, means the Chief of the Defence Force.
 - summons*** means a summons issued under regulation 118.
- (2) For this Part, an inquiry conducted by a Commission of Inquiry is ***completed***:
 - (a) if the Commission of Inquiry is constituted by only 1 member — when that member prepares a report under subregulation 123 (1); or

- (b) if the Commission of Inquiry is constituted by more than 1 member — when the members agree on a document prepared under subregulation 123 (2) in relation to that inquiry; or
- (c) if the members cannot so agree — when each of the members has prepared, in relation to that inquiry, a statement required by subregulation 123 (3), whether or not in writing and whether or not signed or capable of being signed by the member who prepared it.

109 Appointment of Commission of Inquiry

- (1) Subject to subregulation (2), the appointing authority:
 - (a) must, by instrument in writing, appoint a Commission of Inquiry to inquire into the death or suicide of a member of the Defence Force that appear to have arisen out of, or in the course of, the member's service; and
 - (b) may, by instrument in writing, appoint a Commission of Inquiry to inquire into:
 - (i) the serious injury of a member of the Defence Force, which arose out of, or in the course of, that member's service; or
 - (ii) any other matter concerning the Defence Force that is specified in the instrument.
- (2) The appointing authority is not required to appoint a Commission of Inquiry if the member's death or suicide occurs in circumstances that the Minister has, by written direction, specified as circumstances in which a Commission of Inquiry is not required.
- (3) The appointing authority may, by instrument in writing:
 - (a) add a matter to the matters into which the Commission of Inquiry may inquire; or
 - (b) vary those matters.

110 Power to make recommendations

A Commission of Inquiry is empowered to make recommendations arising from its findings.

111 Constitution

- (1) A Commission of Inquiry may be constituted by 1 or more persons.
- (2) If a Commission of Inquiry is constituted by more than 1 person, the persons constituting the Commission of Inquiry may include 1 or more members of the Defence Force.
- (3) If the Commission of Inquiry is constituted by 1 person, that person must be eligible to be appointed as President under regulation 112.
- (4) The appointing authority must specify in the instrument of appointment the names of the persons who constitute the Commission of Inquiry.
- (5) Any subsequent appointments of members must be made in separate instruments of appointment.
- (6) The performance of the functions or the exercise of powers of the Commission of Inquiry is not affected by a vacancy in the membership of the Commission of Inquiry, other than the President.

112 President

- (1) The appointing authority must, in the instrument appointing a Commission of Inquiry or by later instrument, appoint 1 of the members of the Commission of Inquiry to be the President.
- (2) The President of the Commission of Inquiry must:
 - (a) have judicial experience; and
 - (b) be a civilian; and
 - (c) not be a Permanent or Reserve member of the Defence Force.

113 Resignation of President

The President of a Commission of Inquiry:

- (a) may resign the office of President by writing signed by the President and delivered to the appointing authority; and

- (b) may resign the office of member by writing signed by the member and delivered to the appointing authority.

Note The President may resign the office of President while remaining as a member of the Commission of Inquiry, or may resign as both the President and a member of the Commission of Inquiry.

114 Resignation of member

If a member of a Commission of Inquiry is not a member of the Defence Force, the member may resign the office of member by writing signed by the member and delivered to the appointing authority.

115 Procedure

Subject to these Regulations, the procedure of a Commission of Inquiry is the procedure that the appointing authority directs.

116 President may obtain information

The President may inform himself or herself on any matter relevant to an inquiry in such manner as the President thinks fit.

117 Conduct of inquiries in private or in public

- (1) Subject to subregulation (2), a Commission of Inquiry must not conduct an inquiry in public.
- (2) The appointing authority may direct:
 - (a) that a Commission of Inquiry conduct all or part of an inquiry in public; or
 - (b) that a person, or persons included in a class of persons, specified in the direction may be present during all or part of an inquiry.

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- (3) If the President of a Commission of Inquiry that is conducting all or part of an inquiry in public is satisfied that it is necessary to do so in the interests of the defence of the Commonwealth or of fairness to a person who the President considers may be affected by the inquiry, the President may:
 - (a) direct that all or part of the inquiry must be conducted in private and give directions as to the persons who may be present; or
 - (b) order that a person, or persons included in a class of persons, specified in the order not be present during the hearing of all or part of the inquiry.
 - (4) If the President of a Commission of Inquiry makes an order referred to in paragraph (3) (b), the President may authorize a person to take such reasonable action as is required to give effect to that order.

118 Summing of witnesses

For the purposes of an inquiry conducted by a Commission of Inquiry, the President may, by writing signed by the President, summon a person to appear at the inquiry to give evidence or to produce a document or article.

119 Manner of taking evidence

- (1) Subject to this regulation, a Commission of Inquiry must not take evidence on oath or affirmation.
- (2) If the appointing authority considers that a person may be affected by an inquiry that is to be made, or that is being made, by a Commission of Inquiry, the appointing authority must direct that all evidence to be given before the Commission or all evidence to be so given after the giving of the direction, as the case may be, must be on oath or affirmation.
- (3) If, under a direction under subregulation (2), the evidence to be given by a witness appearing before a Commission of Inquiry is to be on oath or affirmation, the President must, subject to subregulation (4), administer, or cause to be administered, to the witness an oath or affirmation in accordance with the form in the Schedule.

- (4) For the purposes of giving effect to a direction referred to in subregulation (3), the President may permit a person to take an oath in such form as the person declares to the President to be binding upon the conscience of that person.

120 Duties of witnesses

- (1) A person is guilty of an offence if:
- (a) the person is served with a summons to appear before a Commission of Inquiry; and
 - (b) a reasonable amount for the costs of the person's travel to appear before the Commission has been tendered to the person; and
 - (c) the person fails to appear and report at the time and place specified in the summons.

Penalty: 5 penalty units or imprisonment for 3 months.

- (2) A person is guilty of an offence if:
- (a) the person is served with a summons to appear before a Commission of Inquiry; and
 - (b) a reasonable amount for the costs of the person's travel to appear before the Commission has been tendered to the person; and
 - (c) the person fails to appear and report from day to day.

Penalty: 5 penalty units or imprisonment for 3 months.

- (3) An offence against subregulation (1) or (2) is an offence of strict liability.

Note For **strict liability**, see section 6.1 of the *Criminal Code*.

- (4) It is a defence to a prosecution for an offence against subregulation (1) or (2) if:
- (a) the person has been excused by the President of the Commission from appearing and reporting at the time and place specified in the summons or from day to day; or
 - (b) the person has a reasonable excuse for failing to so appear and report.

Note A defendant bears an evidential burden in relation to the matters mentioned in subregulation (4) (see section 13.3 of the *Criminal Code*).

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- (5) A person is guilty of an offence if the person:
- (a) appears before a Commission of Inquiry; and
 - (b) is called upon by the President of the Commission to be sworn or to make an affirmation; and
 - (c) refuses to be sworn or to make an affirmation.

Penalty: 5 penalty units or imprisonment for 3 months.

- (6) A person is guilty of an offence if the person:
- (a) appears before a Commission of Inquiry; and
 - (b) is called upon by the President of the Commission to be sworn or to make an affirmation; and
 - (c) fails to be sworn or to make an affirmation.

Penalty: 5 penalty units or imprisonment for 3 months.

- (7) An offence against subregulation (6) is an offence of strict liability.

Note For *strict liability*, see section 6.1 of the *Criminal Code*.

- (8) It is a defence to a prosecution for an offence against subregulation (5) or (6) if the person has a reasonable excuse for refusing or failing to be sworn or to make an affirmation.

Note A defendant bears an evidential burden in relation to the matters mentioned in subregulation (8) (see section 13.3 of the *Criminal Code*).

- (9) A person is guilty of an offence if:
- (a) the person appears as a witness before a Commission of Inquiry; and
 - (b) the person refuses to answer a question relevant to the inquiry put to that person by:
 - (i) a member of the Commission; or
 - (ii) a legal practitioner appointed to assist the Commission; or
 - (iii) a person who may examine a witness under regulation 55; and
 - (c) the President of the Commission requires the person to answer the question.

Penalty: 5 penalty units or imprisonment for 3 months.

- (10) A person is guilty of an offence if:
- (a) the person appears as a witness before a Commission of Inquiry; and
 - (b) the person fails to answer a question relevant to the inquiry put to that person by:
 - (i) a member of the Commission; or
 - (ii) a legal practitioner appointed to assist the Commission; or
 - (iii) a person who may examine a witness under regulation 55; and
 - (c) the President of the Commission requires the person to answer the question.

Penalty: 5 penalty units or imprisonment for 3 months.

- (11) An offence against subregulation (10) is an offence of strict liability.

Note For **strict liability**, see section 6.1 of the *Criminal Code*.

- (12) It is a defence to a prosecution for an offence against subregulation (9) or (10) if the person has a reasonable excuse for refusing or failing to answer the question.

Note A defendant bears an evidential burden in relation to the matters mentioned in subregulation (12) (see section 13.3 of the *Criminal Code*).

- (13) A person is guilty of an offence if:
- (a) the person appears as a witness before a Commission of Inquiry; and
 - (b) the person has been served with a summons to produce a document or article; and
 - (c) the document or article:
 - (i) is in the custody or control of that person; and
 - (ii) is relevant to the inquiry; and
 - (d) the person refuses to produce that document or article.

Penalty: 5 penalty units or imprisonment for 3 months.

- (14) A person is guilty of an offence if:
- (a) the person appears as a witness before a Commission of Inquiry; and

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- (b) the person has been served with a summons to produce a document or article; and
 - (c) the document or article is:
 - (i) in the custody or control of that person; and
 - (ii) relevant to the inquiry; and
 - (d) the person fails to produce that document or article.

Penalty: 5 penalty units or imprisonment for 3 months.

- (15) An offence against subregulation (14) is an offence of strict liability.

Note For *strict liability*, see section 6.1 of the *Criminal Code*.

- (16) It is a defence to a prosecution for an offence against subregulation (13) or (14) if the person has a reasonable excuse for refusing or failing to produce the document or article.

Note A defendant bears an evidential burden in relation to the matters mentioned in subregulation (16) (see section 13.3 of the *Criminal Code*).

- (17) A person appearing as a witness before a Commission of Inquiry is not excused from answering a question, when required to do so, on the ground that the answer to the question may tend to incriminate that person, unless the answer to the question:
 - (a) may tend to incriminate that person in respect of an offence with which that person has been charged; and
 - (b) the charge has not been finally dealt with by a court or otherwise disposed of.

Note At 1 January 2007, subsection 124 (2C) of the *Defence Act 1903* provided: 'A statement or disclosure made by a witness in the course of giving evidence before a court of inquiry, a board of inquiry, a Chief of the Defence Force commission of inquiry, an inquiry officer or an inquiry assistant is not admissible in evidence against that witness in:

- (a) any civil or criminal proceedings in any federal court or court of a State or Territory; or
- (b) proceedings before a service tribunal;

otherwise than in proceedings by way of a prosecution for giving false testimony at the hearing before the court of inquiry, the board of inquiry, the inquiry officer or the inquiry assistant.'

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- (18) Without limiting the circumstances that may constitute reasonable excuse for the purposes of subregulation (12), if a person giving evidence in public before a Commission of Inquiry considers, on reasonable grounds, that the answering of a question in public at the inquiry may:
- (a) disclose a secret process of manufacture; or
 - (b) be prejudicial to the defence of the Commonwealth;
- that person has a reasonable excuse for not answering that question in public at the inquiry.
- (19) Without limiting the circumstances that may constitute a reasonable excuse for the purposes of subregulation (16), if a person appearing as a witness before a Commission of Inquiry considers, on reasonable grounds, that the production in public at the inquiry of a document or article may:
- (a) disclose a secret process of manufacture; or
 - (b) be prejudicial to the defence of the Commonwealth;
- that person has a reasonable excuse for not producing that document or article in public at the inquiry.

121 Appearances and representation

- (1) If the President of a Commission of Inquiry considers that a person (*person A*) may be affected by the inquiry conducted by the Commission, person A is authorised to appear before the Commission.
- (2) If the President of a Commission of Inquiry considers that the record or reputation of a person who has died (*person B*) may be affected by the inquiry conducted by the Commission, a single representative of person B is authorised to appear before the Commission.
- (3) Person A, and the representative of person B, may appoint another person (*person C*) (who may be a legal practitioner) to represent him or her for the purposes of the inquiry, and person C is authorised to appear before the Commission.
- (4) If a legal practitioner appointed under subregulation (3) is an officer in the Defence Force, his or her services must be made available at the expense of the Commonwealth.

122 Copy of evidence affecting a person

- (1) This regulation applies if the President of a Commission of Inquiry considers that any evidence given before the Commission may affect a person (*affected person*) who was not present or represented before the Commission when evidence was given.
- (2) If this regulation applies, the President must:
 - (a) forward to the affected person a copy of the relevant evidence; and
 - (b) inform the affected person of his or her right:
 - (i) to appear before the Commission; and
 - (ii) to submit to the Commission any written statement, relevant to the inquiry, that the affected person thinks fit.

123 Report of Commission

- (1) If the President of a Commission of Inquiry, constituted by only 1 member, is satisfied that all information relevant to the inquiry that is practicable to obtain has been obtained, the President must prepare and sign a document setting out:
 - (a) the findings of the Commission; and
 - (b) any recommendations arising from those findings that the Commission thinks fit to make;to be the report of the Commission.
- (2) Subject to subregulation (3), if the President of a Commission of Inquiry, which is constituted by more than 1 member, is satisfied that all information relevant to the inquiry that is practicable to obtain has been obtained, the President must prepare a document, to be signed by each member of the Commission, setting out:
 - (a) the findings of the Commission; and
 - (b) any recommendations arising from those findings that the Commission thinks fit to make;to be the report of the Commission.

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- (3) If the members of a Commission of Inquiry cannot agree on a document prepared under subregulation (2), each member of the Commission must make a statement in writing, to be signed by that member, of:
- (a) the findings made by the member; and
 - (b) any recommendations arising from those findings that the member may think fit to make;
- and those statements constitute the report of the Commission.
- (4) The report of a Commission of Inquiry must be provided to the appointing authority.
- (5) If a report or a copy of a report of a Commission of Inquiry is provided under this regulation, it must be accompanied by a copy of:
- (a) the transcript or other record of any oral evidence taken during the course of the inquiry; and
 - (b) any documents received by the Commission and accepted as evidence during the course of the inquiry.

124 Dissolution or reconstitution of Commission on death etc of member

- (1) In this regulation:

2-member Commission means a Commission of Inquiry appointed by an instrument that specifies the names of 2 persons who are to constitute the Commission, and includes a multi-member Commission the membership of which is reduced to 2 persons under a direction referred to in paragraph (5) (a) or (6) (a).

multi-member Commission means a Commission of Inquiry appointed by an instrument that specifies the names of 3 or more persons who are to constitute the Commission.

non-Presidential member means a member of a Commission of Inquiry other than the President.

single-member Commission means a Commission of Inquiry which is comprised only of the President.

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- (2) If:
- (a) the member of a single-member Commission ceases to be a member of the Commission of Inquiry at any time; or
 - (b) a member of a 2-member Commission ceases to be a member of the Commission of Inquiry before the Commission of Inquiry completes its inquiry and the other member of the Commission of Inquiry:
 - (i) is not the President; and
 - (ii) is not eligible to be appointed as President under regulation 112; or
 - (c) a member of a multi-member Commission ceases to be a member of the Commission of Inquiry before the Commission of Inquiry completes its inquiry and the other members of the Commission of Inquiry:
 - (i) do not include the President;
 - (ii) are not eligible to be appointed as President under regulation 112;
- the Commission of Inquiry is taken to be dissolved under subregulation 67 (3).
- (3) Subject to subregulations (5) and (7), if a member of a 2-member Commission or a multi-member Commission ceases to be a member of the Commission of Inquiry while the inquiry by the Commission of Inquiry is suspended, the Commission of Inquiry is taken to be dissolved under subregulation 67 (3).
- (4) If a member of a 2-member Commission ceases to be a member of the Commission of Inquiry before the Commission of Inquiry completes its inquiry, and the other member is the President, the appointing authority may direct the Commission of Inquiry, constituted by the President alone, to continue the inquiry; or
- (a) the appointing authority may, by instrument, appoint a person to be a member of the Commission of Inquiry; and
 - (b) the inquiry by the Commission of Inquiry is suspended until the appointing authority so appoints, or until the Commission of Inquiry is dissolved, or taken to be dissolved, under subregulation 67 (3).

- (5) If the President of a 2-member Commission ceases to be a member of the Commission of Inquiry before the Commission of Inquiry completes its inquiry, and the other member is eligible to be appointed as President under regulation 112:
- (a) the appointing authority may, by instrument, appoint the other member to be the President and, in the same instrument, appoint a person to be a member of the Commission of Inquiry; and
 - (b) the inquiry by the Commission of Inquiry is suspended until the appointing authority makes those appointments, or until the Commission of Inquiry is dissolved, or taken to be dissolved, under subregulation 67 (3).
- (6) If a non-Presidential member of a multi-member Commission ceases to be a member of the Commission of Inquiry before the Commission of Inquiry completes its inquiry, and the other members of the Commission of Inquiry include the President:
- (a) the appointing authority may, by instrument, appoint a person to be a member of the Commission of Inquiry or direct the Commission of Inquiry to continue the inquiry constituted with its remaining members; and
 - (b) the inquiry by the Commission of Inquiry is suspended until the appointing authority so appoints or directs, or until the Commission of Inquiry is dissolved, or taken to be dissolved, under subregulation 67 (3).
- (7) If:
- (a) the President of a multi-member Commission ceases to be a member of the Commission of Inquiry before the Commission of Inquiry completes its inquiry; and
 - (b) 1 or more of the other members is eligible to be appointed as President under regulation 112;
- the appointing authority may, by instrument:
- (c) appoint a member referred to in paragraph (b) to be the President and, in the same instrument, appoint a person to be a member of the Commission of Inquiry; or
 - (d) appoint a member referred to in paragraph (b) to be the President and direct that person and the other members to constitute the Commission of Inquiry for the purpose of continuing the inquiry; and

the inquiry by the Commission of Inquiry is suspended until the appointing authority so appoints a member to be the President, or until the Commission of Inquiry is dissolved, or taken to be dissolved, under subregulation 67 (3).

Part 9 Annual report

125 Annual report on operation of these Regulations

- (1) For:
 - (a) the financial year ending 30 June 2007; and
 - (b) each succeeding financial year;the Chief of the Defence Force must, at the end of the financial year, prepare a report on the operation of these Regulations during the financial year.
- (2) The report must be included in the annual report of the Department.

Note Section 63 of the *Public Service Act 1999* requires that a report on a Department's activities during the year be prepared for presentation to Parliament.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.frli.gov.au.