

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2013 No. 113**

Issued by the authority of the Minister for Defence

*Defence Act 1903*

*Naval Defence Act 1910*

*Air Force Act 1923*

*Defence (Inquiry) Amendment Regulation 2013 (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 Australian Defence Force (ADF), or for carrying out or giving effect to the Act.

Section 45 of the *Naval Defence Act 1910* provides that the Governor-General may make regulations, not inconsistent with the *Naval Defence Act 1910*, in respect of the Navy.

Section 9 of the *Air Force Act 1923* provides that the Governor-General may make regulations, not inconsistent with the *Air Force Act 1923*, in respect of the Air Force.

The *Defence (Inquiry) Regulations 1985* (the Principal Regulations) made under the Act prescribe such matters as the appointment, procedures and powers of Courts of Inquiry, Boards of Inquiry, Inquiry Officers, Chief of the Defence Force Commissions of Inquiry and Inquiries by the Inspector-General ADF.

Regulation 63 of the Principal Regulations makes it an offence to disclose the records or report of an inquiry conducted under the Principal Regulations, unless the Minister has authorised it. Sub-regulation (2A) makes it a defence to a prosecution for this offence if the person is acting in the performance of the duties of his or her office. Reluctance to rely on this defence, in the absence of specific authorisation to disclose the records or report of an inquiry, has led to a practice of seeking Ministerial authorisation even in relation to matters that fall squarely within the performance of a person's duties. In some cases, this has led to delays before the findings of an inquiry can be communicated to individuals with an interest in the outcome of the inquiry, in delays to action to implement inquiry recommendations including to remedy systemic issues and hold individuals to account, while Ministerial authorisation is obtained.

Recent reviews have identified these issues and recommended changes to the inquiry disclosure arrangements created by regulation 63 (for example, page 66 of the Supplement to Volume 1 of the *DLA Piper Report of the Review of allegations of sexual and other abuse in Defence*, and recommendation 27 of the *Review of the Management of Incidents and Complaints in Defence including Civil and Military jurisdiction 2011* conducted by the Inspector-General ADF).

The Regulation would repeal regulation 63 of the Principal Regulations and substitute a new regulation, which would specifically authorise disclosure of inquiry records and reports in the performance of a person's duties.

The new sub-regulation 63(4) authorises disclosure of the records or report of an inquiry if it is in the performance of a person's duties. This authorisation will reduce the administrative burden and delay associated with obtaining Ministerial authorisation before disclosing inquiry records and reports in order to, for example:

- inform affected persons of the outcome of an inquiry;
- implement inquiry recommendations; and
- provide individuals with procedural fairness in respect of adverse decisions made on the basis of inquiry outcomes.

The new sub-regulation 63(5) would give the Minister power to make binding directions as to what matters fall within the performance of duties for the purposes of sub-regulation 63(3). This provision ensures that the Minister is able to specify particular categories of inquiry whose disclosure would, or would not, be within the performance of a person's duties. It would also enable the Minister to specify that disclosure to certain categories of recipient is, or is not, within the performance of a person's duties. For example, the Minister would be able to direct that disclosure of all inquiry documents to an external review body, such as the Commonwealth Ombudsman, is within the performance of a person's duties.

The new sub-regulation 63(9) would enable the Minister to delegate his or her powers to authorise disclosure of inquiry records and reports.

The Act specifies no conditions that must be met before the power to make the Regulation may be exercised.

The Regulation would be a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Authority: This Regulation is made under the *Defence Act 1903*, the *Naval Defence Act 1910* and the *Air Force Act 1923*.

**Consultation-** In developing these amendments, consultation was undertaken within Defence and included:

- Defence Legal Division,
- Legal advisers in the three Service headquarters and Headquarters Joint Operations Command,
- Directorate of CDF Commissions of Inquiry, and
- Inspector-General ADF.

Externally consultation was undertaken with:

- Office of Parliamentary Counsel,
- Prime Minister and Cabinet (Executive Council Secretariat) and
- Office of Best Practice Regulation advised that a Regulation Impact Statement was not required (14928 refers).

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Defence (Inquiry) Amendment Regulation 2013 (No. 1)***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Instrument**

The *Defence (Inquiry) Regulations 1985* (the Principal Regulations) prescribe such matters as the appointment, procedures and powers of Courts of Inquiry, Boards of Inquiry, Inquiry Officers, Chief of the Defence Force Commissions of Inquiry and Inquiries by the Inspector-General ADF. Regulation 63 makes it an offence to disclose the records or report of an inquiry conducted under the Regulations, unless the Minister has authorised it.

Sub-regulation (2A) makes it a defence to a prosecution for this offence if the person is acting in the performance of the duties of his or her office. Reluctance to rely on this defence, in the absence of specific authorisation to disclose the records or report of an inquiry in the performance of duties, has led to a practice of seeking Ministerial authorisation even in relation to matters that fall squarely within the performance of a person's duties. Recent reviews have recommended changes to the inquiry disclosure arrangements created by regulation 63 (for example, page 66 of the Supplement to Volume 1 of the *DLA Piper Report of the Review of allegations of sexual and other abuse in Defence*, and recommendation 27 of the *Review of the Management of Incidents and Complaints in Defence including Civil and Military jurisdiction 2011* conducted by the Inspector-General ADF).

The Regulation repeals regulation 63 and substitute a new regulation. The new sub-regulation 63(4) would authorise disclosure of the records or report of an inquiry if it is in the performance of a person's duties. The new sub-regulation 63(5) would give the Minister power to make binding directions as to what matters fall within the performance of duties for the purposes of sub-regulation 63(3). The new sub-regulation 63(9) would enable the Minister to delegate his or her powers to authorise disclosure of inquiry records and reports. The substance of the new regulation 63 would otherwise remain the same.

The new regulation 63 would continue to reflect the need to protect information and documents obtained in inquiries under the Regulations. These inquiries have significant coercive powers to obtain information, including incriminating information about individuals. Individuals giving evidence to an inquiry under the Regulation may suffer significant detriment, including to their reputation, if that information subsequently becomes widely known.

This must be balanced against the need to disclose information and documents obtained in inquiries in order to, for example, advise persons affected by an inquiry about the inquiry outcomes, to implement inquiry recommendations, make other decisions on issues arising from an inquiry report or evidence, and to provide individuals with procedural fairness if adverse action is proposed to be taken after an

inquiry. The new regulation 63 would clarify that disclosure in situations like this is authorised in the performance of a person's duties.

The new regulation 63 would not create any new offence. Instead, it would clarify the application of the offence of disclosing information and documents relating to inquiries under the Principal Regulations.

### **Human rights implications**

The Legislative Instrument relating to the disclosure of inquiry information and documents engages the following human rights:

#### *Protection against arbitrary interference with privacy*

This right is protected in Article 17 of the International Covenant on Civil and Political Rights, which provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.

The regulation protects against arbitrary interference with privacy by maintaining the offence of unauthorised disclosure of inquiry information and documents, including personal information contained therein. Personal information in inquiry information or documents could only be disclosed if specifically authorised by a Minister in the Defence portfolio (as is the case under the current regulation), or if disclosure was in the performance of the duties of a Commonwealth employee's office. This provides a balance between the protection of the privacy of individuals, and the interests of the Australian Defence Force and the Commonwealth generally in carrying out their lawful and legitimate functions and activities in relation to matters that are subject of an inquiry under the Principal Regulations.

The new regulation 63(5) will allow the Minister to give binding directions about what amounts to the performance of duties for the purposes of sub-regulation 63(4). The Minister's directions may provide further clarification as to the balance between the right to protection against arbitrary interference with privacy, and the requirements of the Australian Defence Force and the Commonwealth in carrying out their lawful and legitimate functions.

#### *Freedom of expression*

This right is protected in Article 19 of the International Covenant on Civil and Political Rights, which guarantees freedom of expression, including the right to impart and receive information. The freedom of expression is not an absolute right, and Article 19(3) of the ICCPR specifies the legitimate aims which any legal restriction on the exercise of freedom of expression must pursue. In this case the regulation limits the right to freedom of expression in order to promote respect for the rights and reputations of others. The new regulation would continue to prohibit disclosure of inquiry information and documents, protecting individuals who are required by law to provide information to an inquiry (including in some cases self-incriminating information) from arbitrary interference with their privacy and protecting the reputations of individuals who may be the subject of adverse findings in an inquiry.

The new regulation 63(5) will allow the Minister to give binding directions about what amounts to the performance of duties for the purposes of sub-regulation 63(4). The

Minister's directions may provide further clarification as to the balance between the right to freedom of expression in this context and the rights and reputation of others.

### **Conclusion**

This Legislative Instrument is compatible with human rights because it advances the protection of human rights, including the protection against arbitrary interference with privacy. To the extent that it limits any human rights, those limitations are reasonable and proportionate.