

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence

Subject- *Defence Act 1903*

Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016

The *Defence Act 1903* (the Act) prescribes the control, administration, constitution and service of the Australian Defence Force (ADF).

Subsection 124(1) of the Act provides 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 ADF, or for carrying out or giving effect to the Act.

Paragraphs 124(1)(gc) and (h) and subsections 124(2AA) and (2AB) of the Act provide for the making of regulations addressing the procedures, powers and reporting obligations of the Inspector-General of the Australian Defence Force (Inspector-General ADF) in respect of the performance of the Inspector-General ADF's functions, including matters connected with inquiries, investigations and information gathering. The Act also provides for the making of regulations addressing the appointment, procedures and powers of courts of inquiry, boards of inquiry, Chief of the Defence Force commissions of inquiry, inquiry officers and inquiry assistants.

The Regulation amends the *Defence (Inquiry) Regulations 1985*, to support the implementation of progressive changes to the ADF military justice system. The changes enhance the independence of the Inspector-General ADF, give the Inspector-General ADF responsibility for some functions previously conducted within the ADF, and give the Inspector-General ADF the necessary powers to perform these functions. Relevant amendments to the Act were made in the *Defence Legislation Amendment (Military Justice Enhancements – Inspector-General ADF) Act 2015*. The Inspector-General of the Australian Defence Force Regulation 2016 has been made at the same time as this Regulation, and outlines the Inspector-General ADF's functions and powers. This Regulation supports those changes by amending the *Defence (Inquiry) Regulations 1985*, which was previously the mechanism for the Inspector-General ADF to conduct inquiries.

Previously, inquiries undertaken by the Inspector-General ADF were governed by the *Defence (Inquiry) Regulations 1985*. However, the *Defence Legislation Amendment (Military Justice Enhancements–Inspector-General ADF) Act 2015* enhanced the independence, powers and functions of the Inspector-General ADF. The *Inspector-General of the Australian Defence Force Regulation 2016*, made at the same time as this Regulation, provides details of the Inspector-General ADF's new functions and powers. This Regulation amends the *Defence (Inquiry) Regulations 1985* by:

- repealing Part 7 (Inquiries by the Inspector-General of the ADF), as the Inspector-General ADF will now conduct inquiries under the *Inspector-General of the Australian Defence Force Regulation 2016*;

- replacing regulation 109 (Appointment of Commission of Inquiry), as the Inspector-General ADF will take responsibility for inquiring into service-related deaths; and
- amending regulation 70A, to provide greater flexibility in the appointment of inquiry officers.

Details of the Regulation are set out in Attachment A.

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

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

The Regulation commences on 1 October 2016.

Regulatory Impact Statement

The Office of Best Practice Regulation advised that no regulatory impact statement was required (OBPR ID 16927).

Consultation

An exposure draft of the Regulation was provided for consultation with internal Defence stakeholders. In response to the feedback received to the exposure draft of the Regulation, a new draft of the Regulation was prepared.

Authority: Section 124 of the *Defence Act 1903*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016

The Regulation 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 Regulation

The purpose of the Regulation is to support the implementation of progressive changes to the ADF military justice system, in particular enhanced independence and functions of the Inspector-General ADF. In this Regulation, this involves amending the *Defence (Inquiry) Regulations 1985* to: repeal Part 7 (Inquiries by the Inspector-General of the ADF), replace regulation 109 (Appointment of Commission of Inquiry), and amend regulation 70A (Appointment of Inquiry Officers and inquiry assistants).

Human rights implications

The Regulation does not engage any of the applicable rights or freedoms.

Conclusion

This instrument is compatible with human rights as it does not infringe on any human rights or freedoms.

Marise Payne
Minister for Defence

ATTACHMENT A – DETAILS OF PROVISIONS

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016*.

Section 2 – Commencement

This section provides that the *Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016* commences on 1 October 2016.

Section 3 – Authority

This section provides that the *Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016* is made under the *Defence Act 1903*.

Section 4 - Schedules

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1 – Main amendments

Item 1 – Part 7

Part 7 of the *Defence (Inquiry) Regulations 1985*, which provided for the appointment, procedures and powers of IGADF inquiries, has been repealed. These inquiries will now be conducted in accordance with the *Inspector-General of the Australian Defence Force Regulation 2016*.

Item 2 – Regulation 109

Regulation 109 of the *Defence (Inquiry) Regulations 1985*, which provided for the appointment of Commissions of Inquiry, has been repealed and replaced with new regulation 109. Previously, appointment of a Commission of Inquiry was mandatory in certain situations, in particular into the death of an ADF member that appeared to have arisen out of their service (subject to Ministerial direction otherwise). Appointment of a Commission of Inquiry will no longer be mandatory in these situations, reflecting that the Inspector-General ADF's new functions in the *Inspector-General of the Australian Defence Force Regulation 2016* include inquiring into service-related deaths. A Commission of Inquiry may now be appointed to inquire into any matter and the matters that may be inquired into may be varied at any time in writing.

Part 2 – Other amendments

Defence (Inquiry) Regulations 1985

Item 3 – Paragraph 3(1)(d) Court of Inquiry

Regulation 3 of the *Defence (Inquiry) Regulations 1985* contains the definitions of terms used in the Regulation. This item removes the reference to ‘Part VIII’ in the definition of *Court of Inquiry* and replaces it with a reference to ‘Part 8’. This is a technical amendment and ensures that the term ‘Part 8’ is used consistently throughout the Regulation.

Item 4 – Regulation 70A

Regulation 70A of the *Defence (Inquiry) Regulations 1985* provides for the persons who may appoint an inquiry officer or inquiry assistant and how the appointment must be made. This item repeals subregulation 70A(1) and replaces it with a new subregulation which:

- (a) removes from subregulation 70A(1) the restriction that an inquiry officer or inquiry assistant may only be appointed to an inquiry which concerns the part of the Defence Force that was under the command or control of the relevant appointing officer. It also provides a greater discretion for authorised appointing officers to appoint inquiry officers and inquiry assistants in relation to any matter concerning the Defence Force;
- (b) removes from paragraph 70A(1)(a) the reference to a ‘commanding officer in the Defence Force’ and replaces it with ‘Chief of the Defence Force or a service chief’;
- (c) removes from paragraph 70A(1) (b) the reference to ‘an officer who has the powers of a formation commander under the *Australian Military Regulations 1927*’ as this Regulation has ceased to exist. Instead, this paragraph provides that ‘an officer or class of officers authorised, in writing, by Chief of the Defence Force or a service chief’ pursuant that paragraph may appoint inquiry officers and inquiry assistants; and
- (d) removes from paragraph 70A (1) (c) the reference to ‘an officer who holds an appointment superior to that of an officer’ mentioned in 70A (1) (a) or (b)’.

Item 5 – Regulation 70A

Regulation 70A of the *Defence (Inquiry) Regulations 1985* is further amended by inserting new subregulation 70A(2), which provides the Chief of the Defence Force or a service chief with the discretion to authorise an officer, or class of officers, to appoint an inquiry officer or inquiry assistant under this Regulation, subject to any conditions specified in the authorisation.

Item 6 – Part 10

The Principal Regulation is amended by inserting new Part 10 which contains transitional provisions. Regulation 126 provides that the repealed provisions of Part 7

continue to apply in relation to an inquiry commenced, but not completed, before 1 October 2016. The regulation further provides that an inquiry officer or inquiry assistant appointment in force immediately before 1 October 2016 in relation to an inquiry continues in force on and after 1 October 2016, for the purposes of completing that inquiry. The regulation further provides that a Commission of Inquiry appointment in force immediately before 1 October 2016 continues in force on and after 1 October 2016, for the purposes of completing that Commission of Inquiry.