EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence Personnel

Subject – ***Defence Act 1903***

Defence Legislation Amendment (Instrument Making) Act 2017

Defence (Inquiry) Regulations 2018

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

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 Defence Force, or for carrying out or giving effect to the Act.

Paragraph 124(1)(gc) and subsection 124(2A) of the Act provide for the making of regulations addressing inquiries concerning the Defence Force.

Purpose of the *Defence (Inquiry) Regulations 2018*

The *Defence (Inquiry) Regulations 2018* (the Regulations) prescribe matters providing for, and in relation to, inquiries concerning the Defence Force. Inquiries under these Regulations are not ends in themselves. Their purpose is to facilitate the making of decisions relating to the Defence Force by providing the most important enabler of a good decision—accurate, reliable and timely information.

Inquiries under these Regulations are designed to assist command in securing the proper functioning of the Defence Force; they are not about individuals as such and are not an external accountability mechanism. The legal powers and protections provided under these Regulations, such as the ability to compel the production of evidence, enable robust and thorough investigations that furnish commanders and other Defence leaders with the facts and circumstances associated with an incident or circumstance. Internal inquiries are critical to supporting informed decision-making by command about complex incidents that can affect all aspects of the Defence Force.

The Regulations provide for two flexible inquiry formats: a Commission of Inquiry and an Inquiry Officer Inquiry. The former will be used for higher level matters that are particularly complex and sensitive, while the latter will be used to inquire into more routine matters.

The Regulations replace the *Defence (Inquiry) Regulations 1985* (the old Regulations), which allowed for five separate forms of inquiry: General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry, Chief of the Defence Force (CDF) Commissions of Inquiry and Inquiry Officer Inquiries.

The old Regulations contained detailed content regarding procedural aspects of the different types of inquiries. This had the capacity to prolong inquiries and impede the making of timely decisions by command.

In addition, some of the forms of inquiry have become redundant or obsolescent over time. For instance, General Courts of Inquiry and Combined Courts of Inquiry have never been used. While in 2016, the function of inquiring into Service-related deaths previously performed by CDF Commissions of Inquiries was transferred to the Inspector-General of the Australian Defence Force (IGADF) and is now conducted under the *Inspector-General of the Australian Defence Force Regulation 2016*. Additionally, some matters that had frequently been the subject of inquiries under the old Regulations are now dealt with using other fact finding mechanisms. For example, the IGADF has a significant formal role in the management of redresses of grievance under the *Defence Regulation 2016* and such matters can be investigated as part of the IGADF inquiry framework. Lower level and less complex inquiries are more commonly dealt with at unit level using simplified non-statutory fact finding mechanisms introduced following the implementation of certain recommendations of the *Re-Thinking Systems of Inquiry, Investigation and Review* project in 2015.

Notwithstanding these changes, there remains a requirement for a statutory mechanism to enable commanders to swiftly inquire into matters concerning the Defence Force. There will be matters where commanders may need to rely on statutory powers and protections to uncover the information they need to make decisions for internal purposes. For example, in unacceptable behaviour and abuse complaints, safety incidents or sensitive operational matters. However, the old Regulations are at times overly legalistic, procedurally prescriptive and restrictive, and can hinder the capacity of commanders to gather this information quickly, flexibly and efficiently.

The Regulation will:

- Consolidate five different types of inquiry mechanisms into two flexible inquiry formats – a Commission of Inquiry and Inquiry Officer Inquiry
- Provide greater flexibility in internal decision-making inline with the requirement for a capable, agile and potent future force, while retaining essential protections against unfairness
- Promote flexibility and efficiency in the conduct of inquiries through creating the position of Commission of Inquiry assistant who can obtain evidence outside of formal hearings
- Remove inflexible criteria regarding the appointment of inquiry officials to enable those appointing inquiries to appoint individuals according to their experience and expertise
- Update the immunities of inquiry officials, and the powers of the appointing authority to manage poorly performing inquiries, to achieve a better balance between accountability on the one hand and the protections required to ensure a frank and fearless inquiry on the other
- Reflect contemporary arrangements in Defence where specific subject matters are now dealt using other inquiry mechanisms—most notably inquiries into

Service-related deaths and redresses of grievance which are managed by the IGADF under the *Inspector-General of the Australian Defence Force Regulation 2016*

- Modernise, clarify and simplify provisions, and remove redundant provisions from the old Regulations
- Replace the old Regulations before they sunset in accordance with the *Legislation Act 2003*.

Details of the Regulations are set out in Attachment A.

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

The Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

The Regulations commence at the same time that Part 1 of Schedule 1 to the *Defence Legislation Amendment (Instrument Making) Act 2017* commences.

Regulatory Impact Statement

The Office of Best Practice Regulation advised that no regulatory impact statement was required (reference OBPR ID 22629).

Consultation

The Attorney-General's Department was consulted on the proposed Regulations and agreed that the features of the proposed Regulations were appropriate. Because inquiries under the proposed Regulations would relate to the Defence Force, there was extensive consultation with the Chief of the Defence Force, the Service Chiefs and their staffs, but no consultation of the public. The CDF and Service Chiefs were presumed to speak in the interests of officers and enlisted members of the Services, who were, by convention, not consulted. The Chief of the Defence Force will communicate changes to the Defence Force and there will be training for personnel involved in directing and conducting inquiries.

The Regulations were drafted by the Office of Parliamentary Counsel.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence (Inquiry) Regulations 2018

The Regulations are 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 Regulations

The purpose of the Regulations is to enable the conduct of inquiries to facilitate command decision-making concerning the Defence Force. The Regulation will consolidate five different types of inquiry mechanisms into two (a Commission of Inquiry and Inquiry Officer Inquiry) and provide greater flexibility in decision-making inline with the requirement for a capable, agile and potent future force.

Human rights implications

The Regulations engage the following human right:

- right to a fair hearing in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR)

Right to a fair hearing

Article 14(1) of the ICCPR requires that people are entitled to a fair hearing of any criminal charges against them and of their rights and obligations in a suit at law.

Sections 38 and 67 of the Regulations have the effect of abrogating the common law privilege against self-incrimination in oral testimony provided to Commissions of Inquiries and inquiry officers, respectively. However, both the Act (subsection 124(2C)) and the Regulations (sections 40 and 69) support the right to a fair hearing, because the abrogation of the privilege against self-incrimination is accompanied by significant protections against the use of information obtained in subsequent criminal, disciplinary and civil trials.

The purpose of statutory inquiries under the Regulations is to facilitate command decision-making concerning the Defence Force. Ascertaining the true causes of significant events involving Defence Force members is frequently more important than possible prosecution of, or civil suit against, individuals. Compelling witnesses to provide information about an event, even though it could implicate them in wrong-doing, while also protecting the information from subsequent use in criminal or civil proceedings, is an important mechanism to obtain information.

Previously, the privilege against self-incrimination was similarly abrogated for inquiries conducted under the old Regulations. The privilege is also currently abrogated for inquiries conducted under the *Inspector-General of the Australian Defence Force Regulation 2016*. For consistency of approach and to ensure quality

outcomes, similar powers should apply to Commissions of Inquiries and Inquiry Officer Inquiries conducted under the Regulations.

The requirement that hearings of Commissions of Inquiry be held in private, and the prohibitions against the use and disclosure of certain information and documents that apply in both types of inquiries (including the application of the exemption under section 38 of the *Freedom of Information Act 1982*), constitute additional levels of protection in respect of the abrogation of the privilege against self-incrimination. For example, where an individual gives oral testimony containing incriminating evidence, subsequent use or publication of that testimony can be prohibited.

Conclusion

The Regulations are compatible with human rights because they ensure that the right of people to enjoy a fair trial is safeguarded, promoted and enhanced by eliminating the possibility of the unfair use of any admissions of wrongdoing.

Darren Chester
Minister for Defence Personnel

ATTACHMENT A – PROVISIONS IN *DEFENCE (INQUIRY) REGULATIONS 2018*

Part 1 – Preliminary

Part 1 provides preliminary information about the Regulations, including the name, commencement, authority and schedules. It also provides for the purpose of the Regulations, the purpose of inquiries, and definitions used in the Regulations.

Section 1 – Name

This section provides for the name of the Regulations: *Defence (Inquiry) Regulations 2018*.

Section 2 – Commencement

This section provides that the Regulations commence at the same time that Part 1 of Schedule 1 to the *Defence Legislation Amendment (Instrument Making) Act 2017* commences.

Section 3 – Authority

This section provides that the Regulations are made under the *Defence Act 1903*.

Section 4 – Schedules

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

Section 5 – Purpose of this instrument

This section provides that for the purposes of paragraph 124(1)(gc) of the Act, these Regulations prescribes matters providing for, and in relation to, inquiries concerning the Defence Force.

Paragraph 124(1)(gc) allows the Governor-General to make regulations in relation to inquiries concerning the Defence Force, other than inquiries conducted by the Defence Force Remuneration Tribunal under Part IIIA of the Act, the Inspector-General of the Australian Defence Force (IGADF) under Part VIIIB of the Act, or the Defence Honours and Awards Appeal Tribunal under Part VIIIC of the Act.

Section 6 – Purpose of inquiries

This section provides that the purpose of inquiries concerning the Defence Force that are conducted by Commissions or inquiry officers under these Regulations is to facilitate the making of decisions relating to the Defence Force.

Section 7 – Definitions

This section provides definitions of words and phrases used throughout the Regulations.

A note states that a number of expressions used in the Regulations are defined in the Act. These expressions, and their definitions in the Act, include:

- ***'Chief of the Defence Force'*** means the Chief of the Defence Force appointed under subsection 12(1) of the Act.
- ***'Defence Force*** means the Australian Defence Force.
- ***'Member'*** includes any officer, sailor, soldier and airman.
- ***'officer'*** means a person appointed as an officer of the Navy, Army or Air Force and who holds a rank specified in items 1 to 12 of the table in subclause 1(1) of Schedule 1 to the Act; or a chaplain in the Defence Force.
- ***'The Secretary'*** means the Secretary of the Department.

In the Regulations, section 7 provides the following definitions.

- **'*Act'*** means the *Defence Act 1903*.
- **'*appointing authority'*** for a Commission means both the Chief of the Defence Force and the Secretary acting jointly if the Commission is appointed under section 8 by both of those persons acting jointly; or otherwise the person who appoints the Commission under section 8.
- ***'COI assistant'*** of a Commission means a person appointed under section 9 or subsection 13(2) as an assistant of the Commission.
- ***'COI member'*** of a Commission means a person appointed under paragraph 8(3)(a), subsection 8(4) or subsection 13(2) as a member of the Commission. It includes a member appointed as the President of the Commission.
- ***'COI official'*** of a Commission means a COI assistant of the Commission, a COI member of the Commission, or a legal practitioner appointed under section 10 or subsection 13(2) to assist the Commission.
- ***'COI records'*** of a Commission means the transcript or other record of oral evidence given to a COI assistant or at a hearing of the Commission; documents produced to a COI assistant or COI member or at a hearing of the Commission; or documents prepared by a COI official of the Commission that relate to the Commission's inquiry. In this definition, the word 'documents' means 'any record of information' in accordance with section 2B of the *Acts Interpretation Act 1901* and includes: anything on which there is writing; anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; anything from which sounds,

images or writings can be reproduced with or without the aid of anything else; and a map, plan, drawing or photograph.

- ***'COI report'*** of a Commission means a report relating to the Commission's inquiry prepared in accordance with section 24.

- ***'Commission'*** means a Commission of Inquiry appointed under subsection 8(1).

- ***'engage in conduct'*** includes omitting to perform an act.

- ***'inquiry officer'*** means a person appointed under section 44(1) or subsection 48(3) as an inquiry officer.

- ***'inquiry official'*** means an inquiry officer or an IO assistant of the inquiry officer

- ***'IO assistant'*** of an inquiry officer means a person appointed under section 45 or subsection 48(3) as an assistant of the inquiry officer.

- ***'IO records'*** of an inquiry officer means the transcript or other record of oral evidence given to the inquiry officer or an IO; documents produced to the inquiry officer or an IO assistant; or documents prepared by the inquiry officer or the IO assistant that relate to the inquiry officer's inquiry. In this definition, the word 'documents' means 'any record of information' in accordance with section 2B of the *Acts Interpretation Act 1901* and includes: anything on which there is writing; anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and a map, plan, drawing or photograph.

- ***'IO report'*** of an inquiry officer means a report relating to the inquiry officer's inquiry prepared in accordance with section 57.

- ***'President'*** of a Commission means the person appointed under paragraph 8(3)(b) or (c) or subsection 13(2) as the President of the Commission.

Part 2 – Commissions of Inquiry

This part provides for the appointment and conduct of Commissions of Inquiry. It also provides for the Commission report, the use and disclosure of information, offences and other matters.

Commissions of Inquiry under this Part represent a consolidation of the four higher-level inquiry formats under the old Regulations—General Courts of Inquiry, Boards of Inquiry, Combined Boards of Inquiry and Chief of the Defence Force (CDF) Commissions of Inquiry. This promotes simplicity and flexibility in the appointment and conduct of such higher-level inquiries.

Division 1 – Appointment of Commissions of Inquiry etc.

This Division provides for the appointment, replacement and termination of Commissions of Inquiry and COI officials.

Section 8 – Appointment of Commissions of Inquiry etc.

This section provides for the appointment of a Commission of Inquiry.

It provides for an appointing authority to appoint by written instrument a Commission of Inquiry to inquire into such matters concerning the Defence Force as are specified in the written instrument and to prepare the report by a specified date (subsection 8(1)). This is substantially similar to the circumstances in which a Commission of Inquiry could be appointed under previous regulation 109 of the old Regulations. The content of the instrument specifying the matters to be inquired into may be referred to as 'terms of reference' or by other task descriptors commonly used in a Defence Force context.

The appointing authority can be the Minister, the CDF, or the CDF and the Secretary acting jointly (subsection 8(1)). Under the old Regulations, only the Minister could appoint a General Court of Inquiry or a Combined Board of Inquiry and only the CDF could appoint a CDF Commission of Inquiry. The CDF or a Service Chief (or delegate) could appoint a Board of Inquiry and the CDF and the Secretary could jointly appoint a Board of Inquiry into a matter concerning the administration of the Defence Force.

With the consolidation of these higher-level inquiry formats into a single Commission of Inquiry, it is necessary to reflect most of these appointment arrangements for the new format. Consistent with reformed Defence Force command arrangements under the *Defence Legislation Amendment (First Principles) Act 2015*, Service Chiefs are no longer expressly authorised by the Regulations to appoint Commissions. The retention of joint appointment authority by the CDF and the Secretary reflects their responsibility for the joint administration of the Defence Force under section 10 of the Act. Appointing authorities reside at this high level to reflect the strong powers that can be exercised by Commissions.

The appointing authority may amend by written instrument the matters specified in the instrument of appointment or specify additional matters to be inquired into (paragraphs 8(2)(a) and (b)). An amendment to the terms of reference may be made at any time after the original instrument of appointment has been made. Allowing such amendments provides flexibility and confers on the appointing authority a control mechanism to ensure that the inquiry is focused and serves its purpose of facilitating informed decision-making. An amendment might be appropriate where relevant matters were not initially identified and therefore not included in the original instrument of appointment, or where a flaw in the original instrument of appointment is identified.

The appointing authority may also amend the specified date by which the report is to be prepared (paragraph 8(2)(c)). This may be appropriate where there has been an unforeseen delay in Commission proceedings or where the process has taken longer

than anticipated. It may be used following a suspension of the Commission under section 14 (see below).

This section also provides for the appointment of members of the Commission and the President of the Commission.

In the instrument of appointment for the Commission of Inquiry, the appointing authority must appoint one or more persons as members of the Commission (paragraph 8(3)(a)). If only one member is appointed, that member is the President of the Commission (paragraph 8(3)(b)). If more than one member is appointed, the appointing authority must specify in the instrument who is the President and who is the member. This section also allows the appointing authority to appoint by written instrument additional members at any time (subsection 8(4)).

The eligibility requirements provided for in previous regulation 112 of the old Regulations, such as that the President must have judicial experience and be a civilian, have not been reproduced in this section. The eligibility requirements in the old Regulations severely restricted the individuals who could be appointed as the President. Removing the eligibility requirements gives the appointing authority the ability to appoint individuals according to whom the appointing authority considers has the most appropriate skills and experience to conduct the inquiry, and not according to what positions they have held and currently hold. As the appointing authority (and any delegates under section 43) are high ranking individuals, they will apply careful judgment and experience to their selections.

Consistent with applicable principles of procedural fairness as they apply to administrative inquiries, the appointing authority would need to satisfy himself or herself, prior to appointment, that members of the Commission are not biased and do not have conflicts of interest regarding the subject matter being inquired into. The appointing authority will need to be *reasonably* satisfied of these matters, noting that it cannot be said that any internally appointed inquiry, the purpose of which is to facilitate internal decision-making, will ever be purely independent.

Instruments of appointment made under this section are not legislative instruments under the *Legislation Act 2003*. The appointment aspect of the instrument is exempt from legislative instrument status in accordance with item 8 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*. Similarly, the setting out of the terms of reference aspect of the instrument is not of legislative character because, for the purposes of subsection 8(4) of the *Legislation Act 2003,* it applies the law in a particular case rather than determining or altering the content of the law.

Section 9 – Appointment of COI assistants

This section allows the appointing authority to appoint by written instrument one or more persons as assistants of the Commission. The appointing authority may do this at any time. A COI assistant may hold dual appointments as both a COI assistant appointed under this section, and a legal practitioner assisting under section 10 (and commonly referred to as ‘Counsel Assisting’).

As with the President in subsection 8(3), no eligibility requirements are contained in this section. Again, this gives the appointing authority a wide discretion to determine who they wish to appoint. However, a COI assistant should be of an appropriate seniority and have relevant skills and experience in light of the matters to be inquired into. An individual should not be appointed as a COI assistant if the inquiry relates to the conduct of that person or the inquiry is likely to require the person to be a witness. Otherwise, this could give rise to a real or perceived conflict of interest and potentially an allegation of a lack of impartiality. As the appointing authority (and any delegates under section 43) are high ranking individuals, they will apply careful judgment and experience to their selections.

It is anticipated that COI assistants will be used mainly to gather documents and other evidence outside of formal Commission hearings. This introduces a highly useful level of flexibility in evidence gathering processes that was lacking in higher level inquiries under the old Regulations. It enables formal COI hearings to focus on examining witnesses about complex or disputed facts. It is expected that the flexibility and agility created by this change will assist Commissions to conduct inquiries more effectively and expeditiously.

Instruments of appointment made under this section are not legislative instruments under the *Legislation Act 2003*. This is because instruments of appointment are exempt from legislative instrument status in accordance with item 8 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Section 10 – Appointment of legal practitioners assisting Commissions

This section allows the appointing authority to appoint, in writing, one or more legal practitioners to assist the Commission. A legal practitioner appointed under this section (commonly referred to as 'Counsel Assisting') may be also appointed as a COI assistant under section 9 and, when holding both appointments, will be expected in dealings with witnesses and other legal representatives to make clear the capacity in which he or she is acting.

Legal practitioners appointed under this section are subject to the *Legal Services Directions 2017* when assisting Commissions. The *Legal Services Directions 2017* are binding rules about the performance of Commonwealth legal work, and as legal practitioners appointed under this section are performing duties on behalf of the Commonwealth (through the Department of Defence) it is appropriate for them to be bound by those rules.

In this section 'legal practitioner' has the same meaning as in the Act, which refers to the definition in the *Defence Force Discipline Act 1982*. It is a person who is enrolled as a barrister, a solicitor, a barrister and a solicitor or a legal practitioner of a civil court.

Instruments of appointment made under this section are not legislative instruments under the *Legislation Act 2003*. This is because instruments of appointment are exempt from legislative instrument status in accordance with item 8 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Section 11 – Resignation of COI officials

This section allows a COI official to resign his or her appointment by giving a written resignation to the appointing authority (or either the CDF or the Secretary if they were the appointing authority acting jointly) (subsection 11(1)). The resignation takes effect the day it is received by the person to whom it is given or at a later date as specified in the resignation (subsection 11(2)). This section substantially reflects previous regulations 113 and 114 of the old Regulations.

It is appropriate to confer the ability for individuals to resign from their role in a Commission as it gives them a discretion to resign in circumstances where such action might be appropriate. For example, where they identify an actual or apparent conflict of interest. It is also not considered appropriate for the instrument to purport to compel a civilian to continue to perform their duties as a COI official where they do not wish to do so.

The section specifically excludes members of the Defence Force from being able to resign. This is because members of the Defence Force are under an obligation of service and are directed to perform duties. It is inconsistent with the nature of their service to be able to step down from certain duties at their discretion. This is consistent with previous regulation 114 of the old Regulations which also excluded members of the Defence Force from being able to resign.

Section 12 – Termination of appointment of COI officials

This section grants the appointing authority the powers to terminate the appointment of a COI official at any time by giving written notice. The termination takes effect on the day specified in the written notice. If the appointing authority was the CDF and Secretary acting jointly, then both the CDF and Secretary must give written notice of the termination.

The appointing authority may determine that it is necessary or appropriate to terminate the appointment of a COI official for a range of appropriate reasons. For example, where the appointing authority is reasonably satisfied that a COI official has engaged in misconduct, is acting or has acted in bad faith, is physically or mentally unwell or otherwise unable to perform their role, or where it is necessary to ensure that the Commission can be completed expeditiously.

Any decision to terminate can be reported by any person to the IGADF or the Defence Force Ombudsman for review if it is reasonably suspected that the appointing authority acted improperly in issuing the termination notice.

In the event that a COI official holds dual appointments (for example as a COI assistant appointed under section 9 and a legal practitioner appointed under section 10), both appointments are taken to be terminated if a written notice is issued under this section. Similarly, if the COI official is the President of the COI and they are issued a termination notice under this section, their appointment as both a member of the Commission and the President is terminated. However, the individual could in effect be ‘re-appointed’ by a written instrument as another COI official under subsection 8(4) or section 13.

Section 13 – Replacement of COI officials

This section allows an appointing authority to replace a COI official by written instrument if that COI official resigns under section 11, has their appointment terminated under section 12 or dies (subsections 13(1) and (2)). The appointing authority may appoint another COI official to replace the first COI official, with effect on the date specified in the written instrument (subsection 13(2)).

For the purposes of exercising his or her powers or performing his or her functions as a COI official, upon their appointment the replacement COI official may have regard to any COI records (subsection 13(3)). This authorisation facilitates the expeditious and efficient conduct of the new inquiry.

Section 14 – Termination of Commissions

If at any time he or she considers it appropriate in all the circumstances, the appointing authority for a Commission may by written notice given to the President terminate the appointment of the Commission or suspend it for a specified period of time (subsection 14(1)). The termination or suspension of a Commission effectively results in the functions and powers of all COI officials being terminated or suspended.

Circumstances in which it might be appropriate for a Commission to be terminated include where the passage of time has meant that the outcome of the Commission is no longer required to facilitate decision-making by command, or where the purpose of the Commission has been overtaken by other events. It might also be appropriate to terminate a Commission (even if a new one is later appointed) where, for example, litigation concerning the subject matter of the Commission has been commenced in a court and the Commission will likely be prevented from completing its task for many months or even years.

Circumstances in which it might be appropriate for a Commission to be suspended include where another internal or external process is being conducted (for example, a criminal investigation by civilian police) and it is appropriate for the Commission to suspend its inquiries until the outcome of the other process is known. The suspension notice may state that the specified period of suspension is until a named date, until another event has occurred or until the appointing authority gives further notice.

If the appointing authority had suspended a Commission under this section and wishes the Commission to recommence at an earlier time than the period specified in the suspension notice, or the period of suspension was until the appointing authority gave further notice, the appointing authority may provide written notice to the President that the Commission is no longer suspended.

If a Commission is terminated and a second Commission is later appointed to inquire into the same or similar matters, the second Commission may have regard to any COI records of the first Commission (subsection 14(2)). This authorisation facilitates the expeditious and efficient conduct of the new inquiry.

Section 15 – Completion of inquiry

This section provides that the appointing authority may, after receiving the COI report, determine in writing that the Commission's inquiry has been completed. This provides the appointing authority with the discretion to keep the Commission afoot until he or she is satisfied that all necessary tasks have been completed.

This differs from the previous subregulation 108(2) of the old Regulations which provided that a Commission's inquiry is completed upon delivery of the report or agreement of the members of the Commission. Since it is the appointing authority who appoints the Commission, it is appropriate for the appointing authority to also determine when it is complete.

Division 2 – Conduct of Commissions

This Division provides for the conduct of Commissions, including provisions relating to the procedures, notices and hearings of Commissions.

Section 16 – Procedures generally

This section provides that subject to Division 2, the appointing authority may specify in writing how the Commission is to conduct its inquiry (subsection 16(1)). This gives the appointing authority the flexibility to ensure that the Commission is conducted in a way which best facilitates subsequent internal decision-making. This is consistent with previous regulation 115 of the old Regulations.

This section sets out a number of principles and rules by which Commissions are to be conducted. A Commission must conduct its inquiry fairly, economically, quickly and informally (paragraph 16(2)(a)). The purpose of this is to ensure that the focus of the Commission is on gathering the best available information with the least possible delay in order to inform command decision-making, while ensuring that fairness to individuals is maintained.

A Commission must comply with the rules of procedural fairness (paragraph 16(2)(b)). This includes the rule against bias, which requires that COI officials bring open minds to the questions in issue, and the hearing rule, which requires that individuals be given an opportunity to have their say before a proposed adverse finding or recommendation is made against them by a Commission. This requirement not only protects the rights and interests of individuals who are granted rights of appearance and representation before Commission hearings under section 23, but also those who are not. In this context, procedural fairness is concerned with the conduct of the Commission rather than the actual outcome reached or decisions ultimately made by the relevant decision-maker.

A Commission is not bound by the rules of evidence, legal forms or technicalities (paragraph 16(2)(c)). This provides the Commission with the flexibility to collect and consider all relevant information. Similarly, a Commission may inform itself on any matter relevant to its inquiry in such manner as the President of the Commission thinks fit (paragraph 16(2)(d)). This reflects previous regulation 50 of the old Regulations.

Section 17 – Times and places for conduct of inquiries

This section provides that a Commission must conduct its inquiry at such times and at such places as the President determines (subsection 17(1)). The section also provides that a Commission may conduct its inquiry and exercise its powers in or outside Australia (subsection 17(2)). A Commission may therefore be appointed to inquire into matters occurring, for example, in an overseas operational environment.

Section 18 – Notice to produce documents or things relevant to inquiry

This section provides that if the President reasonably believes that a person has documents or things that are relevant to the Commission's inquiry, he or she may by written notice require the person to produce any such documents or things to a COI member or COI assistant at a specified place within a specified period, or at a specified hearing of the Commission (subsection 18(1)). A person must be given a minimum of 14 days notice in such circumstances (subsections 18(2) and 18(3)). A note references section 29, which sets out the offence of failing to comply with a notice to produce.

Consistent with previous regulation 118 of the old Regulations, a notice can be issued to both members of the Defence Force and civilians alike. This ensures that all documents and things relevant to the inquiry can be obtained, regardless of the identity of the individual who has possession of that document or thing.

The notice period in this section is consistent with paragraph 9.3.4 of *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Commonwealth Offence Guide), which states that for a notice to produce, a person should be given at least 14 days to produce the required information or documents. Individuals can, however, agree on a shorter timeframe if, for example, a shorter period is required for operational reasons or the documents or things are easily collated and produced.

Section 19 – Notice to attend to give evidence

This section provides that if the President reasonably believes that a person has information that is relevant to the Commission's inquiry, he or she may by written notice require the person to attend before a COI assistant at a specified place on a specified day to give evidence or to attend a specified hearing of the Commission to give evidence (subsection 19(1). A person must be given a minimum of 14 days notice to attend (subsections 19(2) and (3)). A note references section 30, which sets out the offence of failing to comply with a notice to attend.

Consistent with previous regulation 118 of the old Regulations, a notice can be issued to both members of the Defence Force and civilians alike. This ensures that all evidence relevant to the inquiry can be obtained, regardless of the identity of the individual who has the information.

The notice period in this section is consistent with paragraph 9.3.4 of the Commonwealth Offence Guide, which states that for a notice to attend, a person should be given the notice at least 14 days in advance of the hearing date stipulated in

the notice. Individuals can, however, agree on a shorter timeframe if, for example, a shorter period is required for operational reasons. Members of the Defence Force may be ordered pursuant to command authority (for example, by their commanding officer) to attend for duty at a Commission hearing at shorter notice than the 14 days stipulated in this section.

If a person is given a notice to attend, he or she is entitled to be paid a reasonable allowance for expenses incurred by the person for transport, meals and accommodation in connection with complying with the notice (subsection 19(4)). The allowances will ordinarily be based on the fees payable to witnesses prescribed by the *Public Works Committee Regulations*. However, the use of the words 'reasonable allowance' enables the flexibility to respond to the individual circumstances of a witness required to attend an inquiry. A member of the Defence Force whose attendance is part of his or her duty and for which is separately receiving travel, meal and allowance entitlements would not receive an additional separate allowance under this section. This is consistent with regulation 34 of the *Inspector-General of the Australian Defence Force Regulation 2016*.

Section 20 – Evidence to be given on oath or affirmation

This section provides that all evidence given at a hearing of a Commission, or to a COI assistant, must be given on oath or affirmation.

This represents a change from the previous regulation 119 of the old Regulations which provides that evidence must not be taken on oath or affirmation unless one of the listed exceptions applies. A requirement that all evidence be taken on oath or affirmation supports the offence provisions (see Division 5 below) and section 38 which abrogates the privilege against self-incrimination, and ensures that the Commission is able to satisfy itself as to the veracity of all evidence presented. It is balanced with the protection of witnesses (section 40) and the prohibitions on the disclosure of COI records and COI reports (section 37).

Section 21 – Hearings of Commissions

This section provides that a hearing of a Commission must be held in private (subsection 21(1)). However, the appointing authority may by written notice to the President direct that the Commission hold one or more of its hearings in public or that a person or persons specified in the notice may be present during all or part of a private hearing of the Commission (subsection 21(2)). This substantially reflects previous regulation 117 of the old Regulations.

If the President is satisfied that it is necessary to do so for one of a number of reasons, he or she may order that a person or persons must not be present at all or part of a public or private hearing of the Commission, or order that all or part of a public hearing must be held in private and give directions as to the persons who may be present (subsection 21(3)). The reasons are that it is necessary to do so in the interests of the defence, security or international relations of the Commonwealth, in fairness to a person who the President considers may be affected by the Commission's inquiry or for the effective conduct of the Commission's inquiry.

The President may make such an order in relation to a hearing despite any direction given by the appointing authority in relation to the hearing (subsection 21(4)). This gives the President the flexibility to conduct the inquiry as he or she considers appropriate.

It may be appropriate for Commission hearings to be held in public where the inquiry has been triggered by an event or incident that is of significant public interest. While the purpose of inquiries under the instrument is to inform internal decision-making, and they are not external accountability mechanisms, the ability to conduct public hearings enables Defence to be transparent and open with the public and this, in turn, promotes public confidence in Defence.

If the President makes an order in relation to a hearing under this section, he or she may authorise a person to take such reasonable action as is required to give effect to the order (subsection 21(5)). This might include, for example, an order that an person's access pass be deactivated to prevent them from entering the location where the hearing is being held.

Section 22 – Removal of certain persons from hearings

The section provides that the President may order that a person be removed from a hearing if he or she considers that the person has insulted a COI official during the hearing, disturbed or interrupted the hearing, or engaged in conduct during the hearing that would constitute a contempt of court if a Commission were a court of record (subsection 22(1)). Removing the person does not prevent any proceedings being instituted against that person under section 34 (discussed below).

The section also provides that if the President makes such an order, he or she may authorise a person to take such reasonable action as is required to give effect to the order (subsection 22(2)). For example, order that they be reported to the civilian police for the purposes of having them treated as a trespasser.

This section reflects previous regulation 107 of the old Regulations. However, this section simplifies regulation 107 by removing distinctions between similar kinds of conduct. For example, removing separate references to use of 'insulting language' towards the inquiry and the 'writing or speaking of words that are false or defamatory' of the inquiry. The section is consistent with section 30 of the *Inspector-General of the Australian Defence Force Regulation 2016*.

Section 23 – Appearance at hearings of Commissions

This section contains a number of provisions regarding the conduct of hearings.

The section provides that if the President considers that a person is likely to be materially adversely affected by the Commission's inquiry, he or she may permit the person or their representative to appear at any hearing of the Commission that is held in private, and must permit the person or their representative to appear at any hearing or part of a hearing of the Commission that is held in public if all or that part of the hearing is likely to deal with matters that are likely to materially adversely affect the person (subsection 23(1)).

If the President permits a person or their representative to appear at a hearing of the Commission and the President considers that the person is likely to be materially adversely affected by evidence given by a witness at the hearing, then the President must permit the person or their representative to examine the witness at the hearing in relation to that evidence (subsection 23(2)). This right of representation is necessary because the risk of damage to a person's reputation is particularly significant where adverse information about the person is discussed, or accusations of misconduct are made, in a public hearing.

The section provides that if the President considers that the record or reputation of a deceased person is likely to be materially adversely affected by the Commission's inquiry, he or she may permit a representative of the person to appear at any hearing of the Commission that is held in private, and must permit a representative of the person to appear at any hearing or part of a hearing of the Commission that is held in public if all or that part of the hearing is likely to deal with matters that are likely to materially adversely affect the person (subsection 23(3)).

If the President permits a representative of a deceased person to appear and he or she considers that the deceased person's record or reputation is likely to be materially adversely affected by evidence given by a witness at the hearing, then the President must permit the representative of the deceased person to examine the witness at the hearing in relation to that evidence (subsection 23(4)).

The requirement that the person be materially adversely affected by the evidence before examining a witness overcomes the difficulties caused by previous regulation 55 of the old Regulations. This contained an implied right for the legal representatives of individuals at Boards of Inquiry and CDF Commissions of Inquiry to appear at all inquiry hearings and ask any questions whatsoever, even when their client was not affected by the particular hearing or evidence being discussed. This created unnecessary delays and did not support the inquiry.

If the President considers it proper to do so, the President may disallow any question put in an examination under subsection (2) or (4) (subsection 23(5)).

If a representative of a person is permitted to appear at a hearing of the Commission under this section, and the representative is a legal officer provided by the Director of Defence Counsel Services, the services of the legal officer must be provided at the expense of the Commonwealth (subsection 23(6)). Services that may be provided at Commonwealth expense include appearances at Commission hearings, reasonable preparation for Commission hearings, the preparation of submissions to the Commission and the provision of advice to the client relating to the Commission. The reference to Director of Defence Counsel Services is consistent with paragraph 110ZB(1)(d) of the Act which provides that the Director has the function of managing the provision of legal representation and advice by legal officers to persons entitled to such representation or advice for the purposes of a Commission of Inquiry.

The section provides that it has effect subject to any order made by the President under section 21 or 22 (subsection 23(7)).

Division 3—Report of Commissions

Section 24 – Report of Commissions

This section provides that if the President is satisfied that all information relevant to the Commission's inquiry that is practicable to obtain has been obtained, the President must prepare a report setting out the findings of the Commission and any recommendations of the Commission arising from those findings. The report must be signed by the President and any other COI member of the Commission (subsection 24(1)).

If a Commission has two or more COI members and those COI members cannot agree on a report, each COI member must make a statement in writing, to be signed by that member, of the findings made by the COI member and any recommendations arising from those findings that the COI member may think fit to make. Those statements constitute the report of the Commission (subsection 24(2)).

The President must give a copy of the report to the appointing authority (or both the CDF or the Secretary if they were the appointing authority acting jointly) (subsection 24(3)).

The report must be accompanied by a copy of the COI records of the Commission (subsection 24(4)). This includes evidence obtained during the course of the Commission, the transcript of public and private hearings and other documents prepared by a COI official.

This section substantially reflects the previous regulation 123 of the old Regulations, when read in conjunction with previous regulation 110 (the express power to make recommendations). Section 24 still empowers the Commission to make recommendations in its report. The appointing authority is not required to respond to any recommendations contained in the report, or otherwise implement those recommendations.

Division 4 – Use and disclosure of information

Section 25 – Directions regarding disclosure of evidence

This section enables the President to give written directions on the disclosure of evidence if he or she is satisfied that it is necessary to do so in the interests the defence, security or international relations of the Commonwealth, in fairness to a person who the President considers may be affected by the Commission's inquiry or in the effective conduct of the Commission's inquiry. These directions may include prohibiting the disclosure of specified information contained in oral evidence given to a COI assistant or at a hearing of the Commission, of specified documents received by a COI member or COI and accepted as evidence, or of specified documents prepared by a COI official that relate to the Commission's inquiry (subsection 25(1)). Such a direction also prohibits disclosure of part of that document or the disclosure of a copy of all or part of that document, and the disclosure of information contained in that document (subsection 25(3)). This section is necessary to mitigate the adverse consequences of a disclosure of sensitive information of certain types (for example, an

inadvertent disclosure of classified information) that might unexpectedly be discussed during a Commission hearing.

A direction does not prohibit the disclosure of information or documents specified in the direction to a COI official or a person authorised in writing by the President, or the inclusion of information or documents specified in the direction in the COI report (subsection 25(2)).

Directions made under this section are not legislative instruments under the *Legislation Act 2003*. This is because for the purposes of subsection 8(4) of the *Legislation Act 2003,* a direction applies the law in a particular case rather than determining or altering the content of the law.

Section 26 – Use, disclosure and copying of certain information and documents as an employee of the Commonwealth or member of the Defence Force

This section provides that a person who is an employee of the Commonwealth or a member of the Defence Force may do certain things in the performance of the person's duties as an employee of the Commonwealth or member of the Defence Force. This includes using information contained in the COI records or COI report; disclosing to a person or making available to the public generally information contained in the COI records or COI report or a document, part of a document or copy of all or part of a document that forms part of the COI records or COI report; or copy a document or part of a document that forms part of the COI records or COI report (subsection 26(1)). This applies despite any direction given under subsection 25(1) (subsection 26(2)).

This section replaces the previous regulation 63 of the old Regulations. Like the most recent version of subregulation 63(4), it provides a positive authorisation to enable employees of the Commonwealth or members of the Defence Force to use, disclose or copy COI records or a COI report where such is necessary in the performance of the person's duties. This overcomes privacy and other restrictions on disclosure that might apply and constitutes a permission to disclose for the purposes of subsection 37(2) of these Regulations.

The ability for COI records and COI reports to be used and disclosed in such circumstances is necessary to promote transparency and enable swift implementation of the findings and recommendations of Commissions. Transmitting information quickly across the Defence Force, the Department and sometimes to other Government departments and agencies enables necessary steps to be quickly taken, such as to mitigate risks to individuals where a COI record or a COI report contains safety critical information which needs to be actioned quickly to prevent further safety incidents from occurring. For example, previous subregulation 63(4) of the old Regulations enabled important information about the welfare and safety of current and former Defence Force personnel to be swiftly provided to relevant staff in the Department of Veterans' Affairs so they could in turn provide prompt assistance to veterans. It is important for Defence to retain the ability to disclose such information from COI reports and records with a minimum of bureaucratic complexity and associated delay.

The requirement in subsection 26(1) that use, disclosure and copying can only occur if it is '*in the performance of the person's duties'* provides a significant safeguard against improper use, disclosure and copying of information contained in COI records and COI reports. If a person were to use, disclose or copy COI record or a COI report and such was not in the performance of the person's duties, they would not be considered to have permission under this section.

Whether disclosure publicly is within the scope of a person's duties will depend on the nature of the person's position and what they are expected to do to undertake their job. For the vast majority of individuals who have access to a COI record or COI report (which will, for the most part, be ADF members and APS employees working at the Department of Defence), disclosure to the public would not be within the course of their duties. If they were to disclose a COI record or COI report in such instances, it may constitute an offence under section 37, as well as an unauthorised disclosure for the purposes of the *Privacy Act 1988* and section 70 of the *Crimes Act 1914*. In addition, unauthorised public disclosure of a COI record or COI report may result in internal administrative or disciplinary action. In the event that Commonwealth employees outside the Department are provided with access to a COI record or COI report, they will similarly be bound by the law in relation to their use and disclosure of those records. Again, disclosure of records publicly by a non-Defence Commonwealth employee is unlikely to be within the scope of their duties.

Chief of the Defence Force Directive 08/2014 enhances this safeguard. This Directive restricts the types of disclosures that validly fall within the scope of a person's official duties. This Directive also requires employees or members to identify whether the COI records or COI report contain personal information. If so, then the employee or member needs to consider whether it is appropriate to redact such information applying a similar approach to that used under the *Freedom of Information Act 1982* (FOI Act). Similarly, if an employee or member identifies that a COI report or COI records contain information concerning the defence, security or international relations of the Commonwealth, they will also need to consider whether such information should be redacted prior to its use or disclosure.

The Directive constitutes a general order to ADF members for the purposes of the *Defence Force Discipline Act 1982* and unauthorised public disclosure may result in internal administrative or disciplinary action. For APS employees, the Directive is referenced in the Department's *Administrative Inquiries Manual*, which is part of the Department's administrative policy framework. Consideration is being given to a new joint Secretary and CDF directive being issued which would be enforceable as a general order for ADF members, and would also constitute a direction to APS employees for the purposes of subsection 15(5) of the *Public Service Act 1999*.

Section 27 – Minister may authorise use, disclosure and copying of certain information and documents

This section provides that the Minister may, in writing, authorise an employee of the Commonwealth or a member of the Defence Force to use information contained in the COI records or COI report for a specified purpose; disclose information contained in the COI records or COI report; disclose a document, a part of a document or a copy of all or a part of a document that forms part of the COI records or COI report; or copy a

document or a part of a document that forms part of the COI records or COI report of a Commission (subsection 27(1)). A note clarifies that the Minister may give a direction to a person or a class of persons (see subsection 33(3A) of the *Acts Interpretation Act 1901*). In this section, disclosure means disclosing to any person within or outside the Defence portfolio.

The Minister's authorisation may be expressed to be subject to conditions specified in the authorisation (subsection 27(2)). For example, that a document may be released but in a redacted format, or that documents be provided electronically.

The Minister's authorisation has effect despite any direction given by the President under subsection 25(1) in relation to the disclosure of evidence (subsection 27(3)). This ensures that any direction of the Minister takes precedence over a direction of the President under subsection 25(1).

Authorisations made under this section are not legislative instruments under the *Legislation Act 2003*. This is because such an authorisation is exempt from legislative instrument status in accordance with item 4 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015* as it has the effect of authorising or approving a particular person to take a particular action.

Section 28 – Minister may use, disclose and copy certain information and documents

This section provides that the Minister herself or himself may use information contained in the COI records or COI report for purposes relating to the Defence Force; disclose information contained in the COI records or COI report; disclose information a document, a part of a document; or a copy of all or a part of a document that forms part of the COI records or COI report, and copy a document or a part of a document that forms part of the COI records or COI report of a Commission (subsection 28(1)). This is despite any direction given by the President under subsection 25(1) in relation to the disclosure of evidence. This ensures that a decision of the Minister with respect to the use, disclosure and copying of such information takes precedence over a direction of the President with respect to evidence under subsection 25(1)).

Division 5—Offences

This division sets out offences in relation to Commissions of Inquiry.

Other than section 35 (taking reprisals), all of the offences in Division 5 are similar to offences contained in the old Regulations. However, defences and penalties are dealt with differently.

In the old Regulations, most of the offences were strict liability offences but this has not been replicated in these Regulations. Paragraph 2.2.6 of the Commonwealth Offence Guide provides that strict liability is generally only appropriate in limited circumstances. Imposing strict liability for the offences contained in these Regulations is not justified given that the conduct leading to the offence (such as the

failure to comply with a notice) may be for a reason outside the person's control and it is appropriate for the fault elements and defences in the *Criminal Code* to apply.

Many of the offences in the old Regulations contained the additional defence of 'reasonable excuse'. Paragraph 4.3.3 of the Commonwealth Offence Guide provides that the defence of 'reasonable excuse' should generally be avoided. It may only be applied to an offence if it is not possible to rely on the general defences in the *Criminal Code* or to design more specific defences. In these Regulations, it is possible and appropriate to rely on the general defences and specific defences have also been included.

In relation to penalties, the penalty of imprisonment for some offences has not been retained from the old Regulations. This is because the Commonwealth Offence Guide provides that generally Regulations should not impose a penalty of imprisonment. Penalties for each offence is set at 20 penalty units (which is a considerable increase on the quantum of fines that could be imposed under the old Regulations) and is likely to be adequate to provide an effective deterrent to the commission of the offence.

Section 29 – Failing or refusing to comply with notice to produce documents or things relevant to inquiry

This section makes it an offence for a person to fail to comply with a notice they are given under section 18 to produce documents or things relevant to an inquiry (subsection 29(1)).

Section 29 also provides two distinct matters that could be considered excuses for complying with a notice. This means that a defendant who wishes to rely on a relevant matter bears an evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists.

In the first instance, if the person believes on reasonable grounds that compliance with the notice is likely to cause damage to the defence, security or international relations of the Commonwealth (paragraph 29(2)(a)). Circumstances in which this might apply include where the person who issued the notice does not have a sufficiently high security clearance to have access to the requested information, or complying with the notice would result in sensitive communications between Australia and an ally being disclosed to the public.

In the second instance, a defendant may seek to rely on the excuse that it would be unduly onerous for the person to comply with the notice (paragraph 29(2)(b)). Circumstances in which this might apply include where the number of documents is unreasonably voluminous given the notice period.

A note states that the person bears the evidential burden in respect of these matters.

The existence of the relevant belief or circumstances could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of these matters beyond reasonable doubt as a matter of course. For example, a prosecution for failure to comply would require a reasonable belief that compliance would not cause damage to security, which would be difficult for a prosecutor to establish. The belief of the

person that compliance is likely to cause damage to defence, or that the circumstances made compliance unduly onerous, require consideration of factors which are peculiarly within the knowledge of the defendant. For example, in relation to whether compliance is unduly burdensome, the volume of information to be provided and the personal circumstances of the person vis a vis the requirements of the order or notice would only be known by the person. Once they have done this, the prosecution would need to disprove the existence of the belief, circumstances, permission or authorisation in order to prove the offence. Reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

The penalty for an offence under this section is a maximum of 20 penalty units. This reflects those principles of public and legal policy which encourages the disclosure of information that will assist the collection of evidence during an inquiry.

Section 30 – Failing or refusing to comply with notice to attend as a witness to give evidence

This section makes it an offence for a person to fail to comply with a notice they are given under section 19 to attend as a witness to give evidence (subsection 30(1)).

The section provides one matter that could be considered an excuse for complying where it would be unduly onerous for the person to comply with the notice (subsection 30(2)). This means that a defendant who wishes to rely on the relevant matter bears an evidential burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists. Circumstances in which this might apply include where the person is overseas or on an extended leave of absence.

A note states that the person bears the evidential burden in respect of this matter.

The existence of the relevant circumstances could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of these matters beyond reasonable doubt as a matter of course. The circumstances which may make compliance unduly onerous, requires consideration of factors which are peculiarly within the knowledge of the defendant. For example, the volume of information to be provided and the personal circumstances of the person vis a vis the requirements of the order or notice would only be known by the person. Once they have done this, the prosecution would need to disprove the existence of the circumstances, permission or authorisation in order to prove the offence. Reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

The penalty for an offence under this section is relatively low, at a maximum of 20 penalty units, and reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

Section 31 – Refusing to be sworn or to make affirmation

This section makes it an offence for a person appearing as a witness at a hearing of a Commission to refuse to be sworn or to make an affirmation when they are called upon to do so by the President (subsection 31(1)).

This section also makes it an offence for a person attending before a COI assistant to give evidence to refuse to be sworn or to make an affirmation when they are called upon to do so by the COI assistant (subsection 31(2)).

The penalty for an offence under this section is a maximum of 20 penalty units.

Section 32 – Failing or refusing to answer question

This section makes it an offence for a person appearing as a witness at a hearing to fail or refuse to answer a question put to them by a COI member, a legal practitioner appointed under section 10 or a person permitted by the President under section 23 to examine the witness, where the question is relevant to the Commission's inquiry and the President requires the person to answer the question (subsection 32(1)). It also makes it an offence for a person attending before a COI assistant to fail or refuse to answer a question put to them by the COI assistant, where the question is relevant to the Commission's inquiry and the COI assistant requires the person to answer the question (subsection 32(2)).

The section provides a defence to both offences if the person appears as a witness at a hearing, fails or refuses to answer a question and they believe on reasonable grounds that the answer to the question is likely to cause damage to the defence, security or international relations of the Commonwealth (subsection 32(3)). Circumstances in which this might apply include where the person asking the question does not have a sufficiently high security clearance to access the requested information, it would disclose a secret process of manufacture, or answering the question would reveal confidential communications between Australia and its allies. This defence can equally apply in respect of public or private hearings.

A note states that the person bears the evidential burden in respect of the matters in subsection 2. This means that the person must adduce or point to evidence that they held the relevant belief. Once they have done this, the prosecution would need to disprove the existence of the belief or circumstances in order to prove the offence. This amounts to a reversal of the burden of proof.

The existence of the relevant belief could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of these matters beyond reasonable doubt as a matter of course. For example, a prosecution for refusal to answer would require a reasonable belief that compliance would not cause damage to security, which would be difficult for a prosecutor to establish. The belief of the person that compliance is likely to cause damage to defence requires consideration of factors which are peculiarly within the knowledge of the defendant, given that they are the person with the information. Reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

Complementing section 32, section 21 (discussed above) provides that a hearing of the Commission must be held in private unless the appointing authority directs otherwise. It also allows the President to make certain orders in relation to hearings where it is necessary to do so in the interests of the defence of the Commonwealth. This may also protect certain information, documents or things from public disclosure.

The penalty for an offence under this section is a maximum of 20 penalty units. This reflects those principles of public and legal policy which encourages the disclosure of information that will assist the collection of evidence during an inquiry.

Section 33 – Giving false evidence

This section makes it an offence for a person to give false evidence at a hearing of a Commission (subsection 33(1)) or to a COI assistant (subsection 33(2)).

The penalty for an offence under this section is a maximum of 20 penalty units.

Section 34 – Contempt etc

This section creates three offences which can be described as contempt. It is an offence for a person to insult a COI official in the course of an inquiry (subsection 34(1)). It is an offence to engage in conduct which disturbs or interrupts the proceedings of an inquiry (subsection 34(2)). It is an offence to engage in conduct that would, if a Commission were a court of record, constitute contempt of that court (subsection 34(3)). These offences apply to an act or omitting to act.

This section is complemented by section 22 (discussed above) which allows the President to order that a person be removed from a hearing if he or she considers that a person has engaged in conduct of the kind expressed above. However, removing the person under section 22 does not prevent the proceedings being instituted against that person for an offence against this section.

The reference to the law of contempt of court in subsection 34(3) applies in circumstances where a person's conduct has the tendency to interfere with or impair the operation of the Commission during the course of the Commission. A Commission of Inquiry does not 'administer justice' in the way that a court of record does, but the conduct of the inquiry may still be interfered with or impaired.

This section reflects previous regulation 57 of the old Regulations. However, section 34 simplifies regulation 57 by removing distinctions between similar kinds of conduct. For example, removing separate references to use of 'insulting language' towards the inquiry and the 'writing or speaking of words that are false or defamatory' of the inquiry.

The penalty for an offence under this section is a maximum of 20 penalty units.

Section 35 – Taking reprisals

This section creates an offence which intends to protect witnesses and those who give evidence in the course of a Commission. With no equivalent in the old Regulations, this is a new offence and is substantially similar to section 31 of the *Inspector-General of the Australian Defence Force Regulation 2016*.

An attempt by a person to dissuade, victimise, penalise or prejudice a person from giving information, producing a document or thing, or answering questions is liable to be prosecuted (subsection 35(1) and (2)). Examples of conduct which might constitute an offence under this section include threatening a person with an unfavourable performance report or posting decision in the event that they provide information to the Commission.

In a prosecution for an offence against this section, it is not necessary to prove that the other person gave any information, produced any document or thing, or answered any question (subsection 35(3)).

The penalty for an offence under this section is a maximum of 20 penalty units.

Section 36 – Disclosure of evidence

This section makes it an offence for a person to disclose information or all or a part of a document and the disclosure is prohibited by a direction issued by the President under subsection 25(1) (subsection 36(1)). This offence recognises that information or documents may have been obtained through powers of compulsion and could include information of a personal or sensitive nature which could result in significant harm if it were to be disclosed without authorisation. This offence is an additional safeguard against unauthorised disclosure.

There are two defences to an offence under this section – where the person is permitted to disclose the information or all or the part of the document under section 26 or 28 (subsection 36(2)), and where the person is authorised to disclose the information or all or the part of the document under section 27 (subsection 36(3)).

Notes state that the person bears the evidential burden in respect of the matters under subsections 2 and 3. This means that the person must adduce or point to evidence that the authorisation exists. Once they have done this, the prosecution would need to disprove the existence of the permission or authorisation in order to prove the offence. This amounts to a reversal of the burden of proof in relation to the authorisation.

The existence of a specific permission or authorisation could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of such a permission or authorisation beyond reasonable doubt as a matter of course. In the case of a prosecution for a contravention of an offence provision, this would require a reasonable belief that there was no permission or authorisation, which would be difficult to establish.

The penalty for an offence under this section is relatively low, at a maximum of 20 penalty units, and reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

Section 37 – Disclosure of COI records or COI reports of Commissions etc.

This section makes it an offence for an employee of the Commonwealth or a member of the Defence Force to disclose information contained in the COI records or COI report; disclose a document, a part of a document or a copy of all or a part of a document that forms part of the COI records or COI; or copy a document or a part of a document that forms part of the COI records or COI report; where that information, document or part of a document came to the knowledge or into the possession of the person in the course of the performance of the person's duties as an employee of the Commonwealth or member of the Defence Force and that information, document or part of a document does not relate to oral evidence given in public at a hearing of a Commission (subsection 37(1)).

This offence recognises that information or documents may have been obtained through powers of compulsion and could include information of a personal or sensitive nature which could result in significant harm if it were to be disclosed without authorisation. This offence is an additional safeguard against unauthorised disclosure.

There are two defences to an offence under this section – where the person is permitted to disclose the information, document or part of the document under section 26 (subsection 37(2)), or where the person is authorised to disclose the information, document or part of the document under section 27 (subsection 37(3)).

Notes state that the person bears the evidential burden in respect of the matters under subsections 2 and 3. This means that the person must adduce or point to evidence that the authorisation exists. Once they have done this, the prosecution would need to disprove the existence of the permission or authorisation in order to prove the offence. This amounts to a reversal of the burden of proof in relation to the authorisation.

The existence of a specific permission or authorisation could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of such a permission or authorisation beyond reasonable doubt as a matter of course. In the case of a prosecution for a contravention of an offence provision, this would require a reasonable belief that there was no permission or authorisation, which would be difficult to establish.

The penalty for an offence under this section is relatively low, at a maximum of 20 penalty units, and reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

Division 6 – Other matters

Section 38 – Self-incrimination

This section provides that an individual appearing at a hearing of a Commission or attending as a witness before a COI assistant is not excused from answering a question, when required to do so, on the ground that the answer to the question might tend to incriminate the individual (subsection 38(1)).

As indicated in a note, subsection 124(2C) of the Act provides that a statement or disclosure made by a witness in the course of giving evidence before an inquiry under these Regulations is not admissible in evidence against the witness other than in proceedings relating to the giving of false testimony.

The section also provides that a person is not required to answer a question if the answer to the question might tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of (subsection 38(2)).

Although this section has the effect of removing the common law privilege against self-incrimination in Commissions, the section generally reflects previous regulation 96 of the old Regulations. This section supports the Commission in the collection of any evidence relevant to an inquiry while balancing the ability of a witness to seek relief from potential criminal consequences.

Subsection 124(2A) of the Act provides that, subject to subsection 124(2B), the power to make regulations under paragraph 1(gc) (the empowering section) includes the power to make regulations requiring a person appearing as a witness before a Commission of Inquiry to answer a question notwithstanding that the answer to the question may tend to incriminate the person. Subsection 124(2B) states that subsection 124(2A) does not authorise the making of a regulation containing a requirement referred to in the subsection concerned where the answer to the question may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court of otherwise disposed of.

Due to the content of subsections 124(2A) and (2C) of the Act, section 38 only applies to oral testimony provided during a hearing of the Commission, and not to documents provided to a Commission. The privilege against self-incrimination would therefore apply to the provision of documents.

Additionally, subsection 124(2C) of the Act only contains the power to make regulations conferring a ‘use’ immunity and not a ‘derivative use’ immunity. This means that while self-incriminatory disclosures cannot be used against the individual in a later court proceedings, those disclosures could be used indirectly. For example, to gather other evidence against that individual. However, the requirement that hearings of Commissions of Inquiry be held in private, and the prohibitions against the use and disclosure of certain information and documents (including the application of the exemption under section 38 of the FOI Act), constitute additional levels of protection in respect of the abrogation of the privilege against self-incrimination. Thus if an individual gives oral testimony containing incriminating evidence, subsequent use or publication of that testimony can be prohibited.

Section 39 – Protection of COI officials from civil or criminal proceedings etc.

This section provides that a COI official is not liable to civil or criminal proceedings for or in relation to an act done, or omitted to be done, in good faith, in the performance or purported performance, or exercise or purported exercise, of the COI official's functions or powers under or in relation to these Regulations (subsection 39(1)).

An immunity is necessary to ensure that COI officials are able to undertake their duties free from intimidation or threats which are designed to delay or deter them from making frank and honest reports. The old Regulations contained a provision which provided that inquiry officers had the same immunities as a justice of the High Court of Australia. The immunity in previous regulation 61 had two components. First, immunity from civil suit or criminal proceedings for acts done in the exercise of their inquiry duties. This constituted an almost absolute immunity which applied even if an inquiry officer was not acting in good faith. Secondly, immunity from being compelled by any person to disclose any aspect of their decision−making processes in relation to an inquiry.

Unlike previous regulation 61, this section provides a qualified immunity which balances the need to protect COI officials with the need to ensure they remain appropriately accountable for their actions and conduct during Commissions. COI officials will only be immune for acts done, or omitted to be done, in good faith. The 'good faith' qualification recognises that COI officials exercise strong powers of compulsion and are capable of causing considerable harm to people, including civilians. For example, they could use their powers of compulsion against a witness in a bullying or abusive manner and should be capable of being held to account for such behaviour. It also recognises that, unlike members of the judiciary, COI officials are inquisitors operating as part of the Executive who are not constrained by the rules of evidence and may exercise their powers in private. They must therefore exercise those powers in good faith if they are to enjoy the immunity. Subsection 39(1) does not prevent an aggrieved person seeking judicial review if, for example, a COI official acts in excess of power or fails to comply with the rules of procedural fairness.

The 'good faith' qualification broadly mirrors the same requirement applicable to individuals who perform similar administrative inquiry functions in other agencies. For example, section 33 of the *Ombudsman Act 1976*, section 33 of the *Inspector-General Intelligence and Security 1986* and section 40 of the *Inspector-General of Taxation Act 2003*.

This section also provides that a COI official is not compellable in any court proceedings or proceedings before a service tribunal to provide information or produce a document that the COI official obtained or prepared in the performance or purported performance, or exercise or purported exercise, of the COI official's functions or powers under these Regulations (subsection 39(2)). This section gives effect to the restrictions contained in Division 4 regarding the use and disclosure of information.

However, the section contains an exception where a court or service tribunal requires the COI official to provide information or produce a document in the interests of

justice. In such circumstances, the information or document would be produced to the court or service tribunal who would then determine whether it is in the interests of justice for the information or document to be presented in proceedings and/or provided to another party to those proceedings.

Section 40 – Protection of witnesses etc. from civil proceedings

This section provides that civil proceedings do not lie against a person for loss, damage or injury of any kind suffered by another person as a result of the first person doing any of the listed things in good faith. This includes producing a document or thing at a hearing or to a COI assistant or COI member, disclosing information to a COI assistant or COI member, or giving evidence or making a submission at a hearing of a Commission or to a COI assistant. This protection applies to Commission witnesses, those appearing before Commission hearings (and their representatives), as well as those who make submissions to a Commission in relation to a process in which they are afforded procedural fairness.

Types of civil proceedings from which this section protects individuals include an action for defamation where a document or thing, information, or evidence they produce would otherwise contain defamatory material. It also protects against any assertion of breach of privacy where a document or thing, information, or evidence they produce contains personal information.

As discussed above, section 38 of these Regulations has the effect of abrogating the common law privilege against self-incrimination in Commissions of Inquiries. The immunity contained in this section is a necessary corollary to protect individuals where their privilege against self-incrimination has been abrogated. Similarly, Division 5 contains offences for failing to produce a document or thing (section 29) or failing to answer a question (section 32). Witness must be protected from civil proceedings for producing a document or thing or answering a question where they are compelled to do so.

Section 41 – Protection of certain publications

This section provides that no civil or criminal proceedings lie in respect of the publication of a fair and accurate account of all or part of a hearing of a Commission that is conducted in public (subsection 41(1)). This is subject to subsection 36(1) which sets out the offence of the disclosure of evidence.

The section also provides that no civil or criminal proceedings lie in respect of the publication of the COI report of a Commission if the COI report was disclosed in accordance with Division 4 of this Part (subsection 41(2)). For example, where the Minister authorised the disclosure under section 27.

Section 42 – COI records and COI reports etc. are exempt document

This section provides that section 38 of the FOI Act applies to the COI records and COI report and the information contained in those records and that report. A note provides that section 37 prohibits, among other things, the disclosure of the things mentioned in this section.

Section 38 of the FOI Act provides that a document is an exempt document if disclosure of the document or information contained in the document is prohibited under a provision of an enactment and this section is expressly applied to the document or information by that provision or by another provision of that or any other enactment. Section 42 expressly applies section 38 to COI records and COI reports and information contained within.

This section provides important reassurance to Commission witnesses that information they are required to provide under powers of compulsion can be withheld by Defence from unrestricted release under the FOI Act. This protection is particularly important for the interests and welfare of victims of abuse, veterans suffering from post traumatic stress disorder and other vulnerable witnesses. If section 38 did not apply, some witnesses might not be as forthcoming as they otherwise would be with important information relevant to a Commission of Inquiry.

Section 38 of the FOI Act applied to the reports and records of inquiries conducted under the old Regulations. This is because previous subregulation 63(2) was specified as a secrecy provision in Schedule 3 of the FOI Act and the exemption continued to apply when the relevant provision was amended to be subregulation 63(1).

Section 43 – Delegation

This section provides for the delegation of the powers of the CDF, the Secretary, and the Minister under Part 2. These powers include the power to appoint Commissions of Inquiry and COI officials and associated powers (Division 1), the power to specify how the Commission is to conduct its inquiry (subsection 16(1)), and the power to direct the Commission to hold one or more of its hearings in public or that a person(s) may be present during all or part of a private hearing (subsection 21(2)). In addition, the Minister can delegate his or her power to authorise the use, disclosure and copying of certain information and documents (section 27) and the power to use, disclose and copy certain information and documents (section 28).

The powers of the CDF, the Secretary or the Minister in Part 2 may be delegated in writing to: an officer in the Navy at or above the rank of Commodore; an officer in the Army at or above the rank of Brigadier; or an officer in the Air Force at or above the rank of Air Commodore (subsection 43(1)). Such ranks are comparable to a public service Senior Executive Service Band 1 position and are therefore an appropriately senior rank to exercise such powers. Delegations will be limited to individuals who are suitable to make such decisions taking into account their experience, position and personal attributes.

In exercising powers under a delegation issued under this section, the delegate must comply with any directions of the CDF, the Minister or the Secretary (subsection 43(3)). This requirement affords an additional safeguard regarding the proper exercise of these powers.

Part 3—Inquiry officers

Division 1 –Appointment of inquiry officers etc.

This Division provides for the appointment, resignation, termination, replacement, suspension and completion of inquiries of inquiry officers and IO assistants.

Section 44 – Appointment of inquiry officers etc.

This section provides that the CDF (or his or her delegate under section 72) may by written instrument appoint a person as an inquiry officer to inquire into such matters concerning the Defence Force as are specified in the instrument and prepare an IO report by a specified date (subsection 44(1)). The content of the instrument specifying the matters to be inquired into may be referred to as 'terms of reference' or by other task descriptors commonly used in a Defence Force context.

This is substantially similar to the circumstances in which an inquiry officer could be appointed under previous regulation 69 of the old Regulations. Compared to Commissions of Inquiry appointed under Part 2 of these Regulations, inquiry officer inquiries are suitable for more routine type matters but where powers of compulsion and protections are still required.

Restrictions imposed by previous regulation 70A of the old Regulations in relation to appointments have not been reproduced in these Regulations in order to give the CDF increased flexibility. Those appointing inquiry officer inquiries will remain accountable for the exercise of these more flexible provisions.

The CDF may by written instrument authorise an inquiry officer to make recommendations arising from the inquiry officer's findings in relation to one or more of the matters referred to in the instrument of appointment (subsection 44(2)). This represents a departure from the previous 70B of the old Regulations which granted an inquiry officer the power to make recommendations arising from his or her findings.

The CDF and other commanders are best placed to determine their information requirements when making the decisions for which they are responsible and accountable. In many cases, but not always, commanders will find recommendations by inquiry officers of assistance when making decisions following an inquiry. However, there can be situations in which the provision of evidence and facts alone will enable the CDF to make sound decisions. In such situations, the decision-making processes of a commander will not be assisted—and may even be hindered—by recommendations provided by an inquiry officer. For example, recommendations could be an unhelpful distraction, or an inquiry officer may have been selected and appointed on the basis they possess highly developed fact-finding skills but lack the necessary service experience to make contextually relevant recommendations.

Additionally, the preparation of recommendations can be a time consuming task for inquiry officers, particularly where procedural fairness must be provided to individuals in respect of proposed adverse recommendations. Where a decision needs to be made quickly, it may be more practical for an inquiry officer to be directed to simply gather evidence and submit it with a report of their findings of fact. The additional time required to create considered recommendations may not be worth the risk of delay to the subsequent decision-making process.

This approach is consistent with subsection 8(2) of the *Inspector-General of the Australian Defence Force Regulation 2016*.

The CDF may amend by written instrument the matters specified in the instrument of appointment or specify additional matters to be inquired into (paragraphs 44(2)(a) and (b)). An amendment to the terms of reference may be made at any time after the original instrument of appointment has been made. Allowing such amendments provides flexibility and confers on the CDF a control mechanism to ensure that the inquiry is focused and serves its purpose of facilitating informed decision-making. An amendment might be appropriate where relevant matters were not initially identified and therefore not included in the original instrument of appointment, or where a flaw in the original instrument of appointment is identified.

The CDF may also amend the specified date by which the report is to be prepared (paragraph 44(2)(c)). This may be appropriate where there has been an unforeseen delay in the inquiry or where the process has taken longer than anticipated. It may be used following a suspension of the inquiry under section 49 (see below).

The eligibility requirements provided for in previous regulation 70 of the old Regulations, such as that the inquiry officer must be an officer, a warrant officer or an ongoing Australian Public Service employee above the APS Level 4, have not been reproduced in this section. This allows the CDF to appoint individuals according to whom he or she considers has the most appropriate skills and experience to conduct the inquiry, and not impose restrictions according to what rank, positions or status they have held and currently hold.

Instruments of appointment made under this section are not legislative instruments under the *Legislation Act 2003*. The appointment aspect of the instrument is exempt from legislative instrument status in accordance with item 8 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*. Similarly, the setting out of the terms of reference aspect of the instrument is not of legislative character because, for the purposes of subsection 8(4) of the *Legislation Act 2003,* it applies the law in a particular case rather than determining or altering the content of the law.

Section 45 – Appointment of IO assistants

This section provides that the CDF may appoint one or more persons as assistants of the inquiry officer. The appointment must be by a written instrument, but it is not necessary for it to be the same instrument as the appointment of the inquiry officer under section 44.

Instruments of appointment made under this section are not legislative instruments under the *Legislation Act 2003*. The appointment aspect of the instrument is exempt from legislative instrument status in accordance with item 8 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Section 46 – Resignation of inquiry officials

This section provides that an inquiry official may resign his or her appointment by giving a written resignation to the CDF (subsection 46(1)). The resignation takes effect the day it is received by the CDF or at a later date as specified in the resignation (subsection 46(2)).

The section specifically excludes members of the Defence Force from being able to resign. This is because members of the Defence Force are under an obligation of service and are directed to perform duties. It is inconsistent with the nature of their service to be able to step down from certain duties at their discretion.

The inclusion of express authority for an inquiry official to resign addresses a gap in the old Regulations which did not include an equivalent provision. It is appropriate to confer the ability for individuals to resign as it allows them to exercise their discretion to resign in circumstances where such might be appropriate. For example, where it becomes apparent that they have a conflict of interest, or where they are no longer able to commit to the inquiry for health or family reasons. It is also not considered appropriate for the instrument to purport to compel a civilian to continue to perform their duties as an inquiry official where they do not wish to do so.

Section 47 – Termination of appointment of inquiry officials

This section allows the CDF to terminate the appointment of an inquiry official at any time by giving written notice. The termination takes effect on the day specified in the written notice (subsection 47(1)).

This represents a departure from regulation 77 of the old Regulations which did not expressly provide for the termination of an inquiry officer inquiry as such. It is appropriate for the CDF as the appointing officer to have the power to terminate the appointment of an inquiry official that they have appointed.

The CDF may determine that it is necessary or appropriate to terminate an appointment of an inquiry official for a range of appropriate reasons. For example, where they the are reasonably satisfied that an inquiry official has engaged in misconduct, is acting or has acted in bad faith, is physically or mentally unwell or otherwise unable to perform their role, or where it is necessary to ensure that the inquiry can be completed expeditiously. It might also be appropriate to terminate a the appointment of an inquiry official where, for example, litigation concerning the subject matter of the inquiry has been commenced in a court and the inquiry will likely be prevented from completing its task for many months or even years.

Any decision to terminate the appointment of an inquiry official can be reported by any person to the IGADF or the Defence Force Ombudsman for review if it is reasonably suspected that the appointing authority acted improperly in issuing the termination notice.

While these Regulations do not contain a power to terminate an *inquiry* as such, the termination of the *inquiry officer* effectively results in the termination of the inquiry unless a replacement inquiry officer is appointed under section 45. Without an

inquiry officer, an inquiry cannot proceed, even if an IO assistant had been appointed. This is because an IO assistant cannot continue to perform functions or exercise powers under these Regulations unless they are performing those functions or exercising those powers in assistance to an inquiry officer.

If an inquiry officer's appointment is terminated under this section, the CDF may later appoint another inquiry officer under section 44 (and the same or a different IO assistant under section 45) to inquire into the same or similar matters. If a second inquiry officer is later appointed to inquire into the same or similar matters, the second inquiry officer may have regard to any IO records of the first inquiry officer (subsection 47(2)). This authorisation facilitates the expeditious and efficient conduct of the new inquiry.

Section 48 – Replacement of inquiry officials

This section allows the CDF to replace an inquiry official by written instrument if an inquiry official resigns under section 46, has their appointment terminated under section 47 or dies (subsections 48(1)). The appointment of the replacement inquiry official takes effect on the date specified in the written instrument (subsection 48(2)).

For the purposes of exercising his or her powers or performing his or her functions as an inquiry official, upon their appointment the replacement inquiry official may have regard to any IO records (subsection 48(3)). This authorisation facilitates the expeditious and efficient conduct of the new inquiry.

Section 49 – Suspension of appointment of inquiry officials

If at any time he or she considers it appropriate in all the circumstances, the CDF may by written notice given to an inquiry official suspend the appointment of the inquiry official for a specified period. The suspension notice may state that the specified period of suspension is until a named date, until another event has occurred or until the CDF gives further notice.

Circumstances in which it might be appropriate for an inquiry official to be suspended include where another internal or external process is being conducted (for example, a criminal investigation by civilian police) and it is appropriate for the inquiry official to suspend their inquiry until the outcome of the other process is known. This constitutes a departure from the old Regulations which did not contain an express power to suspend an inquiry official.

While these Regulations do not contain a specific power to suspend an *inquiry* as such, the suspension of an *inquiry officer* effectively results in the suspension of the inquiry. Without an inquiry officer, an inquiry cannot proceed, even if an IO assistant had been appointed. This is because an IO assistant cannot continue to perform functions or exercise powers under these Regulations unless they are performing those functions or exercising those powers in assistance to an inquiry officer.

If the CDF wishes the inquiry to recommence at an earlier date than the period specified in the suspension notice, or the period of suspension was until the CDF gave

further notice, the CDF may provide written notice to the inquiry official that their appointment is no longer suspended.

Section 50 – Completion of inquiry

This section provides that the CDF may, after receiving the IO report, determine in writing that the inquiry officer's inquiry has been completed. This provides the CDF with the discretion to keep the inquiry afoot until he or she is satisfied that all necessary tasks have been completed.

This differs from the previous regulation 75A of the old Regulations which provided that an inquiry officer's inquiry is completed upon delivery of the report to the CDF. Since it is the CDF who appoints the inquiry to facilitate internal decision-making concerning the Defence Force, it is appropriate for the CDF to also determine when it is complete.

Division 2—Conduct of inquiries

This Division provides for the conduct of inquiry officer inquiries, including provisions relating to the procedures, notices and hearings of inquiry officer inquiries.

Section 51 – Procedure generally

This section provides that subject to Division 2, the CDF may specify in writing how the inquiry officer is to conduct his or her inquiry (subsection 51(1)). This gives the CDF the flexibility to ensure that the inquiry is conducted in a way which will enable information to be collected in order to facilitate command decision-making.

A similar provision was included in previous regulation 71 of the old Regulations which allowed the CDF to direct the procedure to be followed by the inquiry officer, although section 51 does require the CDF to specify these directions in writing. This ensures that there will be adequate records kept in relation to inquiries.

This section sets out a number of principles and rules by which inquiry officers must conduct his or her inquiries. An inquiry officer must conduct his or her inquiry fairly, economically, quickly and informally (paragraph 51(2)(a)). The purpose of this is to ensure that the focus of the inquiry is on gathering the best available information with the least possible delay in order to inform command decision-making, while ensuring that fairness to individuals is maintained.

A inquiry officer must comply with the rules of procedural fairness (paragraph 51(2)(b)). This includes the rule against bias, which requires that inquiry officers bring open minds to the questions in issue, and the hearing rule, which requires that individuals be given an opportunity to have their say before an adverse finding is made against them. In this context, procedural fairness is concerned with the conduct of the inquiry rather than the actual outcome reached or decisions ultimately made by the relevant decision-maker.

An inquiry officer is not bound by the rules of evidence, legal forms or technicalities (paragraph 51(2)(c)). This provides the inquiry officer with the flexibility to collect

and consider all relevant information. Similarly, an inquiry officer may inform himself or herself on any matter relevant to his or her inquiry in such manner as he or she thinks fit (paragraph 51(2)(d)).

Section 52 – Times and places for conduct of inquiries

This section provides that, unless the CDF specifies otherwise under subsection 51(1), an inquiry officer must conduct his or her inquiry at such times and at such places as the inquiry officer determines (paragraph 52(a)). The section also provides that, again unless the CDF specifies otherwise under subsection 51(1), an inquiry officer may conduct his or her inquiry and exercise his or her powers in or outside Australia (paragraph 52(b)). An inquiry officer may therefore be appointed to inquire into matters occurring, for example, in an overseas operational environment.

Section 53 – Ordering members of the Defence Force to give evidence or produce documents or things

This section provides that an inquiry officer may, for the purposes of the inquiry officer's inquiry, order a member of the Defence Force to attend as a witness before the inquiry officer or an IO assistant at a specified time and place to give evidence (paragraph 53(a)); and/or to produce a document or thing to the inquiry officer or an IO assistant at a specified place within a specified period (paragraph 53(b)). A note provides that failure to comply with an order is an offence (see section 61).

The power of an inquiry officer to order a person to attend proceedings or produce a document or thing is limited to members of the Defence Force. Civilians cannot be so ordered, which is consistent with previous regulation 74 of the old Regulations. Inquiries under Part 3 will be appointed for military purposes and are undertaken at a lower level than the more formal Commission of Inquiry. In these circumstances, it is not appropriate for civilians to be compellable. Although, civilians may still be asked to attend or produce a document or thing and, in exceptional circumstances, may be directed to cooperate as an incident of their employment or engagement by the Commonwealth.

Where section 53 does differ from the old Regulations is that all members of the Defence Force can now be ordered to attend as a witness before an inquiry officer or an IO assistant. Under previous regulation 53 of the old Regulations (as applied to inquiry officer inquiries through previous regulation 78) a member of the Reserves could not be ordered to give evidence to an Inquiry Officer or Inquiry Assistant when they are not on duty. Members of the Reserve provide important service in the Defence Force and can possess vital information that can assist an inquiry officer inquiry to perform its function. Without this change, the capacity of many inquiry officers to undertake his or her fact-finding function in a timely manner will be unduly impaired.

Section 54 – Manner of taking evidence

This section provides that an inquiry official must not take evidence on oath or affirmation. This is consistent with previous regulation 73 of the old Regulations.

Section 55 – Inquiries must not be conducted in public

This section provides that an inquiry officer must not conduct his or her inquiry in public. This is consistent with previous regulation 72 of the old Regulations.

It is not appropriate for inquiries undertaken by inquiry officers under this Part to be conducted in public. Inquiries under this Part are lower level and maintaining confidentiality promotes flexibility and agility in the conduct of inquiries and findings that are ultimately made. It also protects the rights of individuals involved given that inquiry officials hold significant powers of compulsion, there is no provision for legal representation and that there may be significant damage to reputation if such inquiries were held publicly.

Section 56 – Removal of certain persons from proceedings

The section provides that an inquiry officer may order that a person be removed from the place where the proceedings of the inquiry officer's inquiry are being held if the inquiry officer considers that the person has insulted the inquiry officer or an IO assistant during the proceedings, disturbed or interrupted the proceedings, or engaged in conduct during the proceedings that would constitute a contempt of court if an inquiry official were a court of record (subsection 56(1)). Removing the person does not prejudice any proceedings being instituted against that person under section 64 (discussed below).

The section also provides that if the inquiry officer makes such an order, he or she may authorise a person to take such reasonable action as is required to give effect to the order (subsection 56(2)). For example, order that they be reported to the civilian police for the purposes of having them treated as a trespasser.

Division 3—Report of inquiry officers

Section 57 – Report of inquiry officer

This section provides that, subject to any direction of the CDF, if the inquiry officer is satisfied that all information relevant to his or her inquiry that is practicable to obtain has been obtained, the inquiry officer must prepare a report setting out his or her findings (paragraph 57(1)(a)).

If the inquiry officer is authorised under subsection 44(2) to make recommendations arising from any or all of those findings, he or she must set out his or her recommendations in the report (paragraph 57(1)(b)).

The inquiry officer must give a copy of the report to the CDF (subsection 57(2)) and the report must be accompanied by a copy of the IO records (subsection 57(3)). This includes information obtained or prepared during the course of the inquiry, the transcript of any interviews conducted, and any other documents prepared by the inquiry officer. This substantially reflects regulation 75 of the old Regulations.

There is no requirement for the inquiry officer to sign the report. This ensures that reports can be provided electronically for maximum flexibility and to avoid delay. This is consistent with previous regulation 75A of the old Regulations.

Division 4 – Use, disclosure and copying of information and documents

Section 58 – Use, disclosure and copying of certain information and documents as an employee of the Commonwealth or member of the Defence Force

This section provides that a person who is an employee of the Commonwealth or a member of the Defence Force may do certain things in the performance of the person's duties as an employee of the Commonwealth or member of the Defence Force. This includes using information contained in the IO records or IO report; disclosing information contained in the IO records or IO report or a document, part of a document or copy of all or part of a document that forms part of the IO records or IO report; or copying a document or part of a document that forms part of the IO records or IO report.

The ability for IO records and IO reports to be used and disclosed in such circumstances is necessary to promote transparency and enable swift implementation of the findings and recommendations of inquiries. Transmitting information quickly across the Defence Force, the Department and sometimes to other Government departments and agencies enables necessary steps to be taken, such as to mitigate risks to individuals where an IO record or an IO report contains safety critical information which needs to be actioned quickly to prevent further safety incidents from occurring. For example, previous subregulation 63(4) of the old Regulations enabled important information about the welfare and safety of current and former Defence Force personnel to be swiftly provided to relevant staff in the Department of Veterans' Affairs so they could in turn provide prompt assistance to veterans. It is important for Defence to retain the ability to disclose such information from IO reports and IO records with a minimum of bureaucratic complexity and associated delay.

The requirement in subsection 58(1) that use, disclosure and copying can only occur if it is '*in the performance of the person's duties'* provides an significant safeguard against improper use, disclosure and copying of information contained in IO records and IO reports. If a person were to use, disclose or copy an IO record or IO report and such was not in the performance of the person's duties, they would not be considered to have permission under this section.

Whether disclosure publicly is within the scope of a person's duties will depend on the nature of the person's position and what they are expected to do to undertake their job. For the vast majority of individuals who have access to an IO record or IO report (which will, for the most part, be ADF members and Commonwealth employees working at the Department of Defence), disclosure to the public would not be within the course of their duties. If they were to disclose an IO record or IO report in such instances, it may constitute an offence under section 66, as well as an unauthorised disclosure for the purposes of the *Privacy Act 1988* and section 70 of the *Crimes Act 1914*. In addition, unauthorised public disclosure of an IO record or IO report may result in internal administrative or disciplinary action. In the event that

Commonwealth employees outside the Department are provided with access to an IO record or IO report, they will similarly be bound by the law in relation to their use and disclosure of those records. Again, disclosure of records publicly by a non-Defence Commonwealth employee is unlikely to be within the scope of their duties.

Chief of the Defence Force Directive 08/2014 enhances this safeguard. This Directive restricts the types of disclosures that validly fall within the scope of a person's official duties. This Directive also requires employees or members to identify whether the IO records or IO report contain personal information. If so, then the employee or member needs to consider whether it is appropriate to redact such information applying a similar approach to that used under the FOI Act. Similarly, if an employee or member identifies that an IO report or IO records contain information concerning the defence, security or international relations of the Commonwealth, they will also need to consider whether such information should be redacted prior to its use or disclosure.

The Directive constitutes a general order to ADF members for the purposes of the *Defence Force Discipline Act 1982* and unauthorised public disclosure may result in internal administrative or disciplinary action. Consideration is being given to a new joint Secretary and CDF directive being issued which would be enforceable as a general order for ADF members, and would also constitute a direction to APS employees for the purposes of subsection 15(5) of the *Public Service Act 1999*.

Section 59 – Minister may authorise use, disclosure and copying of certain information and documents

This section provides that the Minister may, in writing, authorise an employee of the Commonwealth or a member of the Defence Force to use information contained in the IO records or IO report for a specified purpose; disclose information contained in the IO records or IO report; disclose a document, a part of a document or a copy of all or a part of a document that forms part of the IO records or IO report; or copy a document or a part of a document that forms part of the IO records or IO report (subsection 59(1)). A note clarifies that the Minister may give a direction to a person or a class of persons (see subsection 33(3A) of the *Acts Interpretation Act 1901*).

The Minister's authorisation may be expressed to be subject to conditions specified in the authorisation (subsection 59(2)). For example, that a document may be released but in a redacted format, or that documents be provided electronically.

Authorisations made under this section are not legislative instruments under the *Legislation Act 2003*. This is because such an authorisation is exempt from legislative instrument status in accordance with item 4 of the table in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015* as it has the effect of authorising or approving a particular person to take a particular action.

Section 60 – Minister may use, disclose and copy certain information and documents

This section provides that the Minister himself or herself may use information contained in the IO records or IO report for purposes relating to the Defence Force,

disclose information contained in the IO records or IO report, disclose a document, a part of a document or a copy of all or a part of a document that forms part of the IO records or IO report, and copy a document or a part of a document that forms part of the IO records or IO report.

Division 5—Offences

This division sets out offences in relation to an inquiry by an inquiry officer.

Other than section 64 (taking reprisals), all of the offences in Division 5 are similar to the offences contained in the old Regulations. However, defences and penalties are dealt with differently.

In the old Regulations, most of the offences were strict liability offences but this has not been replicated in these Regulations. Paragraph 2.2.6 of the Commonwealth Offence Guide provides that strict liability is generally only appropriate in limited circumstances. Imposing strict liability for the offences contained in these Regulations is not justified given that the conduct leading to the offence (such as the failure to comply with a notice) may be for a reason outside the person's control and it is appropriate for the fault elements and defences in the *Criminal Code* to apply.

Many of the offences in the old Regulations contained the additional defence of 'reasonable excuse'. Paragraph 4.3.3 of the Commonwealth Offence Guide provides that the defence of 'reasonable excuse' should generally be avoided. It may only be applied to an offence if it is not possible to rely on the general defences in the *Criminal Code* or to design more specific defences. In these Regulations, it is possible and appropriate to rely on the general defences and specific defences have also been included.

In relation to penalties, the penalty of imprisonment for some offences has not been retained from the old Regulations. This is because the Commonwealth Offence Guide provides that generally Regulations should not impose a penalty of imprisonment. Penalties for each offence is set at 20 penalty units (which is a considerable increase on the quantum of fines that could be imposed under the old Regulations) and is likely to be adequate to provide an effective deterrent to the commission of the offences.

Section 61 – Failing or refusing to comply with an order to attend as a witness before an inquiry officer etc.

This section makes it an offence for a person to fail to comply with an order that they are given under paragraph 53(a) to attend as a witness to give evidence (subsection 61(1)). A precondition for the operation of this offence is that a person be issued a valid notice to attend under paragraph 53(a). Because such a notice can only be issued to members of the Defence Force, this offence is not capable of applying to a person who is not a member of the Defence Force.

The section provides an excuse where it would be unduly onerous for the person to comply with the order (subsection 61(2)). Circumstances in which this might apply include where the person is overseas or has demanding responsibilities as a carer.

This section also makes it an offence for a person to fail to comply with an order under paragraph 53(b) to produce a document or thing to an inquiry officer, or an IO assistant for an inquiry officer, at a specified place within a specified period (subsection 61(3)).

The section provides two excuses. The first excuse states that where the person believes on reasonable grounds that compliance with the order is likely to cause damage to the defence, security or international relations of the Commonwealth (paragraph 61(4)(a)). Circumstances in which this might apply include where the person who issued the notice does not, to the knowledge of the person receiving the notice, have a sufficiently high security clearance to have access to the requested information or complying with the notice would result in sensitive communications between Australia and an ally being disclosed to the public.

The second excuse for failing or refusing to complying with the order is stated to be where it would be unduly onerous for the person to comply with the order (paragraph 61(4)(b)). Circumstances in which this might apply include where the number of documents is unreasonably voluminous given the notice period.

Notes state that the person bears the evidential burden in respect of these matters. This means that the person must adduce or point to evidence that they held the relevant believe or that the circumstances made compliance unduly onerous for them. Once they have done this, the prosecution would need to disprove the existence of the belief or circumstances in order to prove the offence. This amounts to a reversal of the burden of proof.

The existence of the relevant belief or circumstances could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of these matters beyond reasonable doubt as a matter of course. For example, a prosecution for failure to comply would require a reasonable belief that compliance would not cause damage to security, which would be difficult for a prosecutor to establish. The belief of the person that compliance is likely to cause damage to defence, or that the circumstances made compliance unduly onerous, require consideration of factors which are peculiarly within the knowledge of the defendant. Reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

The penalty for an offence under this section is a maximum of 20 penalty units. This reflects those principles of public and legal policy which encourages the disclosure of information that will assist the collection of information during an inquiry.

If an inquiry officer is a member of the Defence Force superior in rank to a member of the Defence Force who is given an order to attend as a witness, the latter may also commit an offence under the *Defence Force Discipline Act 1982* and be liable to be prosecuted before a service tribunal.

Section 62 – Failing or refusing to answer question

This section makes it an offence for a member of the Defence Force appearing as a witness before an inquiry officer or IO assistant to fail or refuse to answer a question

put to them, where the question is relevant to the inquiry and the inquiry officer or IO assistant requires the person to answer the question (subsection 62(1)).

The section provides a defence if the person believes on reasonable grounds that the answer to the question is likely to cause damage to the defence, security or international relations of the Commonwealth (subsection 62(2)). Circumstances in which this might apply include where the inquiry officer or IO assistant does not have a sufficiently high security clearance to access the requested information, it would disclose a secret process of manufacture, or answering the question would reveal confidential communications between Australia and its allies.

A note states that the person bears the evidential burden in respect of these matters. This means that the person must adduce or point to evidence that they held the relevant belief. Once they have done this, the prosecution would need to disprove the existence of the belief or circumstances in order to prove the offence. This amounts to a reversal of the burden of proof.

The existence of the relevant belief could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of these matters beyond reasonable doubt as a matter of course. For example, a prosecution for refusal to answer would require a reasonable belief that compliance would not cause damage to security, which would be difficult for a prosecutor to establish. The belief of the person that compliance is likely to cause damage to defence requires consideration of factors which are peculiarly within the knowledge of the defendant, given that they are the person with the information. Reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

The penalty for an offence under this section is a maximum of 20 penalty units. This reflects those principles of public and legal policy which encourages the disclosure of information that will assist the collection of information during an inquiry.

If an inquiry officer is a member of the Defence Force superior in rank to a member of the Defence Force who they order to answer a question, the latter may also commit an offence under the *Defence Force Discipline Act 1982* and be liable to be prosecuted before a service tribunal.

Section 63 – Giving false evidence

This section provides that a person commits an offence if the person gives false evidence to an inquiry official.

The penalty for an offence under this section is a maximum of 20 penalty units.

A member of the Defence Force who gives false evidence to an inquiry official may also be liable to prosecution under the *Defence Force Discipline Act 1982.*

Section 64 – Contempt etc.

This section creates three offences which can be described as contempt. It is an offence for a person to insult an inquiry officer or IO assistant in the course of an inquiry (subsection 64(1)). It is an offence to engage in conduct which disturbs or interrupts the proceedings of an inquiry (subsection 64(2)). It is an offence to engage in conduct that would, if an inquiry official were a court of record, constitute contempt of that court (subsection 64(3)). These offences apply to an act or omitting to act.

This section is complemented by section 56 (discussed above) which allows the inquiry officer to order that a person be removed from proceedings if he or she considers that a person has engaged in conduct of the kind expressed above. However, removing the person does not prevent the proceedings being instituted against that person for an offence against this section.

The reference to the law of contempt of court in subsection 64(3) applies in circumstances where a person's conduct has the tendency to interfere with or impair the inquiry official. An inquiry official does not 'administer justice' in the way that a court of record does, but the conduct of the inquiry may still be interfered with or impaired.

This section reflects previous regulation 57 of the old Regulations, which applied to inquiries by inquiry officers by virtue of regulation 78. However, section 64 simplifies regulation 57 by removing distinctions between similar kinds of conduct. For example, removing separate references to use of 'insulting language' towards the inquiry and the 'writing or speaking of words that are false or defamatory' of the inquiry.

The penalty for an offence under this section is a maximum of 20 penalty units.

A member of the Defence Force who engages in insubordinate conduct in relation to an inquiry officer who holds a superior rank in the Defence Force may be liable to prosecution under the *Defence Force Discipline Act 1982.*

Section 65 – Taking reprisals

This section creates an offence which intends to protect witnesses and those who give evidence in the course of an inquiry. With no equivalent in the old Regulations, this is a new offence under these Regulations and is substantially similar to section 31 of the *Inspector-General of the Australian Defence Force Regulation 2016*.

An attempt by a person to dissuade, victimise, penalise or prejudice a witness from giving information, producing a document or thing, or answering questions is liable to be prosecuted (subsection 65(1) and (2)). Examples of conduct which might constitute an offence under this section include threatening an individual with an unfavourable performance report or posting decision in the event that they provide information to an inquiry official.

In a prosecution for an offence against this section, it is not necessary to prove that the other person gave any information, produced any document or thing, or answered any question (subsection 65(3)).

The penalty for an offence under this section is a maximum of 20 penalty units.

Section 66 – Disclosure of IO records or IO reports of inquiry officers etc.

This section makes it an offence for an employee of the Commonwealth or a member of the Defence Force to disclose information contained in the IO records or IO report, or all or a part of a document or a copy of all or part of a document that forms part of the IO records or IO report, or copy a document or part of a document that forms part of the IO records or IO report, and that information or all or the part of the document came to the knowledge or into the possession of the person in the course of the performance of the person's duties as an employee of the Commonwealth or member of the Defence Force (subsection 66(1)).

This offence recognises that information or documents may have been obtained through powers of compulsion and could include information of a personal or sensitive nature which could result in significant harm if it were to be disclosed without authorisation. Making unauthorised disclosure an offence is an additional safeguard against unauthorised disclosure.

The section provides a number of situations where the offence does not apply. The offence does not apply if the person is permitted to disclose the information or all or the part of the document under sections 58 or 59 (subsection 66(2) and (3)). For this defence to be available, the employee or member would need to establish that use or disclosure of the IO report (in part or its entirety) was in the performance of the person's duties (section 58) or that the Minister had authorised the disclosure (section 59).

Notes state that the person bears the evidential burden in respect of these matters. This means that the person must adduce or point to evidence that the permission or authorisation exists. Once they have done this, the prosecution would need to disprove the existence of the permission or authorisation in order to prove the offence. This amounts to a reversal of the burden of proof in relation to the permission or authorisation.

The existence of a specific permission or authorisation could be readily and cheaply established by the defendant, while it would be significantly more difficult and costly for the prosecution to positively disprove the existence of such a permission or authorisation beyond reasonable doubt as a matter of course. In the case of a prosecution for a contravention of an offence provision, this would require a reasonable belief that there was no permission or authorisation, which would be difficult to establish.

The penalty for an offence under this section is relatively low, at a maximum of 20 penalty units, and reversal of the burden of proof is reasonable in order to ensure the effectiveness of this provision.

Division 6—Other matters

Section 67 – Self-incrimination

This section provides that an individual attending as a witness before an inquiry official is not excused from answering a question, when required to do so, on the ground that the answer to the question might tend to incriminate the individual.

As indicated in a note, subsection 124(2C) of the Act provides that a statement or disclosure made by a witness in the course of giving evidence before an inquiry under these Regulations is not admissible in evidence against the witness other than in proceedings relating to the giving of false testimony.

The section also provides that a person is not required to answer a question if the answer to the question might tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of (subsection 67(2)).

Although this section has the effect of removing the common law privilege against self-incrimination in inquiries, it generally reflects previous subregulation 74(3A) of the old Regulations. This section supports the inquiry official in the collection of any evidence relevant to an inquiry while balancing the ability of a witness to seek relief from potential criminal consequences.

Subsection 124(2A) of the Act provides that, subject to subsection 124(2B), the power to make regulations under paragraph 1(gc) (the empowering section) includes the power to make regulations requiring a person appearing as a witness before an inquiry officer answer a question notwithstanding that the answer to the question may tend to incriminate the person. Subsection 124(2B) states that subsection 124(2A) does not authorise the making of a regulation containing a requirement referred to in the subsection concerned where the answer to the question may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court of otherwise disposed of.

Due to the content of subsections 124(2A) and (2C) of the Act, section 67 only applies to oral testimony given by an individual attending as a witness before an inquiry official, and not to documents provided to an inquiry official. The privilege against self-incrimination would therefore apply to the provision of documents.

Additionally, subsection 124(2C) of the Act only contains the power to make regulations conferring a ‘use’ immunity and not a ‘derivative use’ immunity. This means that while self-incriminatory disclosures cannot be used against the individual in a later court proceedings, those disclosures could be used indirectly. For example, to gather other evidence against that individual. However, requirement that inquiries be held in private, and the prohibitions against the use and disclosure of certain information and documents (including the application of the exemption under section 38 of the FOI Act), constitute additional levels of protection in respect of the abrogation of the privilege against self-incrimination. Thus if an individual gives oral

testimony which contains incriminating evidence, subsequent use or publication of that testimony can be prohibited.

Section 68 – Protection of inquiry officials from civil or criminal proceedings etc.

This section provides that an inquiry official is not liable to civil or criminal proceedings for or in relation to an act done, or omitted to be done, in good faith, in the performance or purported performance, or exercise or purported exercise, of the inquiry official's functions or powers under or in relation to these Regulations (subsection 68(1)).

An immunity is necessary to ensure that IO officials are able to undertake their duties free from intimidation or threats or which are designed to delay or deter them from undertaking comprehensive inquiries and making frank and honest reports. The old Regulations contained a provision which provided that inquiry officers had the same immunities as a justice of the High Court of Australia. The immunity in previous regulation 61 had two components. First, immunity from civil suit or criminal proceedings for acts done in the exercise of their inquiry duties. This constituted an almost absolute immunity which applied even if an inquiry officer was not acting in good faith. Secondly, immunity from being compelled by any person to disclose any aspect of their decision−making processes in relation to an inquiry.

Unlike previous regulation 61, this section provides a qualified immunity which balances the need to protect inquiry officials with the need to ensure they remain appropriately accountable for their actions and conduct during inquiries. Inquiry officials will only be immune for acts done, or omitted to be done, in good faith. The 'good faith' qualification recognises that inquiry officials exercise strong powers of compulsion and are capable of causing considerable harm to people. For example, they could use their powers of compulsion against a witness in a bullying or abusive manner and should be capable of being held to account for such behaviour. It also recognises that, unlike members of the judiciary, inquiry officials are inquisitors operating as part of the Executive who are not constrained by the rules of evidence and exercise their powers in private. They must therefore exercise those powers in good faith if they are to enjoy the immunity. Section 68(1) does not prevent an aggrieved person seeking judicial review if, for example, an inquiry official acts in excess of power or fails to comply with the rules of procedural fairness.

The 'good faith' qualification broadly mirrors the same requirement applicable to individuals who perform similar administrative inquiry functions in other Commonwealth agencies. For example, section 33 of the *Ombudsman Act 1976*, section 33 of the *Inspector-General Intelligence and Security 1986* and section 40 of the *Inspector-General of Taxation Act 2003*.

This section also provides that an inquiry official is not compellable in any court proceedings or proceedings before a service tribunal to provide information or produce a document that the inquiry official obtained or prepared in the performance or purported performance, or exercise or purported exercise, of the inquiry official's functions or powers under or in relation to these Regulations (subsection 68(2)). This section gives effect to the restrictions contained in Division 4 regarding the use and disclosure of information.

However, the section contains an exception where a court or service tribunal requires the inquiry official to provide information or produce a document in the interests of justice. In such circumstances, the information or document would be produced to the court or service tribunal who would then determine whether it is in the interests of justice for the information or document to be presented in proceedings and/or provided to the another party to those proceedings.

Section 69 – Protection of witnesses etc. from civil proceedings

This section provides that civil proceedings do not lie against a person (the first person) for loss, damage or injury of any kind suffered by another person as a result of the first person doing any of the listed things in good faith. This includes producing a document or thing to an inquiry official, disclosing information to an inquiry official, or giving evidence or making a submission to an inquiry official. This protection applies to witnesses as well as those who provide documents and things to an IO official.

Types of civil proceedings from which this section protects individuals include an action for defamation where a document or thing, information, or evidence that they produced would otherwise contain defamatory material. It also protects against any assertion of breach of privacy where a document or thing, information, or evidence that they produced contains personal information.

As discussed above, section 67 of these Regulations has the effect of abrogating the common law privilege against self-incrimination in inquiries. The immunity contained in this section is a necessary corollary to protect individuals where their privilege against self-incrimination has been abrogated. Similarly, Division 5 also contains offences for failing to comply with an order to produce a document or thing (section 61) or failing to answer a question (section 62). Witnesses must be protected from civil proceedings for producing a document or thing or answering a question where they are compelled to do so.

Section 70 – Protection of publication of IO report

This section provides that no civil or criminal proceedings lie in respect of the publication of the IO report of an inquiry officer if the IO report was disclosed in accordance with Division 4 of this Part.

Section 71 – IO records and IO reports etc. are exempt documents

This section provides that section 38 of the FOI Act applies to the IO records or an IO report and the information contained in those records and that report. A note provides that section 66 prohibits, among other things, the disclosure of the things mentioned in this section.

Section 38 of the FOI Act provides that a document is an exempt document if disclosure of the document or information contained in the document is prohibited under a provision of an enactment and this section is expressly applied to the document or information by that provision or by another provision of that or any other

enactment. Section 42 expressly applies section 38 to IO records and IO reports and information contained within.

This section provides important reassurance to inquiry witnesses that information they are required to provide under powers of compulsion can be withheld by Defence from unrestricted release under the FOI Act. This protection is particularly important for the interests and welfare of victims of abuse, veterans suffering from post traumatic stress disorder and other vulnerable witnesses. If section 38 did not apply, some witnesses might not be as forthcoming as they otherwise would be with important information relevant to an inquiry.

Section 38 of the FOI Act applied to the reports and records of inquiries conducted under the old Regulations. This is because previous subregulation 63(2) was specified as a secrecy provision in Schedule 3 of the FOI Act and the exemption continued to apply when the relevant provision was amended to be subregulation 63(1).

Section 72 – Delegation

This section provides for the delegation of the powers of the CDF under Part 3. These powers include the power to appoint inquiry officials and associated powers (Division 1) and the power to specify how the inquiry officer is to conduct his or her inquiry (subsection 51(1)).

The CDF may, in writing, delegate any or all of his or her powers under this Part to: an officer in the Navy at or above the rank of Lieutenant; an officer in the Army at or above the rank of Captain; or an officer in the Air Force at or above the rank of Air Flight Lieutenant (subsection 72(1)). While the number of officers to whom the powers could potentially be delegated is broad, it is necessary given the different environments in which inquiry officers may be appointed and inquiries conducted. For example, in the operational environment or on small vessels at sea it may be necessary for junior officers holding command authority to appoint inquiry officers, while in integrated workplaces with members of the Defence Force and Commonwealth employees it might be appropriate for an individual of a higher rank to be delegated the powers. Delegations will be limited to individuals who are suitable to carry out the inquiry taking into account their command responsibilities, rank and position.

This section also provides for the delegation by the Minister of any or all of his or her powers under Part 3. These powers include the power to authorise the use, disclosure and copying of certain information and documents (section 59) and the power to use, disclose and copy certain information and documents (section 60). The Minister may, in writing, delegate these powers to an officer in the Navy at or above the rank of Commodore; an officer in the Army at or above the rank of Brigadier; or an officer in the Air Force at or above the rank of Air Commodore (subsection 72(2)). Such ranks are comparable to a public service Senior Executive Service Band 1 position and are therefore, broadly speaking, an appropriately senior rank to exercise such powers. Again, delegations will be limited to individuals who are suitable to make such decisions taking into account their experience, availability and freedom from bias.

In exercising powers under a delegation, the delegate must comply with any directions of the CDF or Minister as the case may be (subsection 72(3)). This requirement affords an additional safeguard regarding the proper exercise of these powers.

Part 4 – Annual report

Section 73 – Annual report on operation of this instrument

This section requires the CDF to prepare a report on the operation of these Regulations during the financial year, as soon as practicable after the end of a financial year (subsection 73(1)). The report must be included in the annual report of the Department of Defence (subsection 73(3)).

The period that begins on the day these Regulations commences and ends on 30 June 2019 is taken to be a financial year (subsection 73(2)).

Part 5—Transitional, application and saving provisions

This section sets out the transitional, application and saving provisions. The purpose of this Part is to ensure that inquiries under the old Regulations can continue, and that the records of inquiries conducted under the old Regulations continue to be protected.

Section 74 – Definitions

This section provides definitions of words and phrases used in this Part 5:

- ***'commencement'*** means the commencement of these Regulations.
- ***'Court of Inquiry'*** has the same meaning as in the old regulations, as in force immediately before commencement.
- ***'IGADF inquiry'*** means an inquiry referred to in regulation 126 of the old regulations, as in force immediately before commencement.
- ***'inquiry assistant'*** means an inquiry assistant appointed under subregulation 69(2) of the old regulations.
- ***'Inquiry Officer'*** means an Inquiry Officer appointed under subregulation 69(1) of the old regulations.
- ***'old inquiry'*** means an inquiry under the old regulations (other than an IGADF inquiry).
- ***'old regulations'*** means the *Defence (Inquiry) Regulations 1985*.

Section 75 – Continuation of incomplete old inquiries

This section applies in relation to an old inquiry if the old inquiry started before commencement, and immediately before commencement the old inquiry has not been completed (subsection 75(1)).

This section provides that despite the repeal of the old regulations:

- The old inquiry may continue after commencement, as if the repeal had not happened (paragraph 75(2)(a)). This prevents the automatic termination of inquiries upon the commencement of these Regulations.

- The old regulations, as in force immediately before commencement, continue to apply in relation to the old inquiry after commencement as if the repeal had not happened (paragraph 75(2)(b)). This means that the old inquiry is still governed by, and conducted under, the old regulations rather than these Regulations.

- Any written instrument relating to the old inquiry that was made under the old regulations before commencement and that was in force immediately before commencement continues in force, and may be dealt with, after commencement as if the repeal had not happened (paragraph 75(2)(c)). This gives continued effect to a range of written instruments relating to old inquiries, such as appointment instruments made under the old regulations and other like provisions.

- Anything done in relation to the inquiry that was done under the old regulations before commencement and that had effect immediately before commencement continues to have effect, and may be dealt with, after commencement as if the repeal had not happened (paragraph 75(2)(d)). This gives continued effect to a range of things done under the old regulations, such as directions or orders under regulation 11, authorisations under subregulation 15(1), appointments under subregulation 15(2), orders under paragraph 17(1)(c), and grants of leave, orders, directions, authorisations and terminations under Part V.

Section 76 – Continued application of certain protection and immunity provisions in old regulations

This section provides that despite the repeal of the old regulations, the following provisions continue to apply after commencement in relation to an old inquiry that was completed before commencement as if the repeal had not happened:

- Regulations 61 and 64 of the old regulations (paragraph 76(a)). These regulations set out the immunities and protections of certain persons and documents.

- Regulation 78 of the old regulations to the extent that regulation relates to the application of regulations 61 and 64 of those regulations to, and in relation to an Inquiry Officer or an inquiry assistant (paragraph 76(b)).

Section 77 – Saving of directions relating to the disclosure of certain evidence etc.

This section applies in relation to a direction if the direction was given under subregulation 62(1) of the old regulations before commencement, the direction related to an old inquiry that was completed before commencement, and the direction was in

effect immediately before commencement (subsection 77(1)). Subregulation 62(1) provides for the issue of directions regarding the disclosure of evidence.

Despite the repeal of the old regulations:

- The direction continues to have effect and may be dealt with after commencement as if the repeal had not happened (paragraph 77(2)(a)). This prevents the automatic cancellation of the direction upon the commencement of these Regulations.

- Any authorisation given under subregulation 62(3) or paragraph 62(4)(c) of the old regulations before commencement that relates to the direction and that was in effect immediately before commencement continues to have effect and may be dealt with after commencement as if the repeal had not happened (paragraph 77(2)(b)). Section 62 relates to directions regarding the disclosure of evidence.

- Subregulations 62(7) to (9) of the old regulations continue to apply after commencement in relation to a contravention of the direction that occurs after commencement as if the repeal had not happened (paragraph 77(2)(c)). Subregulations 62(7) to (9) set out the offence of contravention of a direction and related provisions.

Section 78 – Continued application of prohibition against disclosure of records or reports of Courts of Inquiry

This section applies in relation to information contained in the records or report of a Court of Inquiry (the protected CI information) and a document, a part of a document or a copy of all or part of a document that forms part of the records or reports of a Court of Inquiry (the protected CI document), whether the inquiry of the Court of Inquiry is completed before or after commencement (subsection 78(1)).

This section provides that despite the repeal of the old regulations, regulation 63 continues to apply after commencement in relation to the disclosure of protected CI information or a protected CI document as if the repeal had not happened (subsection 78(2)). Regulation 63 relates to the disclosure of records or reports of Courts of Inquiry, including the offence of disclosure, ministerial directions and ministerial authority to disclose or copy.

Section 38 of the FOI Act applies after commencement to protected CI information and protected CI documents in relation to which regulation 63 of the old regulations continues (subsection 78(3)). A note provides that previous regulation 63 of the old regulations prohibits, among other things, the disclosure of protected CI information and protected CI documents.

Section 79 – Continued application of prohibition against disclosure of records or reports of Inquiry Officers

This section applies in relation to information contained in the records or report of an Inquiry Officer (the protected IO information) and a document, a part of a document, or a copy of all or part of a document, that forms part of the records or reports of an

Inquiry Officer (the protected IO document), whether the inquiry of the Inquiry Officer is completed before or after commencement (subsection 79(1)).

This section provides that despite the repeal of the old regulations:

- Regulation 78 of the old regulations (to the extent that regulation relates to the application of regulation 63 of the old regulations to, and in relation to, an Inquiry Officer in an inquiry assistant) continues to apply after commencement in relation to the inquiry of the Inquiry Officer as if the repeal had not happened (paragraph 79(2)(a)).

- Regulation 63 of the old regulations continues to apply after commencement in relation to the disclosure of protected IO information or a protected IO document as if the repeal had not happened (paragraph 79(2)(b)). Regulation 63 relates to the disclosure of inquiry records or reports, including the offence of disclosure, ministerial directions and ministerial authority to disclose or copy.

Section 38 of the FOI Act applies after commencement to protected IO information and protected IO documents in relation to which regulation 63 of the old regulations continues to apply under this section (subsection 79(3)). A note provides that previous regulation 63 of the old regulations prohibits, among other things, the disclosure of protected IO information and protected IO documents.

Section 80 – Saving of instruments made under regulation 63 of the old regulations

This section applies in relation to a written instrument (the old instrument) if the old instrument was made under regulation 63 of the old regulations before commencement and the old instrument was in force immediately before commencement (subsection 80(1)). An old instrument might include, for example, a ministerial authorisation which authorises a person to disclose an inquiry report.

This section provides that despite the repeal of the old regulations, the old instrument continues in force, and may be dealt with after commencement for the purposes of sections 78 and 79 of these Regulations as if the repeal had not happened (subsection 80(2)).

Section 81 – Continued application of provisions in the old regulations relating to re-opening etc. of old inquiries by Courts of Inquiry

This section applies in relation to an old inquiry that is an inquiry by a Court of Inquiry if: the old inquiry was completed before commencement and the Court of Inquiry was in existence immediately before commencement (subsection 81(2)).

Despite the repeal of the old regulations:

- Regulations 66 and 67 of the old regulations continue to apply after commencement in relation to the old inquiry as if the repeal had not happened (paragraph 81(2)(a)). Regulation 66 relates to the re-opening of a Court of Inquiry and regulation 67 relates to the duration and dissolution of a Court of Inquiry.

- Any direction relating to the old inquiry that was given under subregulation 66(1) of the old regulations before commencement and that had effect immediately before commencement continues to have effect and may be dealt with after commencement as if the repeal had not happened (paragraph 81(2)(b)).

Section 82 – Continued application of provisions in the old regulations relating to re-opening etc. of old inquiries by Inquiry Officers

This section applies in relation to an old inquiry that is an inquiry by an Inquiry Officer if the old inquiry was completed before commencement and the appointment of the Inquiry Officer was in existence immediately before commencement (subsection 82(1)).

Despite the repeal of the old regulations:

- Regulations 76 and 77 of the old regulations continue to apply after commencement in relation to the old inquiry as if the repeal had not happened (paragraph 82(2)(a)). Regulation 76 relates to the re-opening of an Inquiry Officer Inquiry and regulation 77 relates to the duration and dissolution of an Inquiry Officer Inquiry.

- Any direction relating to the old inquiry that was given under subregulation 76(1) of the old regulations before commencement and that had effect immediately before commencement continues to have effect and may be dealt with after commencement as if the repeal had not happened (paragraph 82(2)(b)).

Section 83 – Last annual report under old regulations

This section provides that despite the repeal of regulation 125 of the old regulations, that regulation continues to apply in relation to a report on the operation of the old regulations during the financial year beginning on 1 July 2017, as if that repeal had not happened and that financial year ended at the end of the day before commencement.

Section 84 – Continued application of provisions in the old regulations relating to IGADF

This section provides that despite the repeal of the old regulations:

- Regulation 126 of the old regulations continues to apply after commencement in relation to an IGADF inquiry as if the repeal had not happened (paragraph 84(2)(a)). Regulation 126 of the old regulations is a transitional provision which gives effect to a Part 7 of the old regulations (which was repealed by the *Defence (Inquiry) Amendment (2016 Measures No. 1) Regulation 2016*) to inquiries commenced but not completed before 1 October 2016.

- Regulations 61 and 64 of the old regulations (to the extent they apply because of this section) continue to apply after commencement in relation to an

IGADF inquiry as if the repeal had not happened (paragraph 84(2)(b)). These regulations set out the immunities and protections of certain persons and documents.

- Regulation 63 of the old regulations (to the extent it applies because of this section) continues to apply after commencement in relation to information contained in the records or report of an IGADF inquiry (the protected IGADF information and a document, a part of a document, or a copy of all or part of a document, that forms part of the records or reports of an IGADF inquiry (the protected IGADF document) as if the repeal had not happened (paragraph 84(2)(c)). Regulation 63 relates to the disclosure of inquiry records or reports, including the offence of disclosure, ministerial directions and ministerial authority to disclose or copy.

Section 38 of the FOI Act applies, after commencement, to protected IGADF information and protected IGADF documents in relation to which regulation 63 of the old regulations continues to apply under paragraph (1)(c) of this section (subsection 84(2)). A note provides that regulation 63 of the old regulations prohibits, among other things, the disclosure of protected IGADF information and protected IGADF documents.

Schedule 1—Repeals

This schedule repeals the *Defence (Inquiry) Regulations 1985*.