

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence

Subject – *Defence Act 1903*

Inspector-General of the Australian Defence Force Amendment Regulations 2021

Authority

1. The *Defence Act 1903* (the Act) prescribes the control, administration, constitution and service of the Australian Defence Force.
2. Subsection 124(1) of the Act provides, in part, that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act is 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.
3. Specifically, paragraphs 124(1)(h), 124(2AA) and (2AB) of the Act provide for the making of regulations addressing the procedures, powers and reporting obligations of the Inspector-General of the Australian Defence Force (Inspector-General ADF) in respect of the performance of the Inspector-General ADF's functions, including matters connected with inquiries, investigations and performance reviews.

Purpose and operation of instrument

4. The purpose of the proposed *Inspector-General of the Australian Defence Force Amendment Regulations 2021* (the Amending Regulations) is to expressly provide for information generated by inquiries under the *Inspector-General of the Australian Defence Force Regulation 2016* (the IGADF Regulation) to be appropriately disclosed, including to law enforcement agencies.
5. The primary purpose is to ensure that information relating to the Afghanistan Inquiry can be lawfully disclosed to the Office of the Special Investigator for investigation purposes, to avoid any possibility of future legal disputes about the process followed in the investigations and associated risk to successful prosecutions. The Amending Regulations achieve this by allowing for the disclosure of inquiry-related information to listed agencies, or other Government agencies where the Inspector-General ADF considers the information to be relevant to the performance of that agency's functions.
6. The Amending Regulations provide for:
 - amendments to section 27 of the IGADF Regulation to extend the Inspector-General ADF's existing power to disclose inquiry reports to all inquiries conducted under the Regulation;

- a new Division 4B in Part 4 of the IGADF Regulation to explicitly permit sharing of inquiry-related information with listed agencies (including the Office of the Special Investigator), and other agencies / authorities where the Inspector-General ADF considers the disclosure is appropriate to the exercise of their functions; and
- the ability to delegate the Inspector-General ADF's information-sharing power.

7. These Amending Regulations are not intended to have any effect on the lawful ability for recipients of any IGADF inquiry or inquiry-related material to subsequently disclose that material.

8. In circumstances where the IGADF is considering disclosing inquiry-related information to a third party pursuant to a new Division 4B in Part 4 of the IGADF Regulation, and that information is or includes personal information, the IGADF will consider what protections are in place in relation to that information.

9. If no legislative protections exist, the IGADF may decide to disclose only if there are appropriate safeguards in place. This could include for example, confirming there are adequate contractual obligations regarding the protection of personal information, the execution of a deed of confidentiality by contractors before a disclosure is made, and/or giving a direction restricting further disclosure.

Legislative instrument

10. The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

11. The Amending Regulations commence on the day after registration on the Federal Register of Legislation.

Regulatory Impact Statement

12. The Office of Best Practice Regulation have advised that no regulatory impact statement was required (OBPR ID 43978).

Consultation

13. The Inspector-General ADF, the Office of the Special Investigator, the Attorney-General's Department, the Department of Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, and the Office of the Australian Information Commissioner were consulted in the development of the Amending Regulations.

14. The Amending Regulations were drafted by the Office of Parliamentary Counsel.

Detailed description

15. A detailed description of the Amending Regulations is at Attachment A.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Inspector-General of the Australian Defence Force Amendment Regulations 2021

1. The *Inspector-General of the Australian Defence Force Amendment Regulations 2021* (the Amending 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 Regulation

2. The purpose of the amending Regulations is to expressly provide for information generated by inquiries under the *Inspector-General of the Australian Defence Force Regulation 2016* (the IGADF Regulation) to be appropriately disclosed, including to law enforcement agencies.

3. The primary purpose is to ensure that information relating to the Afghanistan Inquiry can be lawfully disclosed to the Office of the Special Investigator for investigation purposes, to avoid any possibility of future legal disputes about the process followed in the investigations and associated risk to successful prosecutions. The proposed Regulations would achieve this by allowing for the disclosure of inquiry-related information to listed agencies, or other Government agencies where the Inspector-General ADF considers the information to be relevant to the performance of that agency's functions.

4. The proposed Regulations would provide for:

- amendments to section 27 of the IGADF Regulation to extend the Inspector-General ADF's existing power to disclose inquiry reports to all inquiries conducted under the Regulation;
- a new Division 4B in Part 4 of the IGADF Regulation to explicitly permit sharing of inquiry-related information with listed agencies (including the Office of the Special Investigator), and other agencies / authorities where the Inspector-General ADF considers the disclosure is appropriate to the exercise of their functions; and
- the ability to delegate the Inspector-General ADF's information-sharing power.

Human Rights Implications

5. The Amending Regulations engage the following rights:

- (a) Rights to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR); and
- (b) Right to a fair hearing in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

Right to Privacy

6. The Amending Regulations engage the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which provides:

- 1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2) *Everyone has the right to the protection of the law against such interference or attacks.*

7. The use of the term ‘arbitrary’ means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR, and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ to imply that any limitation must be proportionate and necessary in the circumstances. The right to privacy can be limited by necessity in a democratic society in the interests of national security or the protection of the rights and freedoms of others.

Information-sharing under subsection 27(5) of the IGADF Regulation

8. Subsection 27(5) provides for the IGADF to disclose inquiry reports to a range of people where appropriate. Currently, inquiries appointed by the Minister or CDF are excluded from the operation of subsection 27(5). The Amending Regulations would remove this limitation.

9. Disclosure of inquiry reports under subsection 27(5), as amended, can include disclosure of personal information. This is a reasonable, necessary and proportionate, as the IGADF needs to be able to disclose inquiry reports in order for those inquiries to be acted on. An essential feature of an effective armed force is the need for discipline which is, and is seen to be, rigorously enforced. Failures in the military justice system, when they occur, not only soon become publicly known, but if not properly dealt with, can quickly result in damage to reputation, morale and ultimately, operational effectiveness. Removing the existing limitation on subsection 27(5) enhances the ability of IGADF inquiries to generate positive change.

Disclosure of ‘inquiry-related information’ under new section 28L

10. The Amending Regulations insert new section 28L in the IGADF Regulation, which explicitly authorises the IGADF to disclose inquiry-related information to a range of law enforcement agencies, including the Office of the Special Investigator, and to other agencies where relevant to their functions. This engages the right to privacy as inquiry-related information may include personal information.

11. Disclosure to the listed agencies is reasonable, necessary and proportionate, noting that the listed agencies’ functions are for law enforcement (for example, criminal investigations and prosecutions). The Inspector-General ADF must exercise powers for a proper purpose – that is, the functions of the receiving entity are relevant to whether the Inspector-General ADF can appropriately disclose the information, as would the IGADF’s own functions. Disclosure for law enforcement purposes would be permitted under privacy legislation in any case, so the impact on privacy is low. New subsection 28L(2) lists some of the matters it would be expected the IGADF to consider when disclosing inquiry-related information, including considerations of privacy.

12. In circumstances where the IGADF is considering disclosing inquiry-related information to a third party pursuant to section 28L of the IGADF Regulation, and that information is or includes personal information, the IGADF will consider what privacy protections are in place in relation to that information.

13. If no legislative protections exist, the IGADF may decide to disclose only if there are appropriate safeguards in place. This could include for example, confirming there are adequate contractual obligations regarding the protection of personal information, the execution of a deed of confidentiality by contractors before a disclosure is made, and/or the giving a direction restricting further disclosure.

Right to a fair trial

14. Article 14 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, and includes minimum guarantees in criminal proceedings, including the privilege against self-incrimination. This right is engaged by the Amending Regulations, as they authorise disclosure of inquiry-related information, including information obtained under compulsion where the privilege against self-incrimination has been abrogated, to law enforcement agencies.

15. However, the right to a fair trial is not diminished by the Amending Regulation. The authority to disclose inquiry-related information does not affect the existing protections about the use of information obtained in IGADF inquiries. In particular, it does not affect the restrictions outlined in subsection 124(2CA) of the *Defence Act 1903*, commonly referred to as use and indirect use immunities, which prevent statements made by a witness from being used against them in subsequent civil or criminal proceedings.

16. In the context of the Afghanistan inquiry, for example, part of the role of the Special Counsel to the Office of the Special Investigator will be to assess the inquiry-related information and determine what information can be appropriately provided to the investigators, consistently with this requirement. Nothing in the Amending Regulations has any effect on these immunities.

17. The Amending Regulations are, therefore, compatible with the right to a fair trial.

Conclusion

18. The Amending Regulations are compatible with the relevant human rights and freedoms, as to the extent they may limit the right to privacy, they are reasonable, proportionate and necessary, and they do not limit the right to a fair trial.

ATTACHMENT A – PROVISIONS IN INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE AMENDMENT REGULATIONS 2021

Section 1 - Name of Regulations

1. This section would provide that the title of the Regulations is the *Inspector-General Australian Defence Force Amendment Regulations 2021*.

Section 2 – Commencement

2. This section provides that the Regulations commences on the day after registration.

Section 3 – Authority

3. This section provides that the *Inspector-General Australian Defence Force Amendment Regulations 2021* are made under the *Defence Act 1903*.

Section 4 – Schedules

4. Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in this Schedule concerned, and any other item in a Schedule to this instrument has effect accordingly to its terms.

SCHEDULE 1 – AMENDMENTS

Item 1

5. This item inserts ‘inquiry-related information’ with further information proposes to be found in subsection 28K(1).

Item 2

6. This item omits the reference to the Minister or the Chief of the Defence Force directing the Inspector-General ADF to conduct the inquiry. The proposed amendment to subsection 27(5) allows for the two preconditions to be separated in to subparagraphs, see item 3.

Item 3

7. The item repeals the subparagraphs 27(5)(a)(i) and (ii) and substitute two separate subsections so that if the Minister did not direct the Inspector-General ADF to conduct the inquiry then the Minister may take action and if the Chief of the Defence Force did not direct that Inspector-General ADF to conduct the inquiry then the Chief of the Defence Force.

8. The amendment allows for consistent parties to take consistent actions in relation to the Inspector-General ADF inquiries.

Item 4

9. This item adds to the end of subsection 27(5) a note that whoever directs (Chief of the Defence Force of the Minister) the Inspector-General ADF to conduct the inquiry should get a report about the inquiry.

Item 5

10. This item inserts new subsection 27(5A) requiring the Inspector General ADF to consult the Minister or the Chief of the Defence Force (as the case may be) if the Inspector-General ADF was directed to before informing a person of the findings of the inquiry or giving a person a report about the inquiry.

Item 6

11. This item also inserts subsection 28E(d) that provides for directions relating to disclosure of inquiry-related information.

Item 7

12. This item inserts Division 4B – Disclosure of inquiry-related information after Division 4A of Part 4. This division includes subsection 28K(1)(a)-(b) which applies to inquiry-related information including a report about an inquiry and information, documents or other things collected or created in relation to the conduct of an inquiry. This is broad to allow for as much information relating to the Inspector-General ADF Afghanistan Inquiry to be included as possible.

13. The division also includes section 28L Disclosure of inquiry-related information which prescribes the list to whom the Inspector-General ADF may disclose inquiry-related information. The list is limited to the following:

- the Office of the Special Investigator;
- the Australian Federal Police or the police of a State or Territory;
- the Director of Public Prosecutions of the Commonwealth or a State or Territory;
- the Australian Commission for Law Enforcement Integrity or an integrity agency for a State or Territory (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*); or
- an AGS lawyer (within the meaning of section 55I of the *Judiciary Act 1903*).

14. The division does not have any effect on the lawful ability for recipients of any IGADF inquiry or inquiry-related material to subsequently disclose that material.

15. In order to address practical issues, the list also allows for disclosure to a third party if the third party is providing services to an entity listed above and it is relevant to the performance of another Commonwealth, State or Territory agency or authority's functions and the Inspector-General ADF considers it appropriate in all the circumstances. Any disclosure to a third party has a subjective requirement that must be satisfied which adds a layer of protection.

16. A note to the item provides that a disclosure or use of personal information made in accordance with the section is taken to be authorised by this Act for the purposes of paragraph 6.2(b) of the Australian Privacy Principle 6. In effect, this ensures that when a

disclosure of inquiry-related information is made in accordance with section 28L that Australian Privacy Principle 6 is not breached.

17. This item adds subsection 28L(2) which provides that inquiry-related information given to a person under subsection 28L(1) need not include information that the Inspector-General ADF considers inappropriate for any of the following reasons:

- privacy considerations;
- the person's responsibilities;
- the person's interest in the matter;
- the information is classified or related to national security; or
- the relevance of the information to other information is considered not appropriate for the person because of the above.

18. The above limits and empowers the Inspector-General ADF to ensure information is only disclosed in appropriate circumstances.

19. This item also adds section 28M which allows the Inspector-General ADF (or an authorised person) to make directions restricting the disclosure of inquiry-related information. Subsection 28M(3) includes a penalty if a direction is contravened which would encourage persons to comply.

Item 8

20. This item amends section 34A to include (1) before "The Chief of the Defence Force may".

Item 9

21. This item adds subsection (2) at the end of section 34A which provides that the Inspector-General ADF may, by instrument in writing, delegate the Inspector-General ADF's power under section 28L to a member of the staff assisting (EL2 equivalent or above) the Inspector-General ADF referred to in subsection 110O(1) of the Act. This addition allows for flexibility in the administration of the Inspector-General ADF's power to disclose inquiry-related information.

Item 10

22. This item adds section 38 at the end of Part 6 to allow for disclosures of inquiry-related information on or after the commencement of the instrument regardless of whether the information was collected before, on or after the commencement date. In effect, this allows for relevant information-sharing capacity because it applies to all inquiry-related information ever collected.