

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) provides for 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 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.
3. Specifically, paragraph 124(1)(h), and subsections 124(2AA) and (2AB) of the Act provide for the making of regulations addressing the procedures, powers and reporting obligations of the Inspector-General of the Australian Defence Force (Inspector-General ADF) in respect of the performance of the Inspector-General ADF's functions, including matters connected with inquiries, investigations and 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 allow the IGADF to disclose information relating to the conduct of an inquiry (including the report about an inquiry) under the *Inspector-General of the Australian Defence Force Regulation 2016* (the IGADF Regulation) including to law enforcement agencies and other agencies such as regulatory bodies and State and Territory courts including coroners' offices.
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 (OSI) for investigative purposes to avoid possible legal disputes about the scope and operation of the existing disclosure provisions in the IGADF Regulation. The Amending Regulations achieve this by allowing for the disclosure of inquiry-related information to listed agencies. It also enables disclosure to other Government agencies where the Inspector-General ADF considers the information to be relevant to the performance of that agency's functions and in a form appropriate for disclosure to that agency. In the context of the Inspector-General ADF Afghanistan Inquiry, it supplements the existing power of the Assistant Inspector-General ADF to disclose information to a wide range of persons.

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 OSI and agencies supporting the OSI), and other agencies/authorities where the Inspector-General ADF considers the disclosure is both relevant to the performance of their functions and appropriate; and
 - the ability to delegate the Inspector-General ADF's information-sharing power.

Legislative instrument

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

Commencement

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

Regulatory Impact Statement

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

Consultation

10. 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.

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

Detailed description

12. 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 and other agencies.

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

4. The Amending 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 the sharing of inquiry-related information with listed agencies (including the OSI and agencies supporting the OSI), and other agencies / authorities where the Inspector-General ADF considers the disclosure is both relevant to the performance of their functions and is appropriate; 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 ICCPR.

Right to Privacy

6. The Amending Regulations engage the right to privacy in Article 17 of the 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 Inspector-General ADF to disclose inquiry reports to a range of persons where appropriate. Currently, inquiries directed by the Minister or Chief of the Defence Force (CDF) are excluded from the operation of subsection 27(5). The Amending Regulations would remove this limitation but would require that the Inspector-General ADF consult with the Minister or the CDF (as appropriate) before making a disclosure.

9. Disclosure of inquiry reports under subsection 27(5), as amended, may include disclosure of personal information. This is reasonable, necessary and proportionate, as the Inspector-General ADF needs to be able to disclose inquiry reports in order for participants to be properly advised of inquiry outcomes and for the findings of 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, enforced. The ability to disclose inquiry reports under subsection 27(5) supports the maintenance of discipline by enabling communication of outcomes to relevant parties and preventing any further damage to reputation, morale and ultimately, operational effectiveness. Removing the existing limitation in subsection 27(5) enhances the ability of Inspector-General ADF inquiries to lead to effective action and generate positive change. The existing provisions in subsection 27(7) enable the Inspector-General ADF to not include information for reasons of privacy, relevance and national security, thus acknowledging the right to privacy, a requirement for reasonableness, and protection from arbitrary disclosure of personal information.

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 Inspector-General ADF to disclose inquiry-related information to a range of law enforcement agencies, including the OSI 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) or other agencies which could include regulatory bodies and state and territory courts including coroners' offices. The Inspector-General ADF must exercise his powers for a proper purpose – that is, the functions of the receiving entity are relevant to whether the Inspector-General ADF may appropriately disclose the information. Disclosure for law enforcement purposes would be permitted in accordance with the *Privacy Act 1988* so the impact on privacy is low. New subsection 28L(2) lists some of the matters that the IGADF is to consider when deciding whether to disclose inquiry-related information, including considerations of privacy. Further, new section 28M would enable the Inspector-General ADF to issue a non-disclosure order restricting further disclosure of information.

12. In the context of the Inspector-General ADF Afghanistan Inquiry and other inquiries undertaken by an Assistant Inspector-General ADF who is a judicial officer, section 28L supplements an existing power of the Assistant Inspector-General ADF under section 28G to disclose material to a wide range of persons. The additional privacy impact of providing the Inspector-General ADF with a similar power is therefore low.

Right to a fair trial

13. 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.

14. However, the right to a fair trial is not diminished by the Amending Regulations. The authority to disclose inquiry-related information does not affect the existing protections for individuals in respect of the use of information provided by those individuals in the course of IGADF inquiries. In particular, it does not affect the restrictions outlined in subsection 124(2CA) of the Act and section 32 of the IGADF Regulation, commonly referred to as use and indirect use immunities, which provide, among other things that statements made by a witness in the course of giving evidence before the Inspector-General ADF are not admissible in evidence against the witness in subsequent civil or criminal proceedings.

15. In the context of the Inspector-General ADF Afghanistan Inquiry, for example, part of the role of the Special Counsel to the OSI will be to assess the inquiry-related information and determine what information can be appropriately provided to the investigators, consistently with and in observance of these statutory immunities. Nothing in the Amending Regulations has any effect on these immunities. Further, disclosure to law enforcement agencies and prosecutors supports the right of an accused person to a fair trial as these agencies have a duty to disclose certain information to accused persons.

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

Conclusion

17. The Amending Regulations are compatible with the relevant human rights and freedoms, as to the extent that 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 according to its terms.

SCHEDULE 1 – AMENDMENTS

Item 1

5. This item provides that the term ‘inquiry-related information’ is defined in new subsection 28K(1).

Items 2 and 3

6. Subsection 27(5) of the IGADF Regulation sets out the persons to whom the Inspector-General ADF may disclose an inquiry’s findings and give a copy of the report but does not apply to Minister or CDF directed inquiries. Subsection 27(3) of the IGADF Regulation requires that for Minister and CDF directed inquiries, the report and findings must be given to the Minister or the CDF (as the case may be).

7. These items would amend subsection 27(5) to allow the Inspector-General ADF to give the report and findings to the Minister (where the CDF directed the inquiry) and to the CDF (where the Minister directed the inquiry).

8. The amendment ensures a consistent approach to the disclosure of inquiry findings and reports in relation to all Inspector-General ADF inquiries.

Item 4

9. This item adds to the end of subsection 27(5) a note that refers to the Inspector-General ADF's obligation under subsection 27(3) to provide a copy of the report to the Minister (for Minister directed inquiries) and to the CDF (for CDF directed inquiries).

Item 5

10. This item inserts new subsection 27(5A) requiring the Inspector-General ADF to consult the Minister or the CDF (as the case may be) before making a disclosure of an inquiry's findings or an inquiry report where the inquiry was directed by the Minister or by the CDF.

Item 6

11. Section 28E of the IGADF Regulation sets out certain powers of the IGADF that may be exercised by an Assistant IGADF who is a judicial officer without an authorisation by the IGADF. This item would insert new paragraph 28E(d) to include in the list of powers, a reference to new subsection 28M(1) being the power to give directions regarding the disclosure of inquiry-related information (see item 7 below).

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 describes inquiry-related information as including a report about an inquiry and information, documents or other things collected or created in relation to the conduct of an inquiry. The term 'inquiry related information' is broadly defined to allow for as much information as possible relating to the Inspector-General ADF Afghanistan Inquiry to be covered.

13. The division also includes new section 28L (Disclosure of inquiry-related information) which prescribes the list of persons 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*);
- an AGS lawyer (within the meaning of section 55I of the *Judiciary Act 1903*);
- a Commonwealth, State or Territory agency with relevant functions; and
- third parties providing services to the above.

14. In order to address practical issues that may arise where the listed agencies engage contractors, consultants or secondees (third parties) to assist in the performance of their functions, the section also allows for disclosure by the IGADF to a third party:

- if the third party is providing services to a person or entity listed in subsection 28L(1);

- the IGADF considers that the disclosure is relevant to enabling the third party to assist in the performance of the person’s or entity’s functions; and
- the IGADF is satisfied that the disclosure is appropriate in all the circumstances.

15. The division does not seek to regulate the use or disclosure, by listed persons or agencies, of inquiry-related information provided to them by the Inspector-General ADF. Such use or disclosure will be governed by the respective powers and functions of those persons and agencies (and any other applicable laws).

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 considered not appropriate for the person because of the above.

18. The new section enables the Inspector-General ADF to ensure inquiry related 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) makes the contravention of a direction a criminal offence to encourage compliance.

Item 8

20. This item is a technical amendment to section 34A to include (1) before the words “The Chief of the Defence Force may” consequential on the inclusion of a new subsection (2) into section 34A (see item 9 below).

Item 9

21. This item adds subsection (2) at the end of section 34A to 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 the Inspector-General ADF referred to in subsection 110O(1) of the Act (being staff at an EL2 equivalent or above). This amendment 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 findings and reports and other inquiry-related information on or after the commencement of the instrument regardless of whether the information was collected or created before, on or after the commencement date. In effect, this enables a consistent information-sharing capacity because it applies to all inquiry-related information regardless of when the Inspector-General ADF inquiry was conducted.