

# **REPLACEMENT EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Defence

*Defence Act 1903*

*Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024*

## **Legislative Authority**

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

Subsection 124(1) of the Act provides that the Governor-General may make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for securing the good government of the Defence Force, or for carrying out or giving effect to the Act.

Paragraph 63(1)(f) of the Act provides that the Governor-General may, subject to the provisions of the Act, do all matters and things deemed by him or her to be necessary or desirable for the efficient defence and protection of the Commonwealth or of any State.

The *Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024* (the Regulations) are made under the Act.

## **Purpose**

The purpose of the Regulations is to establish the Afghanistan Inquiry Compensation Scheme (the Scheme). The Scheme provides a process for the Chief of the Defence Force (CDF) to refer certain individuals to the Afghanistan Inquiry Compensation Advocate (the Advocate) for consideration. The Advocate must then make recommendations to the CDF on appropriate actions.

## **Background**

The Inspector-General of the Australian Defence Force Afghanistan Inquiry (the Afghanistan Inquiry) found credible information of incidents of alleged unlawful killings and misconduct by ADF members on operations in Afghanistan during the period 2005 to 2016.

The Afghanistan Inquiry made 15 recommendations to pay compensation to alleged victims or their families where there was credible information of unlawful killing or assault without the establishment of criminal liability. The Scheme provides a process to give effect to these recommendations.

## **Impact and Effect**

Individuals that can be referred by the CDF to the Advocate are those to whom the Afghanistan Inquiry Report specifically relate, being family members of a victim of unlawful killing and individuals who have suffered an unlawful assault or property damage.

The Advocate, who is appointed by the Minister for Defence, is not responsible for undertaking criminal investigations. The Advocate's role is limited to considering the information before them and making compensation recommendations to the CDF as the decision maker.

Due to the current situation in Afghanistan there remains a range of legal, practical and logistical challenges with identifying victims and making payments. Entrenching the Scheme in regulations demonstrates commitment to the consideration and payment of claims.

### **Commencement**

The Regulations commence on the day following registration on the Federal Register of Legislation.

### **Consultation**

During the development of the Regulations, the Department of Defence consulted the Attorney-General's Department, the Department of Foreign Affairs and Trade, the Department of Finance, the Office of the Special Investigator, the Australian Federal Police, the Commonwealth Department of Public Prosecutions, the Australian Public Service Commission and the Australian Government Solicitor. The Regulations were drafted by the Office of Parliamentary Counsel.

### **Impact Analysis**

The Office of Impact Analysis advised that detailed analysis under the Australian Government's Policy Impact Analysis Framework is not required. This is because the proposal will be time-gated to the period of conduct by members of the ADF in Afghanistan from 2005 to 2016, and most (if not all) benefits will accrue to non-citizens of Australia (OIA24-07295).

### **Details / Operation**

Details of the Regulations are set out in [Attachment A](#).

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

### **Human Rights Statement**

The Regulations are compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A Statement of Compatibility with Human Rights is at [Attachment B](#).

## Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024

### Part 1 – Preliminary

#### Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024*.

#### Section 2 – Commencement

This section provides that the Regulations commence on the day following registration on the Federal Register of Legislation.

#### Section 3 – Authority

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

#### Section 4 – Definitions

This section contains a number of definitions relevant to the Regulations:

- ***Department of Foreign Affairs and Trade*** means the Department administered by the Minister for Foreign Affairs.
- ***eligible recipient*** for a claim refers the reader's attention to section 5.
- ***sanctioned***: a person or entity is ***sanctioned*** if they are a designated person or entity within the meaning of the *Autonomous Sanctions Regulations 2011* or a prescribed person or entity within the meaning of the *Charter of the United Nations Act 1945*.
- ***terrorist organisation*** has the meaning given by subsection 102.1(1) of the *Criminal Code*.

### Part 2 – Afghanistan Inquiry Compensation Scheme

#### Section 5 – Claims for compensation

This section sets out the circumstances in which the Chief of the Defence Force (CDF) may refer a claim to the Afghanistan Inquiry Compensation Advocate (the Advocate).

Naming the CDF as the only referral body recognises that the CDF is overall best placed to source and verify information to the relevant standard. The CDF may obtain information through the Inspector-General of the Australian Defence Force (IGADF) Afghanistan Inquiry, Non-Government Organisations, foreign partners, civil society organisations or media organisations which may have relevant holdings and not be subject to the same legal and operational limitations as investigation bodies.

The role of the CDF in the referral process will also minimise the risk of the Advocate receiving a high volume of individual claims (including ambit or spurious) which would be difficult for the Advocate to assess or verify. This will ensure Commonwealth resources are

appropriately expended, with the Advocate positioned to focus on claims passing threshold eligibility requirements and the CDF utilising resources to triage and manage referrals.

Subsection 5(1) provides that the CDF may refer a claim to the Advocate if the CDF is satisfied of two matters.

The first matter is that the claim relates to one or more persons, or persons within a class, (the eligible recipients for the claim) each of whom the CDF considers: is reasonably likely to be the victim of an assault or property damage or a family member of a victim of an unlawful killing; is not reasonably likely to be a member of a terrorist organisation; and is not a sanctioned person and is not reasonably likely to act on behalf of, or at the direction of, a sanctioned entity.

The relevant standard of *reasonably likely* recognises the difficulty that there may be in sourcing records and verifying information.

While this is a beneficial scheme, excluding victims or family members who are reasonably likely to be members of a terrorist organisation or who are acting on behalf of or at the direction of sanctioned entity makes it clear that payments must not be made, or other benefits provided, in contravention of the applicable Australian laws. Relevantly, the Taliban and certain other persons and entities associated with the Taliban are subject to targeted financial sanctions. The Advocate must also consider such issues under section 6.

The term *family member* is not defined and should be interpreted expansively. This provides the CDF with the flexibility to determine eligibility based on the dependency or relationship between the family member and the victim rather than based on a fixed familial connection (for example, parent, sibling, spouse), noting that ‘family’ has a broad understanding in the Afghanistan context.

The second matter is that the assault, property damage or unlawful killing was found to be substantiated by credible information by the IGADF Afghanistan Inquiry.

In order to support the integrity of ongoing criminal investigations into these matters by the Office of the Special Investigator or the Australian Federal Police, the Scheme will operate separately to, and independent of, the Office of the Special Investigator and the Australian Federal Police.

Subsection 5(2) provides that the referral must include the name of each eligible recipient for the claim, the information taken into account by the CDF in deciding to refer the claim, and any other information that the CDF considers may be relevant to the Advocate’s consideration of the claim under section 6.

The scope of information to be included in referrals is not specified in detail in subsection 5(2). This recognises the difficulty that there may be in sourcing records (for example, birth certificates) and verifying particular types of information, noting that the level of information will vary on a case by case basis.

## Section 6 – Consideration of claims

This section provides that upon receiving a referral from the CDF, the Advocate must consider the claim.

Subsection 6(2) sets out the process to be followed by the Advocate in considering claims.

First, the Advocate must consult the Department of Foreign Affairs and Trade regarding the implications of the *Autonomous Sanctions Act 2011*, the *Charter of the United Nations Act 1945*, and Australia's foreign policy interests on options for actions in response to the claim. Afghanistan's political and economic environment mean that there will be a range of foreign policy interests and other international relations considerations that apply. This may include any impact that payments or other actions may have on Australia's engagement with the Taliban and Australia's ongoing advocacy on important issues such as human rights.

Secondly, the Advocate may engage with the eligible recipients for the claim, or a nominated representative of the eligible recipients, and may consult an expert on any subject matter the Advocate considers relevant. Consultation will vary on a case by case basis, but might include consultation with other Government agencies, foreign partners, Non-Government Organisations with a presence in Afghanistan or subject matter experts with knowledge of particular matters relevant to Afghanistan (for example, subject matter experts with a knowledge of the humanitarian crisis in Afghanistan, the economic situation, or banking matters).

Finally, the Advocate must determine what actions to recommend to the CDF in response to the claim. In doing so, the Advocate must take into account the following:

- Any information received as part of the consultation and engagement under this section.
- Cultural expectations, within Afghanistan, of what would be an appropriate action in response to the claim. Those cultural expectations will be different to Australian cultural expectations in the event of an assault or the death of a family member.
- The probability that taking a particular action in response to the claim may make funds available to, or otherwise benefit: a sanctioned person or entity; a terrorist organisation; or an organisation for which the provision of material support or resources constitutes an offence under section 390.4 of the *Criminal Code Act 1995* (supporting a criminal organisation).
- In relation to each eligible recipient for the claim, to the extent that the Advocate is aware of relevant information regarding: the living standards, work status and other circumstances of the person; if the claim relates to unlawful killing—the person's relationship to, and level of dependency on, the deceased; and whether taking a particular action in response to the claim could endanger the person. Even if possible, noting restrictions on financial institutions in Afghanistan, monetary compensation may have an adverse effect on individuals and groups, and may make the recipient(s), and their communities, targets for criminal organisations or the Taliban. Monetary compensation may also not compensate in the same way that, for example, infrastructure or other supplies would.
- Any other cultural, gender, societal, economic or geopolitical factors the Advocate considers relevant. These factors will vary from time to time and from region to region within Afghanistan. Afghanistan is currently experiencing an economic and humanitarian crisis, and issues which may be considered by the Advocate at any given time include the level of international assistance, the marginalisation of women

and other restrictions on human rights, inflation and price rises of essential goods, unemployment and income loss, currency depreciation, and severe drought conditions adversely affecting agricultural production.

The scope of information and considerations are broad given the uncertain social, economic and political situation in Afghanistan. The circumstances of each eligible recipient is likely to vary, many of whom will have limited resources available to them. This will affect the information that the Advocate (and ultimately CDF, as the decision maker) is able to consider. This must be considered alongside the range of foreign policy issues that are applicable. Section 6, coupled with sections 7 and 8, provides as much flexibility and discretion as possible to consider these issues. It would undermine the purpose of the Scheme if requirements were too rigid.

### Section 7 – Report to Chief of the Defence Force

Subsection 7(1) provides that after considering the claim, the Advocate must give a report to the CDF.

The report must include the following:

- The Advocate’s recommendation for appropriate actions in response to the claim.
- The information considered by the Advocate in arriving at the recommendation.
- Any information that the Advocate considers may be relevant to determining whether it is appropriate, necessary or practicable to inform, under subsection 8(4), the eligible recipients for the claim of a decision.
- Any information that the Advocate considers may be relevant to determining whether to inform, under subsection 8(5), any other person of a decision.

The third and fourth requirements above recognise that the Advocate may have information or knowledge relevant to the CDF’s requirement and discretion to notify individuals of decisions and the associated practicalities of doing so.

Subsection 7(2) lists actions that the Advocate may recommend in response to a claim. These actions include:

- Giving monetary or other compensation to one or more eligible recipients for the claim.
- Giving monetary or other compensation to any other person or group.
- A letter of apology or acknowledgement.
- No action.

The ability to provide other forms of compensation recognises that it may not be possible or safe to provide monetary compensation at the present time. Providing sums of money to individuals in Afghanistan, which is currently experiencing a humanitarian crisis, may make the facilitator, the recipient and their community targets for criminal organisations or the Taliban. It may also not be practically possible due to restrictions placed on financial institutions in Afghanistan. Other forms of ‘in kind’ compensation, such as the provision of supplies or infrastructure, may provide a safer alternative and be more beneficial.

The ability to provide monetary or other compensation to any other person or group provides a mechanism to compensate other individuals, beyond those identified as ‘eligible recipients’ in section 5, who may have had some sort of dependency or other relationship with the victim. For example, individuals within a village who relied on a victim to provide a certain service, who now suffer hardship in their absence. Such circumstances could give rise to ‘in kind’ compensation for an entire village, such as the building of infrastructure.

A combination of actions may be recommended. For example, the Advocate could recommend to the CDF that no action be taken presently, but that monetary compensation be paid at a time when possible in the future.

### Section 8 – Action by Chief of the Defence Force

This section provides that after receiving the report from the Advocate, the CDF must consider the recommendation in the report. In doing so, the CDF must take into account the report, the matters referred to in paragraph 6(2)(a) in relation to the claim, and any other information the CDF considers relevant. The broadness of these requirements ensures that the CDF can take into account a wide range of information, noting that the situation in Afghanistan and circumstances of eligible recipients and other individuals are subject to change.

The CDF may also request further information and advice from the Advocate or any other person. This request may concern the individual circumstances of the eligible recipient or any other individual or group of individuals, broader foreign policy matters or international relations issues, or anything else the CDF considers relevant to their decision.

The CDF must then make a decision to either act in accordance with the recommendation or take a different action in response to the claim.

Subsection 8(4) requires that in circumstances where the CDF intends to take a different action to that recommended by the Advocate, the CDF must inform the Minister in writing at least 15 days before making the decision, giving reasons as to why they intend to depart from the Advocate’s recommendation.

Subsection 8(5) requires the CDF to inform each eligible recipient for the claim of the decision, except any such person the CDF reasonably believes it is not appropriate, necessary or practicable to inform. This may be informed by any information the Advocate provides under paragraph 7(1)(c). It may not be appropriate, necessary or practicable to inform, for example, where:

- a class or group of individuals have been identified as eligible recipients and they are affected by a decision (for example, as the beneficiaries of new infrastructure in a village) but it is not practicable or necessary to inform each individually,
- an eligible recipient is unaware of the claim, and the decision is to take no action anyway,
- it becomes apparent, during the course of the Advocate’s inquiry, that the individual is reasonably likely to be a member of a terrorist organisation; is a sanctioned person; or is reasonably likely to act on behalf of, or at the direction of, a sanctioned entity, or

- a single family member or intermediary has been coordinating the provision of information on behalf of a larger family group of eligible recipients, and only that single family member or intermediary is informed.

Subsection 8(6) requires that in circumstances where the CDF does not inform an eligible recipient for the claim of the decision, the CDF must instead inform the Advocate of their decision not to inform, and give the basis for their belief as to why it is not appropriate to do so. Nothing in this subsection; however, requires the CDF to divulge any information, which the CDF reasonably believes, would prejudice the security, defence or international relations of the Commonwealth.

Subsection 8(7) states that the CDF may also inform any other person if the CDF reasonably believes the person's interests are affected by the decision. This may be informed by any information the Advocate provides under subsection 7(1)(d).

This discretion enables the CDF to inform others where the CDF considers that it is appropriate to do so. For example:

- another individual directly affected by a decision who was not identified as an eligible recipient in the original referral,
- representatives from another Government agency such as the Department of Foreign Affairs and Trade which coordinates a humanitarian assistance program in Afghanistan, or
- representatives from a Non-Government Organisation operating in Afghanistan.

Subsection 8(5) is not intended to enable the CDF to inform the Office of the Special Investigator or the Australian Federal Police, as this Scheme operates independently of any Australian criminal justice process.

### Section 9 – Dealing with payments and other compensation

This section provides that on behalf of the Commonwealth, the CDF may make, vary, administer and otherwise give effect to a contract, agreement or arrangement for the making of payments by the Commonwealth to a person for the purposes of implementing a decision under subsection 8(3).

Compensation payments will be funded from the Department's annual appropriation.

## **Part 3 – Afghanistan Inquiry Compensation Advocate**

### Section 10 – Afghanistan Inquiry Compensation Advocate

This section establishes the role of the Advocate.

Subsection 10(1) provides that there is to be an Afghanistan Inquiry Compensation Advocate.

The Advocate is to be appointed, on a part-time basis, by the Minister by written instrument. A note provides that the Advocate may be reappointed, and cross references section 33AA of the *Acts Interpretation Act 1901*.



The office of the Advocate is not a public office for the purposes of the *Remuneration Tribunal Act 1973*.

The Advocate holds office on the terms and conditions in relation to matters not covered by this instrument that are determined by the Minister.

#### Section 11 – Functions and limitations

This section lists the functions of the Advocate. These functions are:

- to consider claims for compensation referred under subsection 5(1) by the CDF
- to recommend to the CDF appropriate actions to take in response to such claims
- to assist the CDF, upon request, to implement decisions under subsection 8(3), where practicable to do so
- to provide advice to the CDF on any matters related to the above functions, and
- to do anything incidental or conducive to the performance of any of the preceding functions.

The Advocate's functions do not include:

- undertaking an inquiry or investigation, or making a finding, as to whether there has been an unlawful killing, assault or property damage, or whether any offence under Australian law has been committed
- directing any person to undertake such an inquiry or investigation, or make such a finding
- soliciting claims for consideration under section 6
- directing APS employees or members of the ADF (other than employees or members made available to the Advocate under section 13)
- entering into any contract, agreement or arrangement on behalf of the Commonwealth.

The functions of the Advocate may be performed within or outside Australia.

#### Section 12 – Powers

This section provides that the Advocate has power to do all things necessary or convenient to be done for or in connection with the performance of the advocate's functions.

The powers of the Advocate may be exercised within or outside Australia.

#### Section 13 – Arrangements relating to staff

This section provides that the staff required to assist the Advocate are to be APS employees or members of the ADF made available for the purposes of assisting the Advocate by the Secretary or the CDF.

#### Section 14 – Consultants

Section 14 provides that the CDF may, on behalf of the Commonwealth, engage consultants to assist in the performance of the Advocate's function in paragraph 11(1)(a).

#### **Part 4 – Miscellaneous**

##### **Section 15 – Collection, use and disclosure of information**

Section 15 provides that information about a person (whether or not it is sensitive information as defined in the *Privacy Act 1988*) may be collected, used or disclosed for the purposes of the performance of a function, or the exercise of a power, under Part 2 of this instrument.

Given the anticipated difficulties that there may be in sourcing records and verifying the identity of individuals, the information relied on in referring and considering a claim, and implementing a decision, may be broad. Strict protocols will be in place to ensure that personal information is protected, given the risk that misuse, loss or unauthorised access or disclosure of personal information could be life threatening. Any collection, use or disclosure of personal information will be reasonable, necessary and proportionate, having regard to the purpose of the Scheme and obligations under the *Privacy Act 1988*. This includes ensuring that any third party with whom information is shared to support implementation overseas (for example, a Non-Government Organisation) is also compliant.

Information held by the CDF and/or the Advocate in respect of an eligible recipient may be disclosable in a future criminal prosecution.

##### **Section 16 – Delegation by Minister**

Subsection 16(1) provides that the Minister may, in writing, delegate the Minister's functions or powers under subsection 10(4) to an officer of the Navy who holds the rank of Rear Admiral or a higher rank, an officer of the Army who holds the rank of Major General or a higher rank, an officer of the Air Force who holds the rank of Air Vice-Marshal or a higher rank, or an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department. A note refers to sections 34AA to 34A of the *Acts Interpretation Act 1901*, which contain provisions relating to delegations.

Delegates would be limited to senior ADF officers and APS employees who possess the necessary authority, expertise and resources to make decisions concerning the terms and conditions of the Advocate effectively. Delegation will enable the Minister to more effectively manage their responsibilities and ensure that decisions relating to the terms and conditions of the Advocate's engagement are dealt with efficiently and effectively.

Subsection 16(2) provides that in performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Minister.

##### **Section 17 – Delegation by Chief of the Defence Force**

Subsection 17(1) provides that the CDF may, in writing, delegate all or any of the CDF's powers or functions under this instrument (except those under this section, or section 18) to an officer of the Navy who holds the rank of Rear Admiral or a higher rank, an officer of the Army who holds the rank of Major General or a higher rank, an officer of the Air Force who

holds the rank of Air Vice-Marshal or a higher rank, or an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department. A note refers to sections 34AA to 34A of the *Acts Interpretation Act 1901*, which contain provisions relating to delegations.

Delegates would be limited to senior ADF officers and APS employees who possess the necessary authority, expertise and resources to make decisions effectively. Delegation will enable the CDF to more effectively manage their responsibilities and ensure that decisions are dealt with efficiently and effectively. The exclusion of this section from delegation ensures that the powers that may be delegated do not include the power to delegate (consistent with section 34AB of the *Acts Interpretation Act 1901*) and the exclusion of section 18 from delegation ensures that CDF retains the review function.

Subsection 17(2) provides that in performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the CDF.

### Section 18 – Review of decisions

This section provides that a person whose interests are affected by a decision under subsection 8(3) that is made by a delegate of the CDF, may request, in writing, a review of the decision.

On receiving the request, the CDF must review the decision personally, and confirm, vary or revoke the decision.

If the CDF intends to vary or revoke a decision that accorded with the Advocate's earlier recommendation made under paragraph 8(3)(a), the CDF must inform the Minister in writing at least 15 days before varying or revoking the decision, giving reasons for the variation or revocation.

Within 60 days after receiving the request, the CDF must give the person written notice of the decision on the review.

There is no process for decisions to be subject to external merits review. Exclusion of merits review was considered with reference to the principles developed by the Administrative Review Council (ARC) as outlined in its publication, *What decisions should be subject to merits review?* Decisions under the Scheme are not appropriate for external merits review on the basis that they concern foreign policy matters and that excluding merits review is consistent with other discretionary compensation schemes.

Decisions made under subsection 8(3) affect Australia's relations with other countries, both with Afghanistan and foreign partners. The Advocate is required under paragraph 6(2)(a) to consult with the Department of Foreign Affairs on Australia's foreign policy interests, which the CDF is required to consider under paragraph 8(1)(b). As discussed in the context of these sections above, Afghanistan's political and economic environment mean that there will be a range of foreign policy interests and other international relations considerations that apply to every decision. This may include any impact that payments or other actions may have on Australia's engagement with the Taliban and Australia's ongoing advocacy on important issues such as human rights. Decisions will incorporate such considerations and so are not appropriate for external merits review.

This approach is consistent with other discretionary schemes, including the Compensation for Detriment caused by Defective Administration (CDDA) scheme, the Territories Stolen Generations Redress Scheme, and the Tactical Payments Scheme in sections 123H and 123J of the *Defence Act 1903*. The Scheme is an executive action, enshrined in regulations to ensure that the enduring commitment to making payment when it becomes possible is clear. This would not be limited by any statutory limitation period and could be reconsidered in light of changing circumstances. Like these other discretionary schemes, it would not be appropriate for external merits

Other review mechanisms regarding the operation of the Scheme will be available. Persons who are affected by decisions under the Scheme may make a complaint to the Department of Defence. If a person is not satisfied with the way the Department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman. The IGADF may also be directed by the Minister or the CDF to undertake an inquiry. The Scheme does not require the establishment of legal liability, and payment under the Scheme does not prevent an individual from pursuing other recourse to enforce a legal right or from lodging a claim under another discretionary scheme such as Act of Grace.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

### ***Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024***

The *Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024* (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 Legislative Instrument**

The purpose of the Regulations is to establish the Afghanistan Inquiry Compensation Scheme (the Scheme). The Scheme provides a process for the Chief of the Defence Force (CDF) to refer certain individuals to the Afghanistan Inquiry Compensation Advocate (the Advocate) for consideration. The Advocate can then make recommendations to the CDF on appropriate actions, which may include the provision of monetary or ‘in kind’ compensation.

#### **Human rights implications**

The Regulations engage the following rights:

- the right to life
- the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment
- the right to an effective remedy and right to a fair hearing

#### ***Right to life***

Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) sets out the right to life, including that no one shall be arbitrarily deprived of their life. Article 1 of the Second Optional Protocol to the ICCPR provides that no one within the jurisdiction of a State Party to the present Protocol shall be executed. Under international human rights law, the right to life must be respected at all times and no derogation is permitted.

The Regulations would positively engage the right to life through enabling appropriate action to be taken in favour of the family member(s) of a victim of unlawful killing by members of the Australian Defence Force (ADF) on operations in Afghanistan during the period 2005 to 2016. The Regulations require relevant information be considered to inform that appropriate action, including the circumstances of the family member and their relationship to the deceased, as well as cultural expectations within Afghanistan of what would be appropriate.

Appropriate action may include the payment of compensation, ‘in kind’ compensation or an apology. Consistent with the recommendations of the Inspector General of the Australian Defence Force Afghanistan Inquiry, appropriate action can be undertaken without the establishment of criminal liability.

### ***Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment***

Article 7 of the ICCPR, and articles 1, 2, 3, 13, 14, 15 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provide the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Infliction of severe pain or suffering by a public official is always prohibited at international law.

The Regulations would positively engage this right through enabling appropriate action to be taken in favour of the victim of an assault by members of the ADF on operations in Afghanistan during the period 2005 to 2016. The Regulations require relevant information be considered to inform that appropriate action, which would include their individual circumstances and any impact that the assault has had on their life.

The Regulations require the decision maker to take into account whether taking a particular action in response to the claim could endanger the person. Monetary compensation may have an adverse effect on individuals and groups, and may make the recipient(s), and their communities, targets for criminal organisations or the Taliban. The Regulations therefore provide scope for alternative ‘in kind’ compensation to be given, such as the provision of supplies or infrastructure where the victim is at risk of torture or cruel, inhuman or degrading treatment or punishment from other criminal organisations or the Taliban if they were to receive money.

### ***Right to an effective remedy and right to a fair hearing***

Article 2(3) of the ICCPR and provide the right to an effective remedy if persons have suffered human rights violations. Article 14(1) of the ICCPR provides that, in the determination of rights and obligations in a suit at law, all persons have a right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

The Regulations would positively engage the right to a fair and effective remedy by enabling an eligible recipient to receive monetary or other compensation, and/or an apology, where they are reasonably likely to be the victim of an assault or property damage, or a family member of a victim of unlawful killing.

The Regulations provide a process for internal review by the CDF where a delegate of the CDF made the decision. Additionally, if the CDF intends to vary or revoke a decision that accorded with the Advocate’s recommendation, the CDF must inform the Minister in writing at least 15 days before varying or revoking the decision, giving reasons for the variation or revocation. The Regulations also set out notice requirements.

The Regulations do not provide a process for decisions to be subject to external merits review, however this limitation is reasonable, necessary and proportionate in the circumstances. Exclusion of merits review was considered with reference to the principles developed by the Administrative Review Council (ARC) as outlined in its publication, *What decisions should be subject to merits review?* Decisions under the Scheme are not appropriate for external merits review on the basis that they concern foreign policy matters

and that excluding merits review is consistent with other discretionary compensation schemes.

Decisions made under the Regulations affect Australia's relations with other countries, both with Afghanistan and foreign partners. Afghanistan's political and economic environment mean that there will be a range of foreign policy interests and other international relations considerations that apply to every decision. This may include any impact that payments or other actions may have on Australia's engagement with the Taliban and Australia's ongoing advocacy on important issues such as human rights. Decisions will incorporate such considerations, and so are not appropriate for external merits review. Exclusion of merits review is therefore a reasonable, necessary and proportionate limitation for achieving the legitimate objective of protecting Australia's foreign policy interests.

This approach is also consistent with other discretionary schemes, including the Compensation for Detriment caused by Defective Administration (CDDA) scheme, the Territories Stolen Generations Redress Scheme, and the Tactical Payments Scheme in sections 123H and 123J of the *Defence Act 1903*. The Scheme is an executive action, enshrined in regulations to ensure that the enduring commitment to making payment when it becomes possible is clear. This would not be limited by any statutory limitation period and could be reconsidered in light of changing circumstances similar to these discretionary schemes, it would not be appropriate for external merits review.

Other review mechanisms regarding the operation of the Scheme will be available. Persons who are affected by decisions under the Scheme may make a complaint to the Department of Defence. If a person is not satisfied with the way the Department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman. The Inspector General of Australian Defence Force may also be directed by the Minister or the CDF to undertake an inquiry.

The Scheme does not require the establishment of legal liability, and payment under the Scheme does not prevent an individual from pursuing other recourse to enforce any legal right they may have in respect of the unlawful killing, assault or property damage. The person is also not prevented from lodging a claim under another discretionary scheme such as Act of Grace. The Scheme is entirely separate to any other financial, legal or regulatory mechanism that the person may have access to according to their particular circumstances, which will vary.

## **Conclusion**

The Regulations are compatible with human rights because they promote human rights, including civil, political, social and economic rights. To the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.