



# Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024

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I, the Honourable Sam Mostyn AC, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 18 July 2024

Sam Mostyn  
Governor-General

By Her Excellency's Command

Richard Marles  
Minister for Defence

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## Part 1—Preliminary

### 1 Name

This instrument is the *Defence (Afghanistan Inquiry Compensation Scheme) Regulations 2024*.

### 2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information        |  |              |
|---------------------------------|--|--------------|
| Column 1                        | Column 2                                     | Column 3     |
| Provisions                      | Commencement                                 | Date/Details |
| 1. The whole of this instrument | The day after this instrument is registered. | 19 July 2024 |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

### 3 Authority

This instrument is made under the *Defence Act 1903*, for the purposes of paragraph 63(1)(f) of that Act.

### 4 Definitions

In this instrument:

**Department of Foreign Affairs and Trade** means the Department administered by the Foreign Affairs Minister.

**eligible recipient** for a claim: see section 5.

**sanctioned**: a person or entity is **sanctioned** if the person or entity is:

- a designated person or entity, within the meaning of the *Autonomous Sanctions Regulations 2011*; or
- a proscribed person or entity, within the meaning of Part 4 of the *Charter of the United Nations Act 1945*.

**terrorist organisation** has the meaning given by subsection 102.1(1) of the *Criminal Code*.

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## Part 2—Afghanistan Inquiry Compensation Scheme

### 5 Claims for compensation

- (1) The Chief of the Defence Force may refer a claim to the Afghanistan Inquiry Compensation Advocate, if the Chief of the Defence Force is satisfied that:
  - (a) the claim relates to one or more persons, or persons within a class, (the *eligible recipients* for the claim), each of whom the Chief of the Defence Force considers:
    - (i) is reasonably likely to be the victim of an assault or property damage or a family member of a victim of unlawful killing; and
    - (ii) is not reasonably likely to be a member of a terrorist organisation; and
    - (iii) is not a sanctioned person and is not reasonably likely to act on behalf of, or at the direction of, a sanctioned entity; and
  - (b) the assault, property damage or unlawful killing was found to be substantiated by credible information by the Inspector-General of the Australian Defence Force Afghanistan Inquiry.
- (2) The referral must include:
  - (a) the name of each eligible recipient for the claim; and
  - (b) the information taken into account by the Chief of the Defence Force in deciding to refer the claim; and
  - (c) any other information that the Chief of the Defence Force considers may be relevant to the advocate's consideration of the claim under section 6.

### 6 Consideration of claims

- (1) Upon receiving the referral, the advocate must consider the claim.
- (2) The advocate:
  - (a) must consult the Department of Foreign Affairs and Trade regarding the implications of any of the following on options for actions in response to the claim:
    - (i) the *Autonomous Sanctions Act 2011*;
    - (ii) the *Charter of the United Nations Act 1945*;
    - (iii) Australia's foreign policy interests; and
  - (b) may:
    - (i) engage with the eligible recipients for the claim, or a nominated representative of the eligible recipients; and
    - (ii) consult an expert on any subject matter the advocate considers relevant.
- (3) The advocate must then determine what actions to recommend in response to the claim, taking into account the following:
  - (a) any information received as part of the consultation and engagement under subsection (2);
  - (b) cultural expectations, within Afghanistan, of what would be an appropriate action in response to the claim;

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- (c) the probability that taking a particular action in response to the claim may make funds available to, or otherwise benefit:
    - (i) a sanctioned person or entity; or
    - (ii) a terrorist organisation; or
    - (iii) an organisation for which the provision of material support or resources constitutes an offence under section 390.4 of the *Criminal Code* (supporting a criminal organisation);
  - (d) the following factors in relation to each eligible recipient for the claim, to the extent that the advocate is aware of relevant information:
    - (i) the living standards, work status and other circumstances of the eligible recipient;
    - (ii) if the claim relates to unlawful killing—the eligible recipient’s relationship to, and level of dependency on, the deceased;
    - (iii) whether taking a particular action in response to the claim could endanger the eligible recipient;
  - (e) any other cultural, gender, societal, economic or geopolitical factors the advocate considers relevant.

## **7 Report to Chief of the Defence Force**

- (1) After considering the claim, the advocate must give a report to the Chief of the Defence Force that includes:
  - (a) the advocate’s recommendation for appropriate actions in response to the claim; and
  - (b) the information considered by the advocate in arriving at the recommendation; and
  - (c) any information that the advocate considers may be relevant to determining whether it is appropriate, necessary or practicable to inform, under subsection 8(5), the eligible recipients for the claim of a decision; and
  - (d) any information that the advocate considers may be relevant to determining whether to inform, under subsection 8(7), any other person of a decision.
- (2) Actions the advocate may recommend in response to the claim include the following:
  - (a) giving monetary or other compensation to one or more eligible recipients for the claim;
  - (b) giving monetary or other compensation to any other person or group;
  - (c) a letter of apology or acknowledgement;
  - (d) no action.

## **8 Action by Chief of the Defence Force**

- (1) After receiving the report, the Chief of the Defence Force must consider the recommendation in the report, taking into account:
  - (a) the report; and
  - (b) the matters referred to in paragraph 6(2)(a) in relation to the claim; and
  - (c) any other information the Chief of the Defence Force considers relevant.

## Section 9

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- (2) The Chief of the Defence Force may also request further information and advice from the advocate or any other person.
- (3) The Chief of the Defence Force must then make a decision to either:
  - (a) act in accordance with the recommendation; or
  - (b) take a different action in response to the claim.
- (4) If the Chief of the Defence Force intends to take a different action in response to the claim, the Chief of the Defence Force must inform the Minister in writing at least 15 days before making the decision, giving reasons for the intended decision.
- (5) After making a decision under subsection (3), the Chief of the Defence Force must inform each eligible recipient for the claim of the decision, except any such person the Chief of the Defence Force reasonably believes it is not appropriate, necessary or practicable to inform.
- (6) If the Chief of the Defence Force does not inform an eligible recipient for the claim, the Chief of the Defence Force must instead:
  - (a) inform the advocate that the Chief of the Defence Force reasonably believes it is not appropriate, necessary or practicable to inform the eligible recipient; and
  - (b) give the basis for the belief, unless the Chief of the Defence Force reasonably believes doing so would prejudice the security, defence or international relations of the Commonwealth.
- (7) The Chief of the Defence Force may also inform any other person if the Chief of the Defence Force reasonably believes the person's interests are affected by the decision.

### **9 Dealing with payments and other compensation**

On behalf of the Commonwealth, the Chief of the Defence Force 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).



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## Part 3—Afghanistan Inquiry Compensation Advocate

### 10 Afghanistan Inquiry Compensation Advocate

- (1) There is to be an Afghanistan Inquiry Compensation Advocate.
- (2) The advocate is to be appointed, on a part-time basis, by the Minister by written instrument.

Note: The advocate may be reappointed: see section 33AA of the *Acts Interpretation Act 1901*.

- (3) The office of the advocate is not a public office for the purposes of the *Remuneration Tribunal Act 1973*.
- (4) The advocate holds office on the terms and conditions in relation to matters not covered by this instrument that are determined by the Minister.

### 11 Functions and limitations

- (1) The advocate has the following functions:
  - (a) to consider claims for compensation referred under subsection 5(1) by the Chief of the Defence Force;
  - (b) to recommend to the Chief of the Defence Force appropriate actions to take in response to such claims;
  - (c) to assist the Chief of the Defence Force, upon request, to implement decisions under subsection 8(3), where practicable to do so;
  - (d) to provide advice to the Chief of the Defence Force on any matters related to the functions in paragraphs (a) to (c) of this subsection;
  - (e) to do anything incidental or conducive to the performance of any of the preceding functions.
- (2) The advocate's functions do not include:
  - (a) undertaking an inquiry or investigation, or making a finding, as to:
    - (i) whether there has been an unlawful killing, assault or property damage; or
    - (ii) whether any offence under Australian law has been committed; or
  - (b) directing any person to undertake such an inquiry or investigation, or make such a finding; or
  - (c) soliciting claims for consideration under section 6; or
  - (d) directing APS employees or members of the Defence Force (other than employees or members made available to the advocate under section 13); or
  - (e) entering into any contract, agreement or arrangement on behalf of the Commonwealth.
- (3) The functions of the advocate may be performed within or outside Australia.

Section 12

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**12 Powers**

- (1) 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.
- (2) The powers of the advocate may be exercised within or outside Australia.

**13 Arrangements relating to staff**

The staff required to assist the advocate are to be APS employees or members of the Defence Force made available for the purpose by the Secretary or the Chief of the Defence Force.

**14 Consultants**

The Chief of the Defence Force may, on behalf of the Commonwealth, engage consultants to assist in the performance of the advocate's function in paragraph 11(1)(a) (considering claims for compensation).

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## Part 4—Miscellaneous

### 15 Collection, use and disclosure of information

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.

### 16 Delegation by Minister

- (1) The Minister may, in writing, delegate the Minister's functions or powers under subsection 10(4) to the following:
  - (a) an officer of the Navy who holds the rank of Rear Admiral or a higher rank;
  - (b) an officer of the Army who holds the rank of Major General or a higher rank;
  - (c) an officer of the Air Force who holds the rank of Air Vice-Marshal or a higher rank;
  - (d) an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department.

Note: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

- (2) In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Minister.

### 17 Delegation by Chief of the Defence Force

- (1) The Chief of the Defence Force may, in writing, delegate all or any of the Chief of the Defence Force's powers or functions under this instrument (except those under this section, or section 18) to the following:
  - (a) an officer of the Navy who holds the rank of Rear Admiral or a higher rank;
  - (b) an officer of the Army who holds the rank of Major General or a higher rank;
  - (c) an officer of the Air Force who holds the rank of Air Vice-Marshal or a higher rank;
  - (d) an SES employee who holds an SES Band 2 position, or an equivalent or higher position, in the Department.

Note: Sections 34AA to 34A of the *Acts Interpretation Act 1901* contain provisions relating to delegations.

- (2) In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Chief of the Defence Force.

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**18 Review of decisions**

- (1) A person whose interests are affected by a decision under subsection 8(3) that is made by a delegate of the Chief of the Defence Force may request, in writing, a review of the decision.
- (2) On receiving the request, the Chief of the Defence Force must:
  - (a) review the decision personally; and
  - (b) confirm, vary or revoke the decision.
- (3) If the Chief of the Defence Force intends to vary or revoke a decision that accorded with the advocate's recommendation as mentioned in paragraph 8(3)(a), the Chief of the Defence Force must inform the Minister in writing at least 15 days before varying or revoking the decision, giving reasons for the variation or revocation.
- (4) Within 60 days after receiving the request, the Chief of the Defence Force must give the person written notice of the decision on the review.