

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2008 No. 68**

Issued by the authority of the Minister for Defence Science and Personnel

*Defence Act 1903*

*Defence Force Amendment Regulations 2008 (No. 1)*

Subsection 124(1) of the *Defence Act 1903* (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 required, 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.

In October 2003, the Senate referred the matter of the effectiveness of Australia's military justice system to the Senate Foreign Affairs, Defence and Trade References Committee for inquiry and report. The Committee tabled its report on 16 June 2005 (the Senate report). In October 2005, in response to the Senate report, the then Government announced amendments to the Australian Defence Force (ADF) Redress of Grievance (ROG) system and expressed its agreement with, and sought the implementation of, the accepted recommendations of the *Review of the ADF Redress of Grievance System 2004* (ROG Review), a joint report by the Commonwealth Ombudsman and Department of Defence. These amendments implement outstanding recommendations of the Senate report and the ROG review in respect of the ROG system. Many of the agreed recommendations in respect of other initiatives have been completed.

Part XV of the *Defence Force Regulations 1952* (the Principal Regulations) provides that a member who has a grievance concerning any matter relating to his or her service may make a complaint to his or her commanding officer. The purpose of the ROG process is to ensure that decisions affecting members' rights, working conditions and careers are made fairly, impartially and according to law.

The Regulations amend the Principal Regulations to improve the complaints and ROG management system in response to the Senate report. The Regulations aim to address the shortfalls in the existing ROG system by streamlining it and by retaining internal and external review and oversight agencies.

The Senate report discussed the ROG process and considered, via various submissions, criticism of certain aspects of the system. These were primarily concerned with delays in handling complaints and overall procedural fairness.

The overarching principle guiding the ROG system remains that complaints will be resolved at the lowest effective level and in the quickest possible timeframe. The Regulations reflect this principle, in addition to re-designing and updating Part XV.

Some of the more significant initiatives in the Regulations include imposing time limits within which a member must make a complaint but allowing a commanding

officer to accept a complaint that has been submitted after those time limits have expired, where there are exceptional circumstances. Furthermore in addressing actual and perceived conflict of interest situations and independence of decision makers, the Regulations provide for the manner in which a commanding officer may deal with a complaint in certain circumstances.

Details of the Regulations are outlined in the Attachment.

The Regulations are a legislative instrument for the purpose of the *Legislative Instruments Act 2003*.

The Regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

There has been no consultation in the making of this instrument as it relates to the management of and the service of members of the Australian Defence Force.

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### **Details of the Defence Force Amendment Regulations 2008 (No. 1)**

**Regulation 1** identifies these Regulations as the *Defence Force Amendment Regulations 2008 (No. 1)*.

**Regulation 2** provides that the Regulations commence on the day after they are registered.

**Regulation 3** provides that the amendments to the *Defence Force Regulations 1952* (the Principal Regulations) are contained in Schedule 1.

#### **Schedule 1 Amendments**

**Item [1]** substitutes Part XV, including the heading which will refer to 'Part 15'. Replacing the heading reflects current drafting practice, to phase out the use of roman numerals in legislation generally. New Part 15 includes new regulations 74 to 93. Previous regulations 83 and 84 have been renumbered as regulations 94 and 95.

Item [1] (regulation 74) contains definitions for the purposes of the Part. New definitions to give effect to the redesign of Part 15 include (among others) –

**'service'** to mean service in both the Permanent and Reserve forces (the latter, on continuous full time service or on duty).

**'external process'**, includes proceedings before a civilian court or tribunal, an investigation by the Commonwealth Ombudsman, Human Rights and Equal Opportunity Commission or the Privacy Commissioner.

**'termination decision'** means a decision under Part VIIIA of the *Defence Act 1903* (which relates to testing for prohibited substances) or the *Defence (Personnel) Regulations 2002* to terminate a member's service.

Regulation 75 outlines who may make a complaint and the circumstances in which a member may not make a complaint. Subregulation (1) provides that a member may make a complaint if he or she considers that a decision, act or omission in relation to the member's service is adverse or detrimental to him or her. It also identifies the need for the complaint to be able to be redressed by the Department of Defence, the Australian Defence Force or the Defence Materiel Organisation. Previously, the ability of a member to make a complaint was restricted to a 'grievance'. The new complaint making regime clarifies the scope of redress available to a member.

Subregulation 75(2) outlines the circumstances in respect of which a member may not make a complaint. These include –

- a decision, act or omission under Part 15;
- an action that initiates an administrative process;
- the issue of a termination notice under Chapter 9 of the *Defence (Personnel) Regulations 2002* or Part VIIIA of the *Defence Act 1903*;

- decision in respect of a performance assessment process;
- a decision, judgement or order made by a civilian court, service tribunal or the Defence Force Discipline Appeals Tribunal;
- a liability under certain provisions of the *Financial Management and Accountability Act 1997*.

These clarify what is contained in the Principal Regulations to include, together with a decision under Part 15, an action that initiates an administrative process. In respect of the latter, these involve certain actions prior to making an actual decision (for example, the issuing of a notice to show cause or a termination notice). These are not considered to be part of the decision making process and therefore are not be able to be the subject of a complaint. A new exclusion is in respect of decisions relating to performance assessments, which often require a subjective assessment and are subject to a separate representation process to resolve disputes. These are not able to be the subject of a complaint, however a member may still make a complaint in respect of the performance assessment process.

Subregulations 75(3) and (4) prescribe the time limits within which a member must make a complaint. A number of submissions to the inquiry mentioned above and criticism of the ROG process generally centred on the delays in the handling of complaints. In order to standardize the process, these provisions impose time limits for making complaints. For a complaint in respect of a termination decision, a member has 14 days within which to make a complaint (from the day he or she was notified of the decision or when he or she could reasonably have known about the decision). In any other case, a member has 6 months within which to make a complaint.

Subregulation 75(5) requires that a complaint must be in writing and submitted to the member's commanding officer.

Regulation 76 allows a commanding officer to accept a complaint that has been submitted after the time limits mentioned above have expired, where there are exceptional circumstances. Exceptional circumstances may include a member being absent on operational service or for medical reasons, however each case must be considered on its merits. Where the commanding officer does not consider that the circumstances warrant an extension of time, he or she is required to refer the complaint to a service chief who must determine whether exceptional circumstances exist. However, an extension of time based on exceptional circumstances does not apply in respect of a termination decision.

Regulation 77 provides for the inquiry into a complaint. Subregulation 77(1) provides that if a complaint is made to a commanding officer or is referred to a service chief or the Chief of the Defence Force (under the relevant provisions, discussed below), the complaint must be inquired into as soon as reasonably practicable.

One of the most commonly cited concerns in the ROG process was the actual and perceived conflict of interest and independence of investigators and decision makers. Subregulations 77(2) and (3) address these concerns and reflect that where a member

has made a complaint to his or her commanding officer and the commanding officer has been a party to the decision or was the decision maker, the complaint must be referred to a service chief. However, where the complaint contains information that was not considered by the commanding officer in making the decision, he or she may proceed to inquire into the complaint.

Regulation 78 provides for review of delayed inquiries. As mentioned above, the Senate report commented on the delays in the ROG handling process. To better promote the efficient handling of complaints, this regulation provides that where a commanding officer has had a complaint for more than 90 days and he or she has not made a decision in respect of that complaint, the commanding officer must notify the member's service chief who must in turn decide whether the complaint should be formally referred to him or her (discussed below). If the service chief decides that the complaint should be referred to him or her, it is deemed to be a referral under regulation 82 and the requirements of that provision (and regulation 77, requiring the service chief to actually inquire into the complaint) apply. In these circumstances, a commanding officer is discharged from his or her obligations under Part 15 to make a decision on the complaint.

Regulation 79 provides for the suspension of the consideration of complaints in certain circumstances. Previously, there was no ability to suspend an investigation to allow external processes (as defined above) or other processes to be completed without potentially compromising the consideration of the complaint. Regulation 79 enables a commanding officer to suspend the complaint resolution process until the external process, disciplinary action or alternative dispute resolution has been completed.

Regulation 80 allows the commanding officer to resume consideration of the complaint where he or she becomes aware that the external process, disciplinary action or alternative dispute resolution process has been completed.

Regulation 81 requires a commanding officer to make a decision in respect of a complaint as soon as practicable after concluding his or her inquiry. The commanding officer must also notify the member as soon as reasonably practicable after the decision is made.

Regulation 82 allows a member to refer a complaint to the relevant service chief if he or she is not satisfied with the decision of the commanding officer in respect of the complaint. Previously, a complaint could be referred to the Vice Chief of the Defence Force (VCDF). However, it was considered more relevant for a service chief to consider, inquire into and decide upon a referral. In respect of a termination decision, the member is required to refer the complaint to the relevant service chief within 14 days after the member is notified of the commanding officer's decision. In any other case, the member has 28 days to refer the complaint. This allows for the expeditious consideration of a complaint.

Regulation 83 provides for situations where exceptional circumstances exist in respect of a referred complaint. If, after the 28 days specified in subregulation 82(3) has passed, the service chief is satisfied that exceptional circumstances exist, he or she may accept a complaint that has been referred after that time. As discussed above, 'exceptional circumstances' will depend on the merits of each case, but might include medical reasons or operational requirements. Similar to regulation 76 above, an extension of time based on exceptional circumstances does not apply in respect of a termination decision.

Regulation 84 provides for the suspension of the consideration of referred complaints. Where an external process (as defined in regulation 74), disciplinary action or an alternative dispute resolution process is underway and a service chief is satisfied that those processes should be completed before a decision on the complaint resolution process is made, he or she may suspend that process.

Regulation 85 allows for the resumption of the consideration of the complaint resolution process when a service chief becomes aware that the processes under regulation 84 have been completed. He or she must resume consideration of the complaint as soon as is reasonably practicable.

Regulation 86 requires a service chief to make a decision on a referred complaint as soon as practicable after it has been referred to him or her, and to notify the member as soon as is reasonably practicable of the decision.

Regulation 87 allows for the further referral of a complaint to the Chief of the Defence Force (CDF). A referral to CDF is available to an officer, which includes a warrant officer, chief petty officer and flight sergeant. This reflects corresponding rank structures contained in the Principal Regulations. Where the referral relates to a decision to terminate the officer's service, he or she must refer the complaint within 14 days after he or she has received the decision by the service chief under regulation 86. Any other complaint must be referred to CDF within 28 days.

Regulation 88 allows CDF to accept a complaint referred to him or her more than 28 days from the day the officer was notified of the decision of the service chief, if CDF considers that exceptional circumstances exist. As mentioned above, 'exceptional circumstances' may include operational imperatives or medical reasons. An extension of time based on exceptional circumstances does not apply in respect of a termination decision.

Regulation 89 mirrors regulation 84 discussed above in respect of the suspension of the consideration of a complaint. Where an external process (as defined in regulation 74), disciplinary action or an alternative dispute resolution process is underway and CDF is satisfied that those processes should be completed before a decision on the complaint resolution process is made, he or she may suspend that process.

Regulation 90 also mirror regulation 85, by allowing for the resumption of the consideration of the complaint resolution process when CDF becomes aware that the

processes under regulation 89 has been completed. He or she must resume consideration of the complaint as soon as is reasonably practicable.

Regulation 91 requires CDF to make a decision on a complaint as soon as practicable after the complaint has been referred to him or her. CDF must also notify the officer of his or her decision as soon as reasonably practicable.

Regulation 92 is in the same terms as former regulation 80 in Part XV of the Principal Regulations, to make it an offence to prevent or dissuade a member from making or referring a complaint, redressing a grievance or taking any other action under Part 15.

Regulation 93 is in the similar terms to former regulation 81 of the Principal Regulations pertaining to delegations. It allows CDF or a service chief to delegate all or any of his or her powers under Part 15 to an officer not below the rank of Commodore in the Navy, Brigadier in the Army or Air Commodore in the Air Force. To reflect the removal of the VCDF from subregulation 76(2) of the Principal Regulations (in favour of a service chief, as discussed in the context of proposed subregulation 82), the reference to VCDF has been substituted with a reference to the relevant service chief. The note to regulation 93 is in the same terms as former subregulations 81(2) and (3). The inclusion of a note reflects current drafting practice; its substantive content has not been affected.

**Item [2]** of Schedule 1 rennumbers regulations 83 and 84 of the Principal Regulations as regulations 94 and 95. This is required because of the restructure of Part 15.