

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence

Defence Act 1903

Inspector-General of the Australian Defence Force Amendment Regulations 2018

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

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

Specifically, paragraphs 124(1)(h), 124 (2AA) and (2AB) of the Act provide for the making of regulations addressing the procedures, powers and reporting obligations of the Inspector-General of the Australian Defence Force (Inspector-General ADF) in respect of the performance of the Inspector-General ADF functions, including matters connected with inquiries, investigations and information gathering.

The purpose of the *Inspector-General of the Australian Defence Force Amendment Regulations 2018* (the Regulations) is to facilitate the conduct of inquiries under the *Inspector-General of the Australian Defence Force Regulation 2016*. It achieves this by outlining the independence, powers and functions of the Inspector-General ADF in circumstances where it is identified that it is preferable that a judicial officer is appointed as an Assistant Inspector-General ADF to inquire into a matter, having regard to the sensitivity, gravity and complexity of the issues to be determined.

The proposed Regulations provide the Inspector-General ADF:

- greater information-sharing capacity so that inquiry records can be made available to a wider class of persons including other statutory officer holders;
- greater flexibility to appoint new Assistants Inspector-General ADF to continue an inquiry in circumstances where the original Assistant Inspector-General is unavailable;
- clarification of the power of the Chief of Defence Force to delegate in connection with the receipt and publication of inquiry reports; and
- a new Division into Part 4 of the *Inspector-General of the Australian Defence Force Regulation 2016* to provide for the powers and functions of a judicial officer who is appointed as an Assistant Inspector-General ADF when carrying out an inquiry under the Regulations.

The proposed Regulations apply to inquiries already commenced as at the date of commencement.

The Act specifies no condition that must be met before the power to make the proposed Regulations may be exercised.

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

Commencement

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

Regulatory Impact Statement

The Office of Best Practice Regulation advised that no regulatory impact statement was required (OBPR ID 24075.).

Consultation

The Department of the Prime Minister and Cabinet and the Attorney-General's Department have been consulted.

Authority: Subsection 124(1) of the *Defence Act 1903*

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 2018

The *Inspector-General of the Australian Defence Force Amendment Regulations 2018* (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 Regulation

The purpose of the *Inspector-General of the Australian Defence Force Amendment Regulations 2018* (the Regulations) is to facilitate the conduct of inquiries under the *Inspector-General of the Australian Defence Force Regulation 2016*. It achieves this by outlining the independence, powers and functions of the Inspector-General of the Australian Defence Force (IGADF) in circumstances where it is identified that it is preferable that a judicial officer is appointed as an Assistant Inspector-General ADF to inquire into a matter, having regard to the sensitivity, gravity and complexity of the issues to be determined.

The proposed Regulations provide the IGADF:

- greater information-sharing capacity so that inquiry records can be made available to a wider class of persons including other statutory officer holders;
- greater flexibility to appoint new Assistants IGADF to continue an inquiry in circumstances where the original Assistant Inspector-General is unavailable;
- clarification of the power of the Chief of Defence Force (CDF) to delegate in connection with the receipt and publication of inquiry reports; and
- a new Division into Part 4 of the *Inspector-General of the Australian Defence Force Regulation 2016* to provide for the powers and functions of a judicial officer who is appointed as an Assistant IGADF when carrying out an inquiry under the Regulations.

The proposed Regulations apply to inquiries already commenced as at the date of commencement.

Human Rights Implications

The Regulation engages the following rights:

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

Right to Privacy

The Bill engages the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which provides:

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

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.

Greater information-sharing power under subsection 27(5)

An essential feature of an effective armed Service is the need for discipline which is, and is seen to be, rigorously enforced. Failures in the military justice system, when they occur, not only soon become publicly known, but if not properly dealt with, can quickly result in damage to reputation, morale and ultimately, operational effectiveness. The IGADF was established under the *Defence Act 1903* to provide the CDF with scrutiny of the military justice system, independent of the ordinary chain of command.

Currently, under subsection 27(5) of the Regulations, the IGADF can only inform the following persons of the findings or provide a copy of the report in relation to the inquiry if he or she considers it appropriate to do so: the Minister, the Chief of the Defence Force, a service chief, an employee of the Department of Defence, a member of the Defence Force, or a person who is affected by a submission or the inquiry (whether or not the person made a submission).

The amending Regulations allow the IGADF to inform *any other person* of the findings in relation to the inquiry or give a report about the inquiry if he or she considers it appropriate to do so. This gives IGADF greater information-sharing capacity and flexibility so that inquiry records can be made available to a wider class of persons, including other statutory office holders or authorities where IGADF refers matters to under paragraph 110C(3)(b) of the *Defence Act 1903*, provided that such release is consistent with the IGADF’s statutory function. These statutory offices holders or authorities may not be affected by a submission to the inquiry or the inquiry itself, but they have the need to know as the inquiry may affect matters that fall within their areas of responsibilities to be dealt with. For example, if a military justice complaint made by a Defence Force member relates to the intelligence function of the Australian Signals Directorate, the IGADF may need to provide information to the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* for his or her consideration.

This change engages the right to privacy, as IGADF may provide information to relevant authorities who are not directly affected by the inquiry, but have a need to know given their

functions. Therefore, the Regulations do not have the effect of intruding into privacy on an unwarranted or unreasonable basis. The flexibility given to IGADF would not be arbitrary, as it would be limited to what he or she considers appropriate and relates to his or her function as the IGADF under the *Defence Act 1903*. In addition, the IGADF has the discretion not to provide information to the recipient that he considers inappropriate for any of the following reasons:

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

This has the effect of ensuring that only relevant and appropriate information is disclosed to the recipient under the provision.

CDF delegations in relation to public release of reports

Under current section 28 of the Regulations, CDF makes the decision on whether to publicly release all or part of the report for inquiries directed by the CDF or death related inquiries. Section 34A of the amending Regulations allow CDF to delegate this power to an ADF officer holding a rank not lower than the rank of Captain (Navy), Colonel (Army) or Group Captain (Air Force). In practice, the decision to release the report would be by a senior ADF member, at or above the rank of Captain, Colonel or Group Captain, who has the relevant knowledge and expertise in the subject matter of the particular inquiry report. This provides necessary flexibility and efficiency in the decision-making process.

This change may engage the right to privacy, as the number of potential decision makers increases, however, this measure does not have the effect of intruding into privacy on an unwarranted or unreasonable basis, given the level of delegation is limited to senior ADF officers at the rank of Captain (Navy), Colonel (Army) and Group Captain (Air Force) who have served many years in the ADF with knowledge in the subject matter of the report. When exercising discretion on whether to release a report, the CDF or his delegates are expected to act reasonably, including taking into account all relevant considerations, such as privacy, rights of individuals, public interest, and national security.

Right to a fair trial

Article 14(1) 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. The right to a fair hearing includes a right to an independent, impartial and competent court of tribunal. This relates to the separation of powers between the judicial and the executive and the requirement that judges do not have, and are not seen to have, any conflicts of interest.

The main purpose of the Regulations is to facilitate the conduct of inquiries by outlining the independence, powers and functions of the IGADF in circumstances where it is identified that it is preferable that a judicial officer is appointed as an Assistant IGADF to inquire into a matter, having regard to the sensitivity, gravity and complexity of the issues to be determined. The amending Regulations clarifies the role of an Assistant IGADF who is also a

judicial officer, making it absolutely clear that undertaking this role could not be seen to interfere with their judicial role.

The Regulations have the effect of enhancing the right to a fair trial, as it emphasises the independence, powers and functions of judicial officers performing duties as an Assistant IGADF under the Regulations.

Conclusion

The Regulations are compatible with human rights.

ATTACHMENT A – PROVISIONS IN INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE AMENDMENT REGULATIONS 2018

Section 1 - Name of Regulation

This section provides that the title of the Regulation is the *Inspector-General Australian Defence Force Amendment Regulations 2018*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after registration.

Section 3 – Authority

This section provides that the *Inspector-General Australian Defence Force Amendment Regulations 2018* is made under the *Defence Act 1903*.

Section 4 – Schedules

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

SCHEDULE 1 – AMENDMENTS

Item 1

This item amends section 4 by inserting the definition of ‘judicial officer’ to mean a judge, magistrate or justice of a federal court or a court of a State or Territory.

Item 2

This item amends subsection 10(1) by inserting ‘ who is not a judicial officer’ after ‘Assistant IGADF’. An Assistant IGADF who is not a judicial officer is covered by Division 2 of Part 3. An Assistant IGADF who is also a judicial officer is covered by Division 4A of Part 4.

Item 3

This item amends section 10 by inserting a new subsection 10(1A) to provide that an Assistant IGADF who is a judicial officer must conduct inquiries into matters as directed by the Inspector-General ADF, but must not help the Inspector-General ADF carry out any other functions.

A note to the item provides that for inquiries conducted by Assistant IGADF who are judicial officers, see Division 4A of Part 4.

Item 4

This item replaces section 15 with new sections 15, 15A and 15B in relation to change of inquiry personnel.

Section 15 applies to inquiry officers. Subsections 15(1) and 15(2) provide that if an inquiry officer is directed to inquire into a matter and he or she has not given the IGADF a report under section 25 in relation to the inquiry, the IGADF may appoint another person as an inquiry officer to inquire into the matter, or direct an Assistant IGADF to inquire into the matter, or personally inquire into the matter. Subsection 15(3) provides that if the original inquiry officer has given the IGADF a report under section 25 in relation to the inquiry, the IGADF may appoint another person as an inquiry officer to inquire further into the matter, or direct an Assistant IGADF to inquire further into the matter, or personally inquire further into the matter. Subsection 15(4) provides that in inquiring into the matter, the new inquiry officer, Assistant IGADF or IGADF may have regard to any record of proceedings made by an inquiry officer or an Assistant IGADF who previously took part in the inquiry, and any evidence collected by an inquiry assistant or Assistant IGADF who previously took part in the inquiry.

Section 15A applies to an Assistant IGADF who is also a judicial officer. Subsections 15A(1) and 15A(2) provide that if an Assistant IGADF who is a judicial officer is directed to inquire into a matter and becomes unavailable before giving a report to the IGADF under section 28F, the IGADF may appoint another person as an inquiry officer to inquire into the matter, direct another Assistant IGADF to inquire into the matter, or personally inquire into the matter. Subsection 15A(3) provides that in inquiring into the matter, the inquiry officer, new Assistant IGADF or IGADF may have regard to any record of proceedings made by an inquiry officer or an Assistant IGADF who previously took part in the inquiry, and any evidence collected by an inquiry assistant or Assistant IGADF who previously took part in the inquiry.

Section 15B applies to an Assistant IGADF who is not a judicial officer. Subsections 15B(1) and 15B(2) provide that if an Assistant IGADF (the original Assistant IGADF) who is directed to inquire a matter has not given the IGADF a report under section 25 in relation to the inquiry, the IGADF may appoint another person as an inquiry officer to inquire into the matter, or direct another Assistant IGADF to inquire into the matter, or personally inquire into the matter. Subsection 15B(3) provides that if the original Assistant IGADF has given the IGADF a report under section 25, the IGADF may appoint another person as an inquiry officer to inquire further into the matter, direct another Assistant IGADF to inquire further into the matter, or personally inquire further into the matter. Subsection 15B(4) provides that in inquiring, or further inquiring into the matter, the inquiry officer, new Assistant IGADF or IGADF may have regard to any record of proceedings made by an inquiry officer or an Assistant IGADF who previously took part in the inquiry, and any evidence collected by an inquiry assistant or Assistant IGADF who previously took part in the inquiry.

Item 5

This item repeals the note to subsection 25(2). The note provided that an inquiry officer or an Assistant IGADF may only make recommendations if authorised to do so by the IGADF.

Item 6

This item repeals the note to subsection 26(1). The note directed the reader to section 15 for what happens if an inquiry officer or Assistant IGADF becomes unavailable. Section 15 has been replaced by new sections 15, 15A and 15B.

Item 7

Item 7 amends subparagraph 27(1)(a)(i) by inserting ‘or 28F’ after ‘section 25’.

Item 8

Item 8 omits the word ‘or’ from subparagraph 27(5)(a)(vi).

Item 9

Item 9 adds subparagraph 27(5)(a)(vii) to paragraph 27(5)(a) to include ‘any other person’. Previously, for IGADF initiated inquiries, the IGADF can only inform the following persons of the findings or provide a copy of the report in relation to the inquiry if he or she considers it appropriate to do so: the Minister, the Chief of the Defence Force, a service chief, an employee of the Department of Defence, a member of the Defence Force, or a person who is affected by a submission or the inquiry (whether or not the person made a submission). Item 9 allows IGADF to inform *any other person* of the findings in relation to the inquiry or give a report about the inquiry if he or she considers it appropriate to do so.

Item 9 gives IGADF greater information-sharing capacity so that inquiry records can be made available to a wider class of persons including other statutory office holders where IGADF refers matters to under paragraph 110C(3)(b) of the *Defence Act 1903*, provided that such release is consistent with the IGADF’s statutory function. These statutory offices holders or authorities may not be affected by a submission to the inquiry or the inquiry itself, but they have the need to know as the inquiry may affect matters that fall within their areas of responsibilities to be dealt with. For example, if a military justice complaint made by a Defence Force member relates to the intelligence function of the Australian Signals Directorate, the IGADF may need to provide information to the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* for his or her consideration.

The flexibility given to IGADF would not be arbitrary, as it would be limited to what he or she considers appropriate and relates to his or her function as the IGADF under the *Defence Act 1903*. In addition, the IGADF has the discretion not to provide information to the recipient that he considers inappropriate for any of the following reasons (subsection 27(7)):

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

This has the effect of ensuring that only relevant and appropriate information is disclosed to the recipient under the provision.

Item 10

Item 10 amends subsection 28(2) by inserting ‘or paragraph 27(5)(b)’ after ‘27(4).

As a result of the amendment, subsection 28(2) provides that if, under subsection 27(4) or paragraph 27(5)(b), the Chief of the Defence Force is given a report about an inquiry, the Chief of the Defence Force may, following consultation with the IGADF, publicly release all or part of the report.

Item 11

Item 11 inserts a new Division 4A (sections 28A to 28J) that applies to inquiries conducted by Assistant IGADF who are also judicial officers. The purpose of Division 4A is to outline the independence, powers and functions of IGADF in circumstances where it is identified that it is preferable that a judicial officer is appointed as an Assistant IGADF to inquire into a matter, having regard to the sensitivity, gravity and complexity of the issues to be determined.

Section 28A provides that Division 4A applies in relation to the conduct of an inquiry by an Assistant IGADF who is a judicial officer, and clarifies that Division 4A has effect despite any other provision of the Regulations.

Section 28B provides that the IGADF must not take part personally in the inquiry.

Section 28C provides that the Assistant IGADF must conduct the inquiry in such matter as the Assistant IGADF considers appropriate having regard to the subject matter of the inquiry. The IGADF must not give directions about the matter in which the inquiry is to be conducted, times and places for the conduct of the inquiry, whether all or any part of the inquiry is to be conducted in public or private, or who can be present at any part of the inquiry conducted in private.

Section 28D applies in relation to the scope of the inquiry. If the Assistant IGADF thinks it appropriate to do so for the purposes of the inquiry, the Assistant IGADF may add anything to the matter into which the Assistant IGADF is to inquire, or vary the terms of the inquiry, or conduct with any person in relation to the inquiry. The IGADF must not give a direction adding anything to the matter into which the Assistant IGADF is to inquire or varying the terms of the inquiry.

Section 28E provides in relation to evidence and information gathering powers. The Assistant IGADF may exercise the powers of the IGADF under subsection 21(1)(directions regarding disclosure of evidence), section 22 (information gathering) and section 23(information gathering) without being authorised to do so by the IGADF.

Section 28F applies in relation to report by Assistant IGADF.

Under subsection 28F(1), the Assistant IGADF must prepare a report if the Assistant IGADF is satisfied that all information relevant to the inquiry that is practicable to obtain has been obtained, and a decision has not been made to end the inquiry under subsection 110DB(1) of the *Defence Act 1903*.

The report must set out the findings of the Assistant IGADF in relation to the inquiry and any recommendations that the Assistant IGADF thinks appropriate to make because of those findings (subsection 28F(2)). The report must be accompanied by a copy of the transcript or other record of any oral evidence taken during the inquiry, a copy of each document accepted as evidence during the inquiry, and a list of all other things that were produced to the inquiry with information about where each thing is located (subsection 28F(3)). The Assistant IGADF must give the report to the IGADF as soon as practicable (subsection 28F(4)). Under subsection 28F(5), the IGADF must not direct the Assistant IGADF to inquire further into, or prepare a further report in relation to, the matter to which the inquiry relates.

Section 28G deals with reports to other persons. Under subsection 28G(1), any report about, or findings in relation to, the inquiry given by the IGADF under subsections 27(3) to (5) must be the report or findings given to the IGADF by the Assistant IGADF under section 28F.

Under subsection 28G(2), the Assistant IGADF may, if he or she considers it appropriate to do so, inform one or more of the following persons of the findings in relation to the inquiry, or provide the person with a copy of the report about the inquiry: the Minister, the Chief of the Defence Force, a service chief, an employee of the Department of Defence, a member of the Defence Force, a person who is affected by a submission or the inquiry (whether or not the person made a submission), or any other person.

The report about the inquiry may be accompanied by a copy of the transcript or other record of any oral evidence taken during the inquiry and any document accepted as evidence during the inquiry (subsection 28G(3)).

Under subsection 28G(4), the report about the inquiry need not include information that the Assistant IGADF considers would be inappropriate to include for any of the following reasons: considerations of privacy, the person's responsibilities, the person's interest in the matter, the information is classified or relates to national security, or the relevance of the information to other information considered not appropriate for the person.

Section 28H provides that the IGADF must not, under subsection 28(3), publicly release all or part of the report about the inquiry, unless the IGADF has consulted the Assistant IGADF about the release. If under paragraph 28G(2)(b), the Assistant IGADF gives a person a report about the inquiry, the Assistant IGADF may, following consultation with the Chief of the Defence Force, publicly release all or part of the report (including a redacted version of the report).

Section 28J provides that in relation to the inquiry, the Assistant IGADF has the same protection and immunity as a Justice of the High Court, and is not subject to the chain of command. This level of immunity consistent with the standard of protection conferred on

Royal Commissioners by section 7 of the *Royal Commission Act 1902*. Removing Assistant IGADF from the chain of command has the effect of increasing his or her independence in relation to the conduct of the inquiry.

Item 12

Item 12 adds a new section 34A in relation to delegation at the end of Part 4.

Section 34A provides that the Chief of the Defence Force may, by instrument in writing, delegate the functions or powers of the Chief of the Defence Force under this Part to an officer holding a rank not lower than the naval rank of Captain or the rank of Colonel or Group Captain.

Under current section 28 of the Regulations, CDF makes the decision on whether to publicly release all or part of the report for inquiries directed by the CDF or death related inquiries. Section 34A will allow the CDF to delegate his power under section 28 to appropriate senior ADF officers to make the decision whether to publicly release all or part of the report. In practice, the decision to release the report would be by a senior ADF member, at or above the rank of Captain, Colonel or Group Captain, who has the relevant knowledge and expertise in the subject matter of the particular inquiry report. This provides necessary flexibility and efficiency in the decision-making process.

This change may engage the right to privacy, as the number of potential decision makers increases, however, this measure does not have the effect of intruding into privacy on an unwarranted or unreasonable basis, given the level of delegation is limited to senior ADF officers at the rank of Captain (Navy), Colonel (Army) and Group Captain (Air Force) who have served many years in the ADF with knowledge in the subject matter of the report. When exercising discretion on whether to release a report, the CDF or his delegates are expected to act reasonably, including taking into account all relevant considerations, such as privacy, rights of individuals, public interest, and national security.

Item 13

Item 16 inserts a new Part 6 to provide for transitional provisions.

Section 37 provides that the Regulations apply in relation to an inquiry begun but not ended or completed before the commencement of the Regulations, and an inquiry begun on or after that commencement.