

Chapter 2

Overview of bill

Provisions of the bill

2.1 The provisions of the bill amend Part VIII B of the Defence Act which provide for the establishment and functions of the Inspector-General ADF (as well as administrative and other matters). The key provisions of the bill are contained in Schedule 1 which has two parts – the amendments and the application and transitional provisions. Clause 2 of the bill provides that the provisions in Schedule 1 will commence on the 28th day after Royal Assent.

Part 1–Amendments

Objects

2.2 Items 1 and 2 amend existing section 110A Object of Part. The additions made to section 110A are underlined below.

110A Object of Part

The main object of this Part is to provide the Chief of the Defence Force with:

- (a) a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command; and
- (b) an avenue independent of the ordinary chain of command by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied.

Functions

2.3 Section 110C provides for the function of the Inspector-General ADF. Item 3 repeals paragraph 110C(1)(e) and substitutes a number of other paragraphs. Item 4 repeals subsection 110C(2). Item 5 adds new subsections 4, 5 and 6. For convenience, the amendments to section 110C are extracted below. The additions to section 110C are underlined, those parts removed are struck through.

110C Functions of the Inspector-General ADF

- (1) The Inspector-General ADF has the following functions:
 - (a) to inquire into or investigate matters concerning the military justice system;
 - (b) to conduct performance reviews of the military justice system, including internal audits, at the times and in the manner the Inspector-General ADF considers appropriate;
 - (c) to advise on matters concerning the military justice system, including making recommendations for improvements;
 - (d) to promote military justice values across the Defence Force;

~~(e) to do anything incidental or conducive to the performance of any of the preceding functions.~~

(e) if directed by the Minister to do so—to inquire into or investigate a matter concerning the Defence Force;

(f) if directed by the Chief of the Defence Force to do so—to inquire into or investigate a matter concerning the Defence Force;

(g) such functions as are prescribed by the regulations;

(h) such functions as are conferred on the Inspector-General ADF by or under this Act;

(i) such functions as are conferred on the Inspector-General ADF by or under any other law of the Commonwealth;

(j) to do anything incidental or conducive to the performance of any of the above functions.

Note: Subsection (4) limits the functions that may be prescribed by regulations made for the purposes of paragraph (g).

~~(2) In addition to his or her functions under subsection (1), the Inspector-General ADF also has:~~

~~(a) the functions conferred on the Inspector-General ADF by or under this Act or any other law of the Commonwealth; and~~

~~(b) such other functions as are prescribed by the regulations.~~

(3) The function referred to in paragraph (1)(a) includes the following:

(a) carrying out preliminary assessments as to whether an inquiry or investigation should be conducted by the Inspector-General ADF;

(b) referring matters to other appropriate authorities to be dealt with.

(4) Regulations made for the purposes of paragraph (1)(g) must not prescribe a function unless the function relates to:

(a) the military justice system; or

(b) complaints made by members of the Defence Force, where the relevant complaint is about a decision, act or omission in relation to the member's service in the Defence Force; or

(c) deaths of members of the Defence Force, where the relevant death appears to have arisen out of, or in the course of, the member's service in the Defence Force.

(5) To avoid doubt, a function prescribed by regulations made for the purposes of paragraph (1)(g) may be to inquire into or investigate a matter mentioned in paragraph (4)(b) or (c).

(6) Subsection (5) does not limit paragraph (1)(g).

Note: The regulations may make provision in relation to the procedures and powers of the Inspector-General ADF in respect of the performance of the Inspector-General ADF's functions (see paragraph 124(1)(h)).

Inquiries and investigations

2.4 Item 6 of Schedule 1 repeals section 110D which provides for when the Inspector-General ADF can conduct inquiries or investigations.

2.5 Item 7 of Schedule 1 inserts 110DA and 110DB. New section 110DA applies to Inspector-General ADF inquiries or investigations conducted into matters concerning the military justice system and inquiries or investigations conducted by the Inspector-General ADF under the regulations. It empowers the Inspector-General ADF to conduct an inquiry or investigation on his or her own initiative, at the request of a service chief or at the request of an individual.¹

2.6 New section 110DB provides that the Inspector-General ADF may end an inquiry or investigation if satisfied that continuing it is not warranted in the circumstances, unless that investigation or inquiry has been directed by the Minister.²

Reports

2.7 The existing section 110R requires the Inspector-General ADF to prepare such reports on the operations of the Inspector-General ADF as directed by the Chief of the Defence Force. Item 8 repeals existing section 110R and substitutes a new section 110R. New section 110R provides that as soon as practicable after the end of each financial year the Inspector-General must give the Minister, for presentation to the Parliament, a report on the operations of the Inspector-General ADF during the financial year.³ This includes the operations of persons appointed as inquiry officers, inquiry assistants and Assistant Inspector-General ADF under existing section 110P.

Self-incrimination

2.8 Existing section 124 deals with the creation of regulations under the Defence Act. This includes regulations for 'the procedures, powers and reporting obligations of the Inspector-General ADF in respect of the performance of the Inspector-General ADF's functions, including in relation to any matter connected with inquiries, investigations and performance reviews' (existing paragraph 124(1)(h)).

2.9 Item 9 inserts two new subsections following existing subsection 124(2A). New subsection 124(2AA) provides that regulations may be made for Inspector-General ADF investigations and inquiries that require a person appearing as a witness to answer a question even if the answer may tend to incriminate the person.

2.10 New subsection 124(2AB) provides that the regulations may make provision for requiring a person appearing as a witness before a person appointed under section 110P (Assistant Inspector-General ADF, or appointed inquiry officers or inquiry assistants) to answer questions even if the answers may tend to incriminate the person.

1 Explanatory memorandum (EM), p. 5.

2 EM, p. 5.

3 Minor typographical errors in the explanatory memorandum in relation to this part have been corrected. *Journals of the Senate*, 9 February 2015, p. 2058.

2.11 However, both subsections 124(2AA) and 124(2AB) are subject to existing subsection 124(2B). Items 10 and 11 of Schedule 1 amend this subsection. The amended subsection is extracted below with additions underlined and parts omitted struck through.

~~Subsection (2A) does~~ Subsections (2A), (2AA), and (2AB) do not authorise the making of a regulation containing a requirement referred to in the subsection concerned ~~that subsection~~ where the answer to the question may tend to incriminate the person in respect of an offence with which the person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.

2.12 The explanatory memorandum (EM) states:

[T]his provides that the Inspector-General ADF, a Inspector-General ADF appointed inquiry officer, Inspector-General ADF appointed inquiry assistant or Assistant Inspector-General ADF cannot require answers to questions from a person which may tend to incriminate that person in respect of an offence with which that person has been charged and in respect of which the charge has not been finally dealt with by a court or otherwise disposed of.⁴

2.13 Item 12 of Schedule 1 inserts new subsection 124(2CA) after existing subsection 124(2C). New subsection 124(CA) provides that if a witness makes a statement or disclosure in the course of giving evidence before the Inspector-General ADF, or persons appointed under section 110P, then:

- (a) the statement or disclosure; and
- (b) the making of the statement or disclosure; and
- (c) any information, document or thing obtained as a direct or indirect consequence of the making of the statement or disclosure

are not admissible in evidence against the witness in:

- (d) any civil or criminal proceedings in any federal court or court of a State or Territory; or
- (e) proceedings before a service tribunal;

other than in proceedings by way of prosecution for giving false testimony at the hearing before the Inspector-General ADF or a person appointed under section 110P.

Part 2—Application and transitional provisions

2.14 Item 13 of Schedule 1 provides for the continued operation of 110D (which is repealed by item 6) in relation to an inquiry or investigation that started before the commencement of the item.

4 EM, p. 6.

2.15 Item 14 clarifies that new section 110DA, as inserted by item 7 of Schedule 1, applies in relation to an inquiry or investigation that started at or after the commencement of this item.

2.16 Item 15 provides that amended section 110R, which imposes an obligation on the Inspector-General to make an annual report applies in relation to the financial year in which this item commences and each later financial year.⁵

5 Minor typographical errors in the explanatory memorandum in relation to this part have been corrected. *Journals of the Senate*, 9 February 2015, p. 2058.

