



## Opportunity to provide feedback during public consultation National Commissioner for Defence and Veteran Suicide Prevention Bill

The Government has announced that the National Commissioner for Defence and Veteran Suicide Prevention (the National Commissioner) is being created in recognition of the need for concerted action to address the unacceptably high rates of suicide among the Australian Defence Force (ADF) member and veteran communities. The primary role of the National Commissioner will be to inquire into the factors and systemic issues contributing to these suicides, and to recommend actions and strategies to support the prevention of future suicides.

Legislation to establish the National Commissioner was introduced into the Parliament on 27 August 2020. The National Commissioner for Defence and Veteran Suicide Prevention Bill provides the National Commissioner with powers broadly equivalent to a Royal Commission. These powers will enable full and genuine inquiries to be held into the tragic past and future deaths by suicide of ADF members and veterans. As an enduring institution, the National Commissioner will be able to monitor the implementation of its recommendations, and build on suicide prevention strategies into the future. Families and others affected by these deaths by suicide will be supported in a trauma-informed and restorative way to contribute to the National Commissioner's work, should they wish to do so.

A second bill containing consequential changes to other legislation has also been introduced - the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill.

The Attorney-General's Department has commenced a public consultation process on the bills and is inviting submissions on the bills over a four week period ending on 24 September 2020.

### ***How to make a submission***

The Attorney-General's Department welcomes submissions on the bills from any interested person or organisation. To assist in making a submission, copies of the bills and Explanatory Memorandums are **attached**, together with an Overview of the National Commissioner's role, which explains key parts of the legislation.

Submissions can be provided by email to [nationalcommissionerconsultation@ag.gov.au](mailto:nationalcommissionerconsultation@ag.gov.au), or by post at:

Attn: National Commissioner for Defence and Suicide Prevention Taskforce  
Robert Garran Offices  
3 – 5 National Circuit  
BARTON ACT 2600

Further information about the consultation process and how to make a submission is available at <https://www.ag.gov.au/about-us/national-commissioner-defence-and-veteran-suicide-prevention>. You can email [nationalcommissionerconsultation@ag.gov.au](mailto:nationalcommissionerconsultation@ag.gov.au) if you require assistance making a submission.

The opportunity to make a submission **closes on 24 September 2020**. Any submission provided may be published online. If you do not wish your submission to be published, please indicate this when you submit your feedback. Parts of published submissions may be redacted as appropriate. You can also ask for your submission to be published anonymously.



Australian Government  
Attorney General's Department

# The National Commissioner for Defence and Veteran Suicide Prevention

## Overview information

On 5 February 2020, the Prime Minister, the Hon Scott Morrison MP, announced that the National Commissioner for Defence and Veteran Suicide Prevention (National Commissioner) will be established to inquire into, and support the prevention of Australian Defence Force (ADF) member and veteran deaths by suicide.

The role and powers of the National Commissioner are set out in a new piece of legislation, the National Commissioner for Defence and Veteran Suicide Prevention Bill. This Bill has been introduced to the Parliament on 27 August 2020.

The Attorney-General's Department is seeking public comment on the Bill between 27 August and 24 September 2020. This document provides an overview of key parts of the Bill.

# The National Commissioner for Defence and Veteran Suicide Prevention

## What will the National Commissioner do?

The National Commissioner will provide an enduring public accountability and system improvement function, to support the prevention of ADF member or veteran deaths by suicide.

The National Commissioner will have the ability to consider the full circumstances relevant to past and any future ADF member or veteran deaths by suicide. Through the breadth of their role the National Commissioner will be able to identify systemic problems, as well as issues that arise in individual cases, in order to make findings and recommendations to reduce ADF member and veteran deaths by suicide.

Through this work, the National Commissioner will support future wellbeing and suicide prevention efforts, by identifying the need for any system-wide reforms, or new approaches to support ADF members and veterans.

The National Commissioner's functions will include:

- **inquiring** into the circumstances of relevant deaths by suicide – including through conducting hearings, round tables, meetings and research
- **making findings and recommendations** addressing ADF member and veteran wellbeing and suicide prevention strategies, as well as any policy, administrative or system-wide changes that may be required
- **promoting understanding** of suicide risk factors for ADF members and veterans, and opportunities for improved wellbeing support
- **monitoring and publically reporting on** responses to any findings or recommendations the National Commissioner has already made
- **working collaboratively** with state and territory Coroners to understand issues contributing to defence and veteran deaths by suicide
- **maintaining a record** of ADF member and veteran deaths by suicide that have been notified to the Commissioner.

The National Commissioner will be able to commence their own inquiries at any time. The National Commissioner will be able to review a broad range of circumstances relevant to ADF member or veteran deaths by suicide, including the extent to which the circumstances of a particular suicide death reflect broader or systemic issues. These circumstances include:

- service in the ADF – including matters connected to recruitment, training, transitions between different forms of ADF service, operational service, and the quality of support services available
- experiences as a veteran – including the circumstances of the person's transition from ADF service, their interactions with government and other bodies, and the possible impact of other personal circumstances (for example, the post-service employment circumstances of the person)
- the health, wellbeing and support services available both during and after service in the ADF, and whether these services were appropriate – including the handling of any complaints made about these services
- other matters the Commissioner considers relevant, which may vary in each case.

The National Commissioner will provide a public report on their findings and recommendations to the Parliament each year, and will be able to provide additional reporting if necessary. The Government will be fully accountable, being required to report to the Parliament on action taken in response to each of the National Commissioner's reports.

The National Commissioner will also conduct an independent comprehensive review of the more than 400 ADF member and veteran deaths by suicide since 2001. At a family's request, the National Commissioner can consider deaths by suicide prior to 2001. An interim report will be provided to Government within 12 months of the review commencing, and a final report within 18 months. Terms of Reference for the review will be publically announced. An interim National Commissioner will be appointed to commence the review.

**Relevant sections of the Bill: 10-12, 26, and 60-62**

# The National Commissioner for Defence and Veteran Suicide Prevention

## Will the National Commissioner's powers be like those of a Royal Commission?

The National Commissioner will have inquiry powers broadly equivalent to a Royal Commission. These powers will allow full and genuine inquiries to be held into the systemic factors relevant to the tragic deaths by suicide of ADF members and veterans. A number of offences are also available in the event of non-compliance with the National Commissioner's inquiry powers.

Unlike a Royal Commission, the National Commissioner will be an enduring institution, so it can continue to monitor and report upon the implementation of its recommendations into the future.

This means the National Commissioner will be a continuous independent voice to Government and the Parliament, rather than operating for a fixed period of time.

Some key examples of the powers proposed for the National Commissioner in the Bill, compared with those of a Royal Commission, are provided below.

	National Commissioner	Royal Commission
Independent from Government	✓	✓
Makes findings and recommendations	✓	✓
Power to require documents and witness statements to be given	✓	✓
Power to summon witnesses and hold public hearings	✓	✓
Power to take evidence on oath or affirmation	✓	✓
May receive information and evidence in private	✓	✓
Power to protect evidence from publication if necessary	✓	✓
Power to refer potential breaches of the law to enforcement bodies	✓	✓
Established as a permanent body	✓	✗

**Relevant sections of the Bill: 10, 11, 26-28, 30-32, 35, 53, 54, 56 and 57**

# The National Commissioner for Defence and Veteran Suicide Prevention

## Will people be able to share their experiences of an ADF member or veteran death by suicide?

Enabling families and others affected by an ADF member or veteran death by suicide to share their experiences will be fundamental to the National Commissioner's role. The guiding principles for the National Commissioner are that it should:

- take a restorative and trauma-informed approach to its work
- recognise that families and others affected by ADF member and veteran deaths by suicide have a unique contribution to make to the National Commissioner's functions, and
- recognise that those families and other affected persons may wish to be included in relevant inquiries by the National Commissioner.

These principles recognise the special role families and people affected by suicide deaths will have to assist the National Commissioner to understand the full circumstances, and tragic consequences, of each death. They also recognise and respect that some people may not wish to share their experiences with the National Commissioner, and should have the choice about whether or not to participate.

Taking a restorative and trauma-informed approach means that the principles of **safety, confidentiality, consultation** and **informed participation** will underpin the way the National Commissioner and their Office operates.

Similar to a Royal Commission process, opportunities for people to share their experiences with the National Commissioner will include:

- making a submission on a matter relevant to the National Commissioner's work – this could be about a personal experience, or about other matters relevant to the National Commissioner's work, such as new initiatives to promote ADF member and veteran wellbeing
- meeting with the National Commissioner or staff of the National Commissioner's Office – these meetings could take the form of a roundtable or group meeting on a particular topic, or a private meeting or interview as appropriate
- providing formal evidence during an inquiry, such as through a witness statement, or by participating in a public or private hearing held by the National Commissioner.

People will be able to make contact with the National Commissioner's Office in a variety of ways, including by telephone, email, or mail, to ask questions and provide information to the National Commissioner. A person will be able to request for the contact to be anonymous.

**Relevant sections of the Bill: 12, 17 and 28**

# The National Commissioner for Defence and Veteran Suicide Prevention

## When could the National Commissioner hold a private hearing?

A hearing is a formal process overseen by the National Commissioner, usually involving witnesses appearing to give evidence under oath or affirmation. The National Commissioner will have powers to hold both public and private hearings.

While hearings will generally be open to the public, the Bill allows for part or all of a hearing to be held in private where:

- personal and private information about a deceased person, or their family, friends or associates, may arise, or
- the evidence a person may give may relate to operationally sensitive or intelligence information.

The wishes and interests of the witnesses involved, and the people or agencies who may be affected by the evidence, will be carefully considered by the National Commissioner when deciding how a hearing should most appropriately occur in each case.

To protect the confidentiality of the information being discussed, a private hearing will generally involve the witness sharing their evidence with the National Commissioner with only a very limited number of other people present in the room (for example, a support person or legal representative may be present to assist a witness). The preferences of the witness will be an important factor guiding how a private hearing will operate.

In practice, the National Commissioner and their staff will be expected to regularly engage with families and other interested persons through organised meetings and discussions. While formal 'evidence' will not be taken during these meetings, they will be an important way for families and others to share their experiences, and for the National Commissioner to develop an understanding of the circumstances surrounding each death by suicide. A formal hearing might then be a further way for the National Commissioner to formally inquire into particular relevant issues, and take evidence, if the National Commissioner thinks this is required.

**Relevant sections of the Bill: 27-29 and 42**

# The National Commissioner for Defence and Veteran Suicide Prevention

## How will information given to the National Commissioner be protected?

Strong legal protections will apply to information given to the National Commissioner. For example, the Bill includes the following criminal offences, which are punishable by a fine or jail sentence:

- Staff in the National Commissioner's Office entrusted with information that has been given to, or developed to assist, the National Commissioner will commit an offence if they inappropriately use or share the information.
- The National Commissioner will have powers to direct that any evidence or documents that have been given to it must not be further shared or published. Breaching an order of this kind will be an offence.

Before using or disclosing information that a person has provided during a private hearing, the National Commissioner will be required to give special consideration to consulting with that person. For example, a person might request that any evidence they give in a private hearing only be used in an anonymous way.

It is also proposed that the general rights of access to official information under the Freedom of Information Act will not apply to requests made of the National Commissioner or their Office, except in relation to specific types of non-sensitive information. This will further protect against people gaining copies of information given to the National Commissioner and is modelled on the same protection available in a Royal Commission.

The Bill also allows the National Commissioner to receive operationally sensitive and intelligence information, whilst ensuring this information is appropriately used and protected.

In addition to these legal protections, the National Commissioner will work closely with a person providing sensitive personal information, to ensure their wishes for the future use of that information were respected. This will be a part of the National Commissioner applying a restorative and trauma-informed approach.

**Relevant sections of the Bill: 29, 42, 53-55 and the National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill**

# The National Commissioner for Defence and Veteran Suicide Prevention

## Will the National Commissioner change the role of a Coroner examining an ADF member or veteran death by suicide?

The National Commissioner will be expected to work together with state and territory Coroners to understand issues contributing to ADF member and veteran deaths by suicide.

The National Commissioner's role will not change the role of state and territory Coroners. The Bill sets out that the National Commissioner will:

- not have the role of making findings on the cause of death, recognising that this is part of the function a Coroner may undertake, and
- need to avoid any prejudice to Coronial processes, as well as any other criminal or civil proceedings, or other inquiries.

The Commonwealth Government is currently working with the state and territory governments and Coroners to establish a new National Coronial Centre for Defence and Veteran Suicides. The Centre will assist Coroners to develop a common understanding of the issues for consideration in individual Defence and veteran deaths by suicide, and to support the National Commissioner in identifying broader systemic issues for further inquiry.

### Relevant section of the Bill: 11



# The National Commissioner for Defence and Veteran Suicide Prevention

## How will the National Commissioner work with Commonwealth bodies?

The National Commissioner will complement the work of other bodies who may have a role in relation to ADF member and veteran suicide and mental health, including:

- **The Inspector-General of the Australian Defence Force (IGADF)** – The IGADF will independently investigate the death of ADF members, where the death appears to have arisen out of, or in the course of, the member's service. The IGADF can also conduct inquiries into matters concerning the military justice system and provides for an independent review of complaints made under Defence's Redress of Grievance process.
- **The Veteran Family Advocate** – The new position of the Veteran Family Advocate within the Veterans' Affairs portfolio will provide strategic advice on policy and operational issues affecting veterans' families, and will work closely with the National Commissioner so that findings can be rapidly translated into action to mitigate suicide risk factors associated with DVA's service delivery.
- **The Commonwealth Ombudsman** – The Ombudsman can investigate complaints about administrative actions taken by the Department of Defence, Department of Veterans' Affairs and other Defence agencies. The Ombudsman also accepts reports of serious abuse in the Australian Defence Force which occurred between two or more people who were serving members at the time, recommends reparation payments where appropriate, and facilitates restorative engagement conferences. The Commonwealth Ombudsman is also the custodian of the Defence Abuse Response Taskforce Archive.

- **Comcare** – Comcare may inquire into work health and safety matters related to the ADF, including the circumstances surrounding a death by suicide (or a suspected death by suicide), where there is a connection to the work or workplace of the ADF.

The National Commissioner will have the power to share information with these and other relevant bodies to assist their inquiries, as well as being able to provide information to law enforcement authorities in the event the National Commissioner identifies a potential breach of the law.

The National Commissioner's strong information gathering powers will also enable it to compel relevant information, such as witness statements, service records and other documentation, from relevant government and other bodies to assist its inquiries.

**Relevant sections of the Bill: 32, 35, 40, 41, 56 and 57**

# How can I provide comment on the Bill?

Submissions can be made by email at [nationalcommissionerconsultation@ag.gov.au](mailto:nationalcommissionerconsultation@ag.gov.au) or by mail using the following address:

**Attn:** National Commissioner for  
Defence and Veteran Suicide  
Prevention Taskforce  
  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600

More information on the consultation process is available at:

[www.ag.gov.au/About/Pages/national-commissioner-defence-veteran-suicide-prevention.aspx](http://www.ag.gov.au/About/Pages/national-commissioner-defence-veteran-suicide-prevention.aspx)

2019-2020

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*Presented and read a first time*

## **National Commissioner for Defence and Veteran Suicide Prevention Bill 2020**

**No.     , 2020**

*(Attorney-General)*

**A Bill for an Act to establish the National  
Commissioner for Defence and Veteran Suicide  
Prevention, and for related purposes**



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Section 2

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**2 Commencement**

- (1) Each provision of this Act 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.

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Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	

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

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

**3 Objects of this Act**

- (1) The main object of this Act is to provide for a Commissioner to examine defence and veteran deaths by suicide, in order to support the prevention of future such deaths.
- (2) To achieve this object, the other objects of this Act are to:
- (a) establish the National Commissioner for Defence and Veteran Suicide Prevention; and
  - (b) empower the Commissioner:
    - (i) to inquire into the circumstances of defence and veteran deaths by suicide; and
    - (ii) to make findings and recommendations on systemic issues contributing to defence and veteran deaths by suicide and on trends and suicide risk factors for defence members and veterans; and

## Section 4

- (iii) to hear about the impact of defence and veteran deaths by suicide on families and others affected; and
- (iv) to promote understanding of suicide risks for defence members and veterans and factors that can improve the wellbeing of defence members and veterans.

#### 4 Simplified outline of this Act

With the object of supporting the prevention of future defence and veteran deaths by suicide, this Act establishes the National Commissioner for Defence and Veteran Suicide Prevention. Broadly, the Commissioner is to inquire into the circumstances of defence and veteran deaths by suicide and to make findings and recommendations relating to defence member and veteran wellbeing and suicide prevention strategies, and any reforms that might be needed.

The Commissioner has a range of powers to gather information.

The Commissioner must report to Parliament each year and may prepare additional reports as the Commissioner considers appropriate.

#### 5 Definitions

In this Act:

***accountable authority***, of a Commonwealth entity, has the same meaning as in the *Public Governance, Performance and Accountability Act 2013*.

***Australian Defence Force*** or ***ADF*** has the same meaning as in the *Defence Act 1903*.

***Australian intelligence entity*** means:

- (a) the Australian Secret Intelligence Service; or
- (b) the Australian Security Intelligence Organisation; or
- (c) the Australian Geospatial-Intelligence Organisation; or

Section 5

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- 1 (d) the Defence Intelligence Organisation; or  
2 (e) the Australian Signals Directorate; or  
3 (f) the Office of National Intelligence.

4 **authorised member**: see subsection 36(2).

5 **Commissioner** means the National Commissioner for Defence and  
6 Veteran Suicide Prevention appointed under section 16.

7 **Commonwealth body** means a Commonwealth entity, or a  
8 Commonwealth company within the meaning of the *Public*  
9 *Governance, Performance and Accountability Act 2013*.

10 **Commonwealth entity** has the same meaning as in the *Public*  
11 *Governance, Performance and Accountability Act 2013*.

12 **defence and veteran death by suicide** means the death of a defence  
13 member or veteran by suicide, or suspected suicide.

14 **Defence Department** means the Department administered by the  
15 Defence Minister.

16 **defence member** means a member of the Defence Force (within the  
17 meaning of the *Defence Act 1903*).

18 **Defence Minister** means the Minister administering the *Defence*  
19 *Force Discipline Act 1982*.

20 **document** includes any book, register or other record of  
21 information, however compiled, recorded or stored.

22 **eligible Judge**: see subsection 63(1).

23 **engage in conduct** means:

- 24 (a) do an act; or  
25 (b) omit to perform an act.

26 **entrusted person** means:

- 27 (a) the Commissioner; or  
28 (b) a member of the staff assisting the Commissioner as  
29 mentioned in section 14.

## Section 5

**head**, of an Australian intelligence entity, means:

- (a) in relation to the Australian Security Intelligence Organisation—the Director-General of Security; or
- (b) in relation to the Australian Secret Intelligence Service—the Director-General of the Australian Secret Intelligence Service; or
- (c) in relation to the Australian Signals Directorate—the Director-General of the Australian Signals Directorate; or
- (d) in relation to the part of the Defence Department known as the Australian Geospatial-Intelligence Organisation—the Director of that part of the Department; or
- (e) in relation to the part of the Defence Department known as the Defence Intelligence Organisation—the Director of that part of the Department; or
- (f) in relation to the Office of National Intelligence—the Director-General of National Intelligence.

**Home Affairs Department** means the Department administered by the Minister administering the *Australian Border Force Act 2015*.

**IGIS official** (short for Inspector-General of Intelligence and Security official) means:

- (a) the Inspector-General of Intelligence and Security; or
- (b) any other person covered by subsection 32(1) of the *Inspector-General of Intelligence and Security Act 1986*.

**inquiry function** means the function set out in paragraph 11(1)(a).

**intelligence information** means information:

- (a) that was acquired or prepared by or on behalf of an Australian intelligence entity in connection with its functions; or
- (b) that relates to the performance by an Australian intelligence entity of its functions; or
- (c) that identifies a person as being, or having been, a staff member (within the meaning of the *Intelligence Services Act 2001*) or agent of the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation.

**personal information** has the same meaning as in the *Privacy Act 1988*.

## Section 5

**protected information** means information (including personal information) made or obtained by an entrusted person for the purposes of this Act.

**reasonable excuse** means:

- (a) in relation to any act or omission by a witness before the Commissioner—an excuse which would excuse an act or omission of a similar nature by a witness before a court of law; or
- (b) in relation to any act or omission by a person summoned as a witness before the Commissioner—an excuse which would excuse an act or omission of a similar nature by a person summoned as a witness before a court of law; or
- (c) in relation to any act or omission by a person given a notice under section 32 or subsection 48(3)—an excuse which would excuse an act or omission of a similar nature by a person served with a subpoena in connection with a proceeding before a court of law.

**secrecy provision** means:

- (a) a provision of a law of the Commonwealth that purports to prohibit; or
- (b) anything done, under a provision of a law of the Commonwealth, to prohibit;

the communication, divulging or publication of information, the production of, or the publication of the contents of, a document, or the production of a thing.

**State body** means a department or authority of a State.

**Territory body** means a department or authority of a Territory.

**use**, in relation to information, includes make a record of.

**veteran** means a person who has served, or is serving, as a member of the Permanent Forces (within the meaning of the *Defence Act 1903*) or as a member of the Reserves (within the meaning of the *Defence Act 1903*).

## 6 Act binds the Crown

3 (2) However, this Act does not make the Crown liable to be prosecuted  
4 for an offence.

6 This Act extends to the external Territories.

8                    This Act extends to acts, omissions, matters and things outside  
9                    Australia and the external Territories.



**Part 2—National Commissioner for Defence and  
Veteran Suicide Prevention**

**Division 1—Introduction**

**9 Simplified outline of this Part**

The National Commissioner for Defence and Veteran Suicide Prevention is established.

The main functions of the Commissioner include:

- (a) inquiring into the circumstances of defence and veteran deaths by suicide; and
- (b) to make findings and recommendations following such inquiries; and
- (c) to promote understanding of suicide risks for defence members and veterans and improving the wellbeing of defence members and veterans.

The Commissioner should take into account general principles in performing the Commissioner's functions.

The Commissioner is assisted by APS employees in the Department who are made available by the Secretary.

**Division 2—Establishment, functions and powers**

**10 National Commissioner for Defence and Veteran Suicide Prevention**

There is to be a National Commissioner for Defence and Veteran Suicide Prevention.

**11 Functions**

(1) The Commissioner has the following functions:

- (a) to inquire into the circumstances of defence and veteran deaths by suicide (see section 26) (the *inquiry function*);
- (b) to make findings and recommendations following such inquiries, including:
  - (i) recommendations in relation to the wellbeing of defence members and veterans and defence and veteran suicide prevention strategies; and
  - (ii) recommendations in relation to any policy, legislative, administrative or structural reforms;
- (c) to review action taken in response to any findings or recommendations made by the Commissioner;
- (d) to work collaboratively with State or Territory Coroners to understand issues contributing to defence and veteran deaths by suicide;
- (e) to maintain a record of defence and veteran deaths by suicide notified to the Commissioner;
- (f) to promote understanding of suicide risks for defence members and veterans and factors that can improve the wellbeing of defence members and veterans;
- (g) to consider any matter related to the above functions referred to the National Commissioner by the Prime Minister or the Minister;
- (h) to do anything incidental or conducive to the performance of any of the above functions.

Section 12

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- 1 (2) To avoid doubt, the following are not functions of the  
2 Commissioner:  
3 (a) to make findings of civil or criminal wrongdoing;  
4 (b) to make findings on the cause of death in relation to a  
5 defence and veteran death by suicide.
- 6 (3) In performing the Commissioner's functions, the Commissioner  
7 must have regard to the need to avoid prejudicing current or future  
8 criminal or civil proceedings or other contemporaneous inquiries.
- 9 Note: An example of a contemporaneous inquiry is a contemporaneous  
10 inquiry conducted by the Inspector-General ADF under section 110C  
11 of the *Defence Act 1903*.
- 12 (4) The Commissioner has power to do all things necessary or  
13 convenient to be done for or in connection with the performance of  
14 the Commissioner's functions.

15 **12 General principles for the performance of the Commissioner's**  
16 **functions**

- 17 (1) This section sets out the principles that should be taken into  
18 account in the performance or exercise of the Commissioner's  
19 functions or powers.
- 20 (2) The Commissioner should take a trauma-informed and restorative  
21 approach.
- 22 (3) The Commissioner should:  
23 (a) recognise that families and others affected by defence and  
24 veteran deaths by suicide have a unique contribution to make  
25 to the Commissioner's functions; and  
26 (b) recognise that those families and other affected persons may  
27 wish to be consulted.

28 **13 Application of finance law**

- 29 For the purposes of the finance law (within the meaning of the  
30 *Public Governance, Performance and Accountability Act 2013*),  
31 the Commissioner is an official of the Department.

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**14 Arrangements relating to staff of the Department**

The staff assisting the Commissioner are to be:

- (a) APS employees in the Department; or
  - (b) persons engaged by, or on behalf of, the Commonwealth as contractors to perform functions or duties;
- whose services are made available to the Commissioner, by the Secretary, in connection with the performance of any of the Commissioner's functions.

**15 Delegation by Commissioner**

- (1) The Commissioner may, in writing, delegate all or any of the Commissioner's functions or powers under section 32 (Commissioner may require information etc.) or 53 (non-publication direction) to a person who is:
- (a) an SES employee in the Department; and
  - (b) a member of the staff assisting the Commissioner as mentioned in section 14.

Note 1: The expression **SES employee** is defined in section 2B of the *Acts Interpretation Act 1901*.

Note 2: 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 Commissioner.

**Division 3—Terms and conditions etc.**

**16 Appointment**

- (1) The Commissioner is to be appointed by the Governor-General by written instrument.

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

- (2) A person must not be appointed as the Commissioner unless the person is, in the Governor-General's opinion, suitable for appointment because of the person's qualifications, training or experience.

**17 General terms and conditions of appointment**

- (1) The Commissioner holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.
- (2) The Commissioner holds office on a full-time basis.
- (3) The Commissioner holds office on the terms and conditions (if any), in relation to matters not covered by this Act, that are determined by the Governor-General.

**18 Remuneration**

- (1) The Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Commissioner is to be paid the remuneration that is prescribed by the rules.
- (2) The Commissioner is to be paid the allowances that are prescribed by the rules.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

Section 19

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**19 Leave of absence**

- (1) The Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

**20 Other paid work**

The Commissioner must not engage in paid work outside the duties of the Commissioner's office without the Minister's approval.

**21 Resignation**

- (1) The Commissioner may resign the Commissioner's appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

**22 Termination of appointment**

- (1) The Governor-General may terminate the appointment of the Commissioner:
  - (a) for misbehaviour; or
  - (b) if the Commissioner is unable to perform the duties of the Commissioner's office because of physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the Commissioner if:
  - (a) the Commissioner:
    - (i) becomes bankrupt; or
    - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
    - (iii) compounds with the Commissioner's creditors; or

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- 1 (iv) makes an assignment of the Commissioner's  
2 remuneration for the benefit of the Commissioner's  
3 creditors; or  
4 (b) the Commissioner is absent, except on leave of absence, for  
5 14 consecutive days or for 28 days in any 12 months; or  
6 (c) the Commissioner engages, except with the Minister's  
7 approval, in paid work outside the duties of the  
8 Commissioner's office (see section 20);  
9 (d) the Commissioner fails, without reasonable excuse, to  
10 comply with section 23.

11 **23 Disclosure of interests**

- 12 (1) A disclosure by the Commissioner under section 29 of the *Public*  
13 *Governance, Performance and Accountability Act 2013* (which  
14 deals with the duty to disclose interests) must be made to the  
15 Minister.  
16 (2) Subsection (1) applies in addition to any rules made for the  
17 purposes of that section.  
18 (3) For the purposes of this Act and the *Public Governance,*  
19 *Performance and Accountability Act 2013*, the Commissioner is  
20 taken not to have complied with section 29 of that Act if the  
21 Commissioner does not comply with subsection (1) of this section.

22 **24 Acting appointments**

- 23 The Minister may, by written instrument, appoint a person to act as  
24 the Commissioner:  
25 (a) during a vacancy in the office of the Commissioner (whether  
26 or not an appointment has previously been made to the  
27 office); or  
28 (b) during any period, or during all periods, when the  
29 Commissioner:  
30 (i) is absent from duty or from Australia; or  
31 (ii) is, for any reason, unable to perform the duties of the  
32 office.
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## Part 3—Information gathering

### 25 Simplified outline of this Part

The Commissioner has a range of powers to obtain information, including conducting inquiries, holding hearings (including private hearings in certain circumstances), requiring the giving of information or the production of documents and applying for search warrants.

Commonwealth, State and Territory bodies may disclose information to the Commissioner for the purpose of assisting in the performance or exercise of the Commissioner's functions or powers.

### 26 Inquiries

- (1) For the purposes of paragraph 11(1)(a), the circumstances that the Commissioner may inquire into include, but are not limited to, the following matters in relation to a defence member or veteran who has, or is suspected to have, died by suicide:
  - (a) the person's service in the ADF (including training, and, for a person who has ceased serving in the ADF, the person's transition from the ADF);
  - (b) issues (including relevant personal circumstances) connected to:
    - (i) the manner or time in which the person was recruited to the ADF; and
    - (ii) for a person who has ceased serving in the ADF—the manner or time in which the person transitioned from the ADF;
  - (c) the availability of health, wellbeing and counselling support services to the person in the person's capacity as a defence member or veteran and the effectiveness of any such services;

## Section 27

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- 1 (d) the quality and effectiveness of responses to any complaints  
2 made by the person or the person's family, friends or  
3 associates in relation to:  
4 (i) the health and wellbeing of the person; or  
5 (ii) the person's access to support services mentioned in  
6 paragraph (c);  
7 (e) the extent to which the circumstances of the death reflect  
8 broader or systemic issues contributing to defence and  
9 veteran death by suicide rates, having regard to the  
10 circumstances of other defence and veteran deaths by suicide;  
11 (f) any other matter the Commissioner considers relevant and  
12 reasonably incidental to defence and veteran deaths by  
13 suicide.
- 14 (2) To avoid doubt, the Commissioner may perform the  
15 Commissioner's inquiry function on the Commissioner's own  
16 initiative.
- 17 (3) For the purposes of performing the Commissioner's inquiry  
18 function, the Commissioner may inquire into a defence and veteran  
19 death by suicide that occurred before the commencement of this  
20 subsection.

## 21 27 Hearings

- 22 (1) The Commissioner may hold a hearing for the purposes of  
23 performing the Commissioner's functions.
- 24 (2) A hearing is to be held in public and the procedure for a hearing  
25 may be such as the Commissioner thinks fit.
- 26 Note: For circumstances where hearings may not be held in public see  
27 subsections 28(1) and (2), and 42(6).
- 28 (3) The Commissioner is not bound by the rules of evidence.
- 29 (4) The Commissioner must ensure that a record of a hearing is made.

**28 Private hearings***Disclosure of information that is personal*

- (1) Despite subsection 27(2), a hearing, or part of a hearing, may be held in private if the Commissioner is satisfied that:
- (a) information relating to a deceased person or the family, friends or associates of a deceased person may be disclosed at the hearing; and
  - (b) the information is personal and private.

*Disclosure of operationally sensitive information*

- (2) Despite subsection 27(2), a hearing, or part of a hearing, may be held in private if the Commissioner is satisfied that a person appearing at the hearing may give evidence that discloses operationally sensitive information.

Note: See also section 33, which requires a person to give notice of likely disclosure of operationally sensitive information to the Commissioner.

*Commissioner must have regard to certain matters when considering whether to hold private hearings*

- (3) When considering whether to hold a hearing, or part of a hearing, in private because of subsections (1) and (2), the Commissioner must have regard to:
- (a) the potential risk of prejudice to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*), or to the operations of a law enforcement or security agency; and
  - (b) whether holding the hearing in private would have a substantial adverse effect on the exercise or performance of the Commissioner's functions or powers; and
  - (c) if the Commissioner invites submissions under subsection 33(3)—any submissions received in response; and
  - (d) the safety and security of any person; and

## Section 29

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- 1 (e) whether legal professional privilege, or any other immunity,  
2 privilege or restriction may apply to the disclosure of the  
3 information; and  
4 (f) any other matters the Commissioner considers relevant.

### 29 Consultation in relation to certain private hearing evidence

- 6 (1) If a witness gives evidence at a private hearing because of  
7 subsection 28(2) (disclosure of operationally sensitive  
8 information), the Commissioner must:  
9 (a) consult any law enforcement or security agency to which the  
10 evidence relates and consider any information received from  
11 the agency following the consultation; and  
12 (b) consider any potential risk of prejudice to national security  
13 (within the meaning of the *National Security Information*  
14 *(Criminal and Civil Proceedings) Act 2004*); and  
15 (c) consider the safety and security of any person.
- 16 (2) If a witness gives evidence at a private hearing because of  
17 subsection 28(1) or (2) (disclosure of personal or operationally  
18 sensitive information), the Commissioner must, before disclosing  
19 or using any evidence the witness has given at, or in relation to, the  
20 private hearing:  
21 (a) consider consulting the witness, and any other person whose  
22 interests are affected by the evidence; and  
23 (b) consider any potential risk of prejudice to a person if the  
24 person is not consulted before using or disclosing  
25 information given at, or in relation to, a private hearing; and  
26 (c) consider any preference the witness communicates (whether  
27 before, during or after a private hearing) to the Commissioner  
28 in relation to consultation.

### 30 Summons

- 30 (1) The Commissioner may, by notice in writing, summon a person to  
31 attend a hearing at a time and place specified in the notice:  
32 (a) to give evidence; or  
33 (b) to produce documents or things specified in the notice.
-

**Section 31**

Note: Failure to comply with a notice is an offence: see section 45.

- (2) The notice must:
    - (a) be in writing and be signed by the Commissioner; and
    - (b) be served on the person required to attend the hearing.
  - (3) A time specified in a notice must be at least 14 days after the day on which the notice is given.
  - (4) However, subsection (3) does not apply if the Commissioner reasonably believes that the circumstances to which the notice relates are urgent or serious.
  - (5) For the purposes of sections 45 (failure to produce), 48 and 49 (legal professional privilege), the power of the Commissioner under this section to require a person to give evidence, or produce a document or thing, includes the power to require the person to give evidence, or produce a document or thing, that is subject to legal professional privilege.
- Note: Under section 48, legal professional privilege might still be a reasonable excuse for failing to produce the document.
- (6) If the Commissioner gives a notice under subsection (1) to an official of a Commonwealth entity, the Commissioner must give a copy of the notice to:
    - (a) if the official performs duties in, or services for, an Australian intelligence entity—the head of the Australian intelligence entity; or
    - (b) in any other case—the accountable authority of the Commonwealth entity.

**31 Evidence on oath or by affirmation**

- (1) At a hearing, the Commissioner may:
  - (a) require a witness to either take an oath or make an affirmation; and
  - (b) administer an oath or affirmation to the witness.

Note 1: Refusal to take an oath or make an affirmation is an offence: see section 46.



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Section 33

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1           require the person to give information or a statement, or produce a  
2           document or thing, that is subject to legal professional privilege.

3           Note:     Under section 48, legal professional privilege might still be a  
4           reasonable excuse for failing to produce the document.

5           (6) If the Commissioner gives a notice under subsection (1) to an  
6           official of a Commonwealth entity, the Commissioner must give a  
7           copy of the notice to:

8           (a) if the official performs duties in, or services for, an  
9           Australian intelligence entity—the head of the Australian  
10          intelligence entity; or

11          (b) in any other case—the accountable authority of the  
12          Commonwealth entity.

### 13       **33 Notice of likely disclosure of operationally sensitive information**

#### 14           *Notice requirement*

15          (1) If:

16           (a) a person either:

17           (i) intends to give evidence, or give or produce to the  
18           Commissioner information or a statement, document or  
19           thing (including as authorised under section 40 or  
20           section 41); or

21           (ii) is required under section 30 or 32 to give evidence at a  
22           hearing, or to give or produce to the Commissioner  
23           information or a statement, document or thing; and

24          (b) the person considers that giving the evidence, or giving or  
25          producing the information or statement, document or thing,  
26          may involve the person disclosing operationally sensitive  
27          information;

28          the person must give written notice to the Commissioner before  
29          giving or producing the evidence, information or statement,  
30          document or thing.

31          Note:     Failure to give written notice is an offence if the person holds or has  
32                   held an Australian Government security clearance: see  
33                   subsection 47(1).

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- 1 (2) The notice must describe the evidence, information or statement,  
2 document or thing that the person considers to be operationally  
3 sensitive information.

4 *Call for submissions*

- 5 (3) If the Commissioner is given a notice under subsection (1), the  
6 Commissioner may invite submissions from persons or bodies  
7 (including law enforcement or security agencies) whose interests  
8 may be affected by disclosure of the information.
- 9 (4) If the Commissioner invites submissions, the Commissioner must  
10 ensure that the information is not disclosed inappropriately in the  
11 course of inviting submissions.

## 12 34 Notice of likely disclosure of intelligence information

13 If:

14 (a) a person either:

15 (i) intends to give evidence, or give or produce to the  
16 Commissioner information or a statement, document or  
17 thing (including as authorised under section 40 or  
18 section 41); or

19 (ii) is required under section 30 or 32 to give evidence at a  
20 hearing, or to give or produce to the Commissioner  
21 information or a statement, document or thing; and

22 (b) the person considers that giving the evidence, or giving or  
23 producing the information or statement, document or thing,  
24 may involve the person disclosing intelligence information;  
25 the person must give written notice to the Commissioner before  
26 giving or producing the evidence, information, statement,  
27 document or thing.

28 Note: Failure to give written notice is an offence if the person holds or has  
29 held an Australian Government security clearance: see  
30 subsection 47(2).

## 31 35 Powers of Commissioner in relation to documents or other thing

32 The Commissioner may:

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## Section 36

- 1 (a) inspect any document or other thing:
  - 2 (i) produced or given to the Commissioner; or
  - 3 (ii) produced or given under a notice under section 30 or 32;
  - 4 and
- 5 (b) retain the documents or other thing for so long as is
  - 6 reasonably necessary for the purposes of performing the
  - 7 Commissioner's functions; and
- 8 (c) in the case of documents:
  - 9 (i) produced or given to the Commissioner; or
  - 10 (ii) produced or given under a notice under section 30 or 32;
  - 11 make copies of any documents that contain matter that is
  - 12 relevant to the Commissioner's functions or powers.

**36 Search warrants**

- 14 (1) The Commissioner or an authorised member may apply for a
  - 15 search warrant under subsection (4) in relation to a matter that is
  - 16 relevant to the Commissioner's functions.
- 17 (2) The Commissioner may, in writing, authorise a person, or each
  - 18 person in a class of persons, to be an *authorised member* for the
  - 19 purposes of this section, if the person, or each person in the class of
  - 20 persons, is a member of the Australian Federal Police, or of the
  - 21 police force of a State or Territory.
- 22 (3) If:
  - 23 (a) the Commissioner, or an authorised member, has reasonable
  - 24 grounds for suspecting that there may be, at that time or
  - 25 within the next following 24 hours, on any land or on or in
  - 26 any premises, vessel, aircraft or vehicle, a thing or things of a
  - 27 particular kind connected with a matter into which the
  - 28 Commissioner is inquiring (*things of the relevant kind*); and

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- 1 (b) the Commissioner, or the authorised member, believes on  
2 reasonable grounds that, if a summons were issued for the  
3 production of the thing or things, the thing or things might be  
4 concealed, lost, mutilated or destroyed;  
5 the Commissioner, or the authorised member, may apply to an  
6 eligible Judge for the issue of a search warrant under  
7 subsection (4).
- 8 (4) If an application is made under subsection (1) to an eligible Judge,  
9 the eligible Judge may, if satisfied that there are reasonable  
10 grounds for issuing the warrant, issue a search warrant authorising  
11 a member of the Australian Federal Police or of the police force of  
12 a State or Territory, or any other person named in the warrant (the  
13 **authorised person**), with such assistance as the authorised person  
14 thinks necessary, and if necessary by reasonable force;  
15 (a) to enter onto the land or on or into the premises, vessel,  
16 aircraft or vehicle; and  
17 (b) to search the land, premises, vessel, aircraft or vehicle for  
18 things of the relevant kind; and  
19 (c) to seize any things of the relevant kind found on the land or  
20 in the premises, vessel, aircraft or vehicle and deliver things  
21 so seized to the Commissioner.
- 22 (5) A warrant issued under this section must include the following  
23 information:  
24 (a) a statement of the purpose for which the warrant is issued,  
25 which must include a reference to the matter into which the  
26 Commissioner is inquiring and with which the things of the  
27 relevant kind are connected;  
28 (b) whether entry is authorised to be made at any time of the day  
29 or night or during specified hours of the day or night;  
30 (c) a description of the kind of things authorised to be seized;  
31 (d) a date, not being later than 1 month after the date of issue of  
32 the warrant, on which the warrant ceases to have effect.
- 33 (6) If, in the course of searching, in accordance with a warrant issued  
34 under this section, for things of a particular kind connected with a

**Section 37**

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1 matter into which the Commissioner is inquiring, the person  
2 executing the warrant finds:

- 3 (a) any thing of another kind that the person believes on  
4 reasonable grounds to be connected with that matter; or  
5 (b) any thing that the person believes on reasonable grounds to  
6 be connected with another matter into which the  
7 Commissioner is inquiring;

8 and the person believes on reasonable grounds that it is necessary  
9 to seize that thing in order to prevent its concealment, loss,  
10 mutilation or destruction, the warrant is taken to authorise the  
11 person to seize that thing.

**37 Application by telephone for search warrants**

- 13 (1) An application for a search warrant under subsection 36(1) may be  
14 made by telephone if the applicant for the warrant considers it  
15 necessary to do so because of circumstances of urgency.
- 16 (2) If an eligible Judge issues a search warrant on an application made  
17 by telephone, the eligible Judge must:  
18 (a) complete and sign that warrant; and  
19 (b) inform the applicant of the terms of the warrant and the date  
20 on which and the time at which it was signed; and  
21 (c) forward a copy of the warrant to the applicant.
- 22 (3) If a search warrant is issued on an application made by telephone,  
23 the Commissioner or a member of the Australian Federal Police or  
24 of the police force of a State or Territory may complete a form of  
25 warrant in the terms indicated by an eligible Judge under  
26 subsection (2).
- 27 (4) A form of warrant completed in accordance with subsection (3) is  
28 taken to be a warrant issued under section 36.

**38 Witnesses subject to questioning**

- 30 (1) Any of the following may, so far as the Commissioner thinks  
31 proper, examine or cross-examine a witness on a matter relevant to  
32 a hearing:

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- 1 (a) a legal practitioner assisting the Commissioner;  
2 (b) any legal practitioner authorised by the Commissioner to  
3 appear before it for the purpose of representing any person;  
4 (c) any person authorised by the Commissioner to appear before  
5 the Commissioner.
- 6 (2) Subject to this Act, a witness who is examined or cross-examined  
7 has the same protection and is subject to the same liabilities as if  
8 examined by the Commissioner.
- 9 Note: For other witness protections, see section 64.

### 39 Witnesses to be paid expenses

- 11 (1) A witness appearing before the Commissioner at a hearing may, on  
12 behalf of the Commonwealth, be paid a reasonable amount for the  
13 expenses of the witness's attendance in accordance with the scale  
14 prescribed in the rules.
- 15 (2) In the absence of a prescribed scale, the Commissioner may  
16 authorise the payment of an amount the Commissioner considers  
17 reasonable.

### 40 Disclosure of information to the Commissioner—Commonwealth

- 19 *Authorisation to disclose*
- 20 (1) A Commonwealth body, or an individual who holds any office or  
21 appointment under a law of the Commonwealth, may, on their own  
22 initiative or at the request of the Commissioner, disclose  
23 information (including personal information) for the purpose of  
24 assisting in the performance or exercise of the Commissioner's  
25 functions or powers.
- 26 (2) A disclosure of information is taken not to have been made by a  
27 Commonwealth body for the purposes of subsection (1) if the  
28 individual making the disclosure is acting beyond the individual's  
29 authority in relation to the body.

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*Authorisation for Commissioner to use*

- (3) The Commissioner is authorised to use information disclosed under this section for the purposes of performing or exercising any of the Commissioner's functions or powers.

*Authorisation not affected by State or Territory law or the general law*

- (4) The authorisation in subsection (1) has effect despite anything in a law of a State or Territory, or the general law, that restricts or prohibits disclosure of information.

Note: Penalties also do not apply under secrecy provisions: see section 58.

## **41 Disclosure of information to the Commissioner—States and Territories**

*Authorisation to disclose*

- (1) Any of the following may, on their own initiative or at the request of the Commissioner, disclose information (including personal information) for the purpose of assisting in the performance or exercise of the Commissioner's functions or powers:
- (a) a State body or Territory body;
  - (b) an individual who holds any office or appointment under a law of a State or Territory;
  - (c) a Coroner or a Coroner's court.
- (2) A disclosure of information is taken not to have been made by a State body or Territory body for the purposes of subsection (1) if the individual making the disclosure is acting beyond the individual's authority in relation to the body.

*Authorisation for Commissioner to use*

- (3) The Commissioner is authorised to use information disclosed under this section for the purposes of performing or exercising any of the Commissioner's functions or powers.



## Section 43

- (5) However, except as mentioned in paragraph (4)(a), an arrangement cannot prevent the exercise of the Commissioner's powers or the performance of the Commissioner's functions under any provision of this Act (including section 57).

*Conduct of hearings*

- (6) Despite subsection 27(2), if the Commissioner is satisfied that a person appearing at a hearing may disclose intelligence information:
- (a) the Commissioner may, subject to paragraph (b) of this subsection, conduct the hearing in public or private; and
  - (b) the conduct of the hearing must be consistent with an arrangement entered into for the purposes of subsection (1) of this section with the Australian intelligence entity to which the information relates.

*Arrangement not a legislative instrument*

- (7) If an arrangement is entered into for the purposes of subsection (1) in writing, the arrangement is not a legislative instrument.

#### **43 Application of this Act in relation to current and former IGIS officials**

Despite anything else in this Act:

- (a) an entrusted person may obtain information from another person that the other person acquired as an IGIS official; and
  - (b) a person may disclose information, that the person acquired as an IGIS official, to an entrusted person;
- only in accordance with sections 34 and 34A of the *Inspector-General of Intelligence and Security Act 1986*.

**Part 4—Offences**

**Division 1—Introduction**

**44 Simplified outline of this Part**

This Part contains offences and other related provisions.

Broadly, the offences relate to:

- (a) failing to attend a hearing, give information or a statement, or produce documents or things; and
- (b) refusing to swear an oath, make an affirmation or answer a question; and
- (c) witness protections; and
- (d) contempt of the Commissioner; and
- (e) unauthorised publication, use or disclosure of information.



**Division 2—Failure to attend hearing, give information or produce documents etc.**

**45 Failure to attend hearing, give information or produce documents etc.**

*Failure to attend hearing*

(1) A person commits an offence if:

- (a) the person is served with a notice under section 30 to attend a hearing; and
- (b) the person fails to comply with the notice.

Penalty: Imprisonment for 2 years.

*Failure to give information, or produce a document or thing*

(2) A person commits an offence if:

- (a) the person is given a notice under section 30 or 32 to give information or a statement, or produce a document or thing, specified in the notice; and
- (b) the person fails to comply with the notice.

Penalty: Imprisonment for 2 years.

*Reasonable excuse*

(3) Subsections (1) and (2) do not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

*Defence of relevance*

(4) Subsection (2) does not apply if the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring.

**Division 2** Failure to attend hearing, give information or produce documents etc.

3                    *Subsections (1) and (2) not affected by State or Territory law or the*  
4                    *general law*

7 Note: Penalties also do not apply under secrecy provisions: see section 58.

10                   A person commits an offence if:

- 18                   Penalty: Imprisonment for 2 years.

20 *Operationally sensitive information*

- 34 *National Commissioner for Defence and Veteran Suicide Prevention* No. , 2020  
Bill 2020

Penalty: Imprisonment for 3 years.

*Intelligence information*

(2) A person commits an offence if:

- (a) the person is required to give a written notice to the Commissioner under section 34; and
- (b) the person holds or has held an Australian Government security clearance (within the meaning of the *Criminal Code*) that allows, or had allowed, access to intelligence information; and
- (c) the person fails to give the notice in accordance with section 34.

Penalty: Imprisonment for 3 years.

## **48 Legal professional privilege**

- (1) It is not a reasonable excuse for the purposes of subsection 45(3) for a person to fail to give information or a statement, or produce a document or thing, that the information, statement, document or thing is subject to legal professional privilege, unless:
  - (a) a court has found the information, statement, document or thing (or the relevant part of it) to be subject to legal professional privilege; or
  - (b) a claim that the information, statement, document or thing (or the relevant part of it) is subject to legal professional privilege has been made to the Commissioner:
    - (i) within the time that the Commissioner, in requiring the information or statement to be given, or the document or thing to be produced, allowed for the giving of the information or statement, or the production of the document or thing;
    - (ii) within such further time as the Commissioner allows for the giving of the information or statement, or the production of the document or thing.

**Part 4 Offences**

**Division 2** Failure to attend hearing, give information or produce documents etc.

**Section 49**

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- 1 (2) If such a claim is made, the Commissioner may decide whether to  
2 accept or reject the claim.
- 3 (3) The Commissioner may, by written notice served on a person,  
4 require the person to produce the information, statement, document  
5 or thing for inspection for the purpose of deciding whether to  
6 accept or reject the claim.
- 7 (4) If the information, statement, document or thing has been produced  
8 for inspection and the Commissioner decides to accept the claim,  
9 the Commissioner must:
- 10 (a) return the information, statement, document or thing to the  
11 person; and
- 12 (b) disregard, for the purposes of any report, recommendation or  
13 finding that the Commissioner makes:
- 14 (i) if the claim is accepted in relation to the whole of the  
15 information, statement, document or thing—the whole  
16 of the information, statement, document or thing; or
- 17 (ii) if the claim is accepted in relation to a part of the  
18 information, statement, document or thing—that part of  
19 the information, statement, document or thing.
- 20 (5) If the information, statement, document or thing has been produced  
21 for inspection and the Commissioner decides to reject the claim,  
22 the Commissioner may use the information, statement, document  
23 or thing for the purposes of performing the Commissioner's  
24 functions.

25 **49 Offences relating to claims for legal professional privilege**

26 *Offences*

- 27 (1) A person commits an offence if:
- 28 (a) the person has failed to give information or a statement, or  
29 produce a document or thing as required by the  
30 Commissioner under section 30 or 32; and
- 31 (b) the Commissioner has decided under subsection 48(2) to  
32 reject a claim that the information or statement, document or  
33 thing (or the relevant part of the information, statement,
-

1 document or thing) is subject to legal professional privilege;  
 2 and  
 3 (c) the person fails to give the information or statement, or  
 4 produce the document or thing as the Commissioner requires,  
 5 after that decision, under section 30 or 32.

6 Penalty: Imprisonment for 2 years.

7 (2) A person commits an offence if:  
 8 (a) the person is required under subsection 48(3) to give  
 9 information or a statement, or produce a document or thing  
 10 for inspection; and  
 11 (b) the person fails to comply with the notice.

12 Penalty: Imprisonment for 2 years.

13 *Reasonable excuse*

14 (3) Subsections (1) and (2) do not apply if the person has a reasonable  
 15 excuse.

16 *Legal professional privilege*

17 (4) It is not a reasonable excuse for the purposes of subsection (3) for a  
 18 person to fail to give information or a statement, or produce a  
 19 document or thing, that the information, statement, document or  
 20 thing is subject to legal professional privilege, unless a court has  
 21 found the information, statement, document or thing to be subject  
 22 to legal professional privilege.

23 Note: A defendant bears an evidential burden in relation to the matters in  
 24 subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

25 *Defence of relevance*

26 (5) It is a defence to a prosecution for an offence against this section  
 27 constituted by a failure to give information or a statement, or  
 28 produce a document or thing, if the information, statement,  
 29 document or thing is not relevant to the matters into which the  
 30 Commission is inquiring.

**Division 2** Failure to attend hearing, give information or produce documents etc.

## 3 50 Self-incrimination

*National Commissioner for Defence and Veteran Suicide Prevention*

*Bill 2020*

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1                    or 32, the individual is not excused from giving the information,  
2                    evidence or statement or producing the document or thing under  
3                    those provisions on that ground.

4                    Note:        A body corporate is not entitled to claim the privilege against  
5                    self-exposure to a penalty.

**Division 3—Witness protections etc.**

**51 Dismissal etc. of witness**

- (1) A person commits an offence if the person:
- (a) dismisses an employee from employment or a defence member from the Defence Force; or
  - (b) prejudices an employee in the employee's employment by the person or disciplines a defence member in their capacity as a defence member;
- for or on account of the employee or a defence member having:
- (c) appeared as a witness before the Commissioner; or
  - (d) given evidence before the Commissioner; or
  - (e) given information or a statement, or produced a document or thing, in accordance with section 30 or 32.

Penalty: 10 penalty units or imprisonment for 1 year.

- (2) Subsection (1) does not apply if the employee or defence member was dismissed, prejudiced or disciplined for some reason other than the reasons mentioned in subsection (1).

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

**52 Contempt of Commissioner**

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct obstructs or hinders the Commissioner in the performance or exercise of the Commissioner's functions or powers.

Penalty: 2 penalty units or imprisonment for 3 months.

- (2) A person commits an offence if:
- (a) the person engages in conduct; and



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1 (b) the conduct would, if the Commissioner were a court of  
2 record, constitute a contempt of that court.

3 Penalty: 2 penalty units or imprisonment for 3 months.

**Division 4—Unauthorised publication, use or disclosure of information etc.**

**53 Non-publication direction**

(1) The Commissioner may direct that any of the following material must not be published, produced or disclosed or must not be published, produced or disclosed except in the manner or to the persons that the Commissioner specifies:

- (a) evidence given before the Commissioner;
- (b) the contents of a document, or a description of a thing, produced or given to the Commissioner;
- (c) information that might enable a person who has given evidence before the Commissioner to be identified.

Note: Publication in contravention of a direction under this subsection is an offence: see section 54.

(2) The Commissioner may, in writing, vary or revoke a direction under subsection (1).

(3) Without limiting subsection (1), the Commissioner may direct that the material must not be published, produced or disclosed to:

- (a) a court; or
- (b) a tribunal, authority or person having power to require the production of documents or the answering of questions.

**54 Publication in contravention of non-publication direction**

A person commits an offence if:

- (a) the person publishes information; and
- (b) the publication contravenes a direction under subsection 53(1).

Penalty: Imprisonment for 3 years.

**55 Unauthorised use or disclosure of protected information**

A person commits an offence if:

- (a) the person is, or has been, an entrusted person; and
- (b) the person uses or discloses information; and
- (c) the information is protected information; and
- (d) neither of the following apply:
  - (i) the use or disclosure is for the purposes of performing or exercising the Commissioner's functions or powers;
  - (ii) the information is disclosed by the Commissioner in accordance with section 56 or 57.

Note: See Part 5.6 of the *Criminal Code* for offences relating to secrecy of information.

Penalty: Imprisonment for 2 years.

**56 Authorisation to disclose information (other than intelligence information)**

*Authorisation to disclose*

- (1) The Commissioner may disclose information (including personal information) to an entity specified in subsection (2) if:
  - (a) the information was given to the Commissioner in accordance with a notice under section 30 or 32, or in accordance with section 40 or 41; and
  - (b) the Commissioner is satisfied that the information will assist the entity to perform any of its functions or exercise any of its powers; and
  - (c) the information is not intelligence information.
- Note: The Commissioner's power under this subsection is not delegable: see section 15.
- (2) The entities are the following:
  - (a) the Attorney-General of the Commonwealth, of a State or Territory;
  - (b) the Australian Federal Police;

**Part 4** Offences

**Division 4** Unauthorised publication, use or disclosure of information etc.

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- 1 (c) the police force of a State or Territory;  
2 (d) the Director of Public Prosecutions;  
3 (e) a Special Prosecutor appointed under the *Special Prosecutors*  
4 *Act 1982*;  
5 (f) a body with functions equivalent to a Royal Commission;  
6 (g) if the information relates, or may relate, to the contravention,  
7 or evidence of a contravention, of a law of the  
8 Commonwealth, a State or a Territory—an entity responsible  
9 for the administration or enforcement of the law;  
10 (h) the Australian Crime Commission;  
11 (i) the Integrity Commissioner (within the meaning of the *Law*  
12 *Enforcement Integrity Commissioner Act 2006*);  
13 (j) a Coroner or a Coroner's court;  
14 (k) any other Commonwealth body;  
15 (l) any other State body or Territory body;  
16 (m) any other individual who holds any office or appointment  
17 under a law of the Commonwealth, a State or Territory.

18 *Authorisation for agencies and bodies to use and disclose*  
19 *information*

- 20 (3) An entity to which information is disclosed under subsection (1)  
21 may use and disclose the information for the purposes for which  
22 the information was disclosed under that subsection.

23 *Contravention of a law*

- 24 (4) A reference in paragraph (2)(g) to a contravention of a law is a  
25 reference to a contravention for which a person may be liable to:  
26 (a) a criminal penalty; or  
27 (b) a civil or administrative penalty.

**57 Authorisation to disclose intelligence information**

*Authorisation to disclose*

- (1) The Commissioner may disclose intelligence information (including personal information) to an entity specified in subsection (2) if:
- (a) the information was given to the Commissioner in accordance with a notice under section 30 or 32, or in accordance with section 40 or 41; and
  - (b) except in the case of a disclosure to the Inspector-General of Intelligence and Security—the information relates, or may relate, to the commission, or evidence of the commission, of an offence against a law of the Commonwealth, a State or a Territory; and
  - (c) in any case—the Commissioner is satisfied that the information will assist the entity to perform any of its functions or exercise any of its powers.

Note: The Commissioner's power under this subsection is not delegable: see section 15.

- (2) The entities are the following:
- (a) the Australian Federal Police;
  - (b) the police force of a State or Territory;
  - (c) the Australian Crime Commission;
  - (d) the Integrity Commissioner (within the meaning of the *Law Enforcement Integrity Commissioner Act 2006*);
  - (e) the Inspector-General of Intelligence and Security;
  - (f) an agency or body, or the holder of an office, that is prescribed by the rules for the purposes of this paragraph.

*Consultation requirement*

- (3) Before disclosing intelligence information under subsection (1) to an entity other than the Inspector-General of Intelligence and Security, the Commissioner must consult the following:
- (a) the person mentioned in subsection (4) for the entity;

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- 1 (b) the head of the Australian intelligence entity to which the  
2 information relates.
- 3 (4) For the purposes of paragraph (3)(a), the person for the entity is as  
4 follows:
- 5 (a) for the Australian Federal Police—the Commissioner of  
6 Police;
- 7 (b) for the police force of a State or Territory—the head  
8 (however described) of the police force of the State or  
9 Territory;
- 10 (c) for the Australian Crime Commission—the Chief Executive  
11 Officer of the Australian Crime Commission;
- 12 (d) for the Integrity Commissioner (within the meaning of the  
13 *Law Enforcement Integrity Commissioner Act 2006*)—the  
14 Integrity Commissioner;
- 15 (e) for an agency or body, or the holder of an office, that is  
16 prescribed by the rules for the purposes of paragraph (2)(f)—  
17 the person holding, or performing the duties of, the principal  
18 office in respect of the body or agency that is prescribed by  
19 the rules for the purposes of this paragraph.
- 20 (5) For the purposes of paragraph (3)(a), the consultation must cover  
21 the protection of the intelligence information while it remains in  
22 the entity's possession.
- 23 *Matters to which Commissioner must have regard in disclosing*  
24 *information*
- 25 (6) In disclosing intelligence information under subsection (1), the  
26 Commissioner:
- 27 (a) must have regard to any matter set out in an arrangement  
28 entered into for the purposes of subsection 42(1) with the  
29 head of the Australian intelligence entity to which the  
30 information relates; and
- 31 (b) may have regard to any other matter the Commissioner  
32 considers relevant.

1     **58 No criminal or civil liability under secrecy provisions**

2             *Information provided in accordance with notices*

- 3             (1) A person who is served with a notice under section 30 (summons)  
4                 or 32 (Commissioner may require information etc.) does not  
5                 commit an offence, and is not liable to any penalty, under a secrecy  
6                 provision because the person:

7                 (a) answers a question at a hearing that the Commissioner  
8                     requires the person to answer; or

9                 (b) gives information or a statement that the person is required to  
10                 give in accordance with the notice; or

11                (c) produces a document or thing that the person is required to  
12                 produce in accordance with the notice.

13             Note:       A defendant bears an evidential burden in relation to the matter in  
14                             subsection (1): see subsection 13.3(3) of the *Criminal Code*.

15             *Information disclosed under section 40 or 41*

- 16             (2) A person who discloses information under section 40 or 41 does  
17                 not commit an offence, and is not liable to any penalty, under a  
18                 secrecy provision because the person disclosed information in  
19                 accordance with section 40 or 41.

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**Part 5—Miscellaneous**

**59 Simplified outline of this Part**

This Part deals with miscellaneous matters, such as:

- (a) reporting requirements; and
- (b) protection and immunity for the Commissioner, legal practitioners and witnesses; and
- (c) the making of rules by the Minister.

**60 Commissioner's reports**

*Annual reports*

- (1) As soon as practicable after the end of each financial year, the Commissioner must give a report to the Prime Minister and the Minister, for presentation to the Parliament, in relation to any matter relating to, or arising in connection with, the exercise of the powers, or the performance of the functions, of the Commissioner during the financial year.

*Additional reports*

- (2) The Commissioner may, from time to time, give the Prime Minister and the Minister, for presentation to the Parliament, a report in relation to any matter relating to, or arising in connection with, the exercise of the powers, or the performance of the functions, of the Commissioner.

*Tabling*

- (3) If the Commissioner gives a report to the Prime Minister and the Minister under subsection (1) or (2), the Minister must cause the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.



**61 Response to report by the Commonwealth**

If the Commissioner gives a report to the Prime Minister and the Minister under subsection 60(1) or (2), the Commonwealth must respond to the report in writing and cause the response to be laid before each House of the Parliament as soon as is reasonably practicable after the report is tabled under subsection 60(3).

**62 Reports if appropriate action not taken on Commissioner's report***Scope*

- (1) This section applies if, in the opinion of the Commissioner, action that is adequate and appropriate in the circumstances is not taken with respect to the matters included in a Commissioner's report under subsection 60(1) or (2).

*Report*

- (2) The Commissioner may give a report to the Prime Minister and the Minister in relation to the action or the response given by the Commonwealth under section 61.
- (3) In preparing a report to give under subsection (2), the Commissioner must have regard to any response given by the Commonwealth under section 61.

*Tabling*

- (4) If the Commissioner gives a report to the Prime Minister and the Minister under subsection (2), the Minister must cause the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

**63 Judges**

- (1) In this Act, unless the contrary intention appears:



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- 1 (a) required or permitted by this Act to be prescribed by the  
2 rules; or  
3 (b) necessary or convenient to be prescribed for carrying out or  
4 giving effect to this Act.
- 5 (2) To avoid doubt, the rules may not do the following:
- 6 (a) create an offence or civil penalty;  
7 (b) provide powers of:  
8 (i) arrest or detention; or  
9 (ii) entry, search or seizure;  
10 (c) impose a tax;  
11 (d) set an amount to be appropriated from the Consolidated  
12 Revenue Fund under an appropriation in this Act;  
13 (e) directly amend the text of this Act.

2019-2020

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIONAL COMMISSIONER FOR DEFENCE AND VETERAN SUICIDE  
PREVENTION BILL 2020**

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Attorney-General, the Honourable Christian Porter MP)

# **NATIONAL COMMISSIONER FOR DEFENCE AND VETERAN SUICIDE PREVENTION BILL 2020**

## **GENERAL OUTLINE**

1. The Bill establishes the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) as an independent statutory office holder within the Attorney-General's portfolio. The Bill gives effect to the announcement of the creation of this new office made by the Prime Minister, the Hon Scott Morrison MP, on 5 February 2020.

2. The Bill is divided into five parts. Part 1 sets out preliminary matters relating to the commencement, objects and definitions of particular terms in the Bill, and its extraterritorial operation. The main object of the Bill is to provide for a Commissioner to examine defence and veteran deaths by suicide through a broad range of functions and powers, in order to support the prevention of future deaths by suicide.

3. Part 2 of the Bill provides for the establishment and appointment of the Commissioner, as well as arrangements for staff to assist, or receive a delegation from, the Commissioner. Part 2 also sets out the functions of the Commissioner, which include:

- inquiring into the circumstances of relevant defence and veteran deaths by suicide
- making findings and recommendations addressing defence member and veteran wellbeing and suicide prevention strategies, and any policy, administrative or structural reforms that may be required
- working collaboratively with State and Territory Coroners to understand issues contributing to defence and veteran deaths by suicide
- maintaining a record of relevant deaths by suicide notified to the Commissioner
- promoting understanding of suicide risks for defence members and veterans, and opportunities for improved wellbeing support, and
- reviewing action taken in response to any findings or recommendations the Commissioner has already made.

4. The Commissioner could review a broad range of circumstances relevant to defence member or veteran deaths by suicide, including the extent to which the circumstances of a particular suicide death reflect broader or systemic issues. The circumstances the Commissioner may consider include:

- service in the Australian Defence Force (ADF) – including matters connected to recruitment, training, transitions between different forms of ADF service, and the quality of support services available
- experiences as a veteran – including the circumstances of the person's transition from ADF service, their interactions with government and other bodies, and the possible impact of other personal circumstances

- the health, wellbeing and support services available both during and after service in the ADF, and whether these services were appropriate – including the handling of any complaints relevant to these services
  - other matters the Commissioner considers relevant, which could vary in each case.
5. The Commissioner would be able to commence their own inquiries at any time, and to consider any past defence member or veteran death by suicide.
6. The Bill provides that, as guiding principles, the Commissioner should:
- take a trauma-informed and restorative approach in exercising their functions and powers – this means the principles of choice, safety, confidentiality, consultation and informed participation, for example, will underpin the way the Commissioner undertakes their role
  - recognise that families and other people affected by a defence member or veteran death by suicide have a unique contribution to make to the Commissioner’s functions, and the Commissioner should recognise that they may wish to be consulted.
7. Part 3 of the Bill sets out the broad information gathering and inquiry powers available to the Commissioner. The Commissioner’s information gathering powers include compelling the production of documents and written statements, convening public and private hearings, and summoning persons to attend a hearing to give evidence under oath or affirmation. These powers are closely modelled on the equivalent powers of a Royal Commission under the *Royal Commissions Act 1902* (Cth), and are supported by similar criminal penalties.
8. Part 3 of the Bill includes provisions enabling Commonwealth, State and Territory bodies (as well as individual officer holders) to provide relevant information to the Commissioner on their own initiative, to assist the work of the Commissioner. A person making a voluntary disclosure of information on behalf of a government body is required to be acting with appropriate authority. Enabling the proactive disclosure of information in this way will support the efficiency of the Commissioner’s inquiries, by facilitating early access to relevant information at the outset of an inquiry. Part 3 also requires the Commissioner to take all reasonable steps to make arrangements relevant to obtaining, storing, accessing, using and disclosing intelligence information, before obtaining intelligence information from the relevant entity.
9. Part 4 of the Bill sets out offences and potential penalties, as well as relevant defences and protections for witnesses. The offences in Part 4 relate to matters such as a failure to comply with a compulsory notice, failure to attend a hearing following a summons, failure to give written notice ahead of disclosing operationally sensitive and intelligence information, and contempt of the Commissioner. The capacity for the Commissioner to consider and compel information that may be subject to legal professional privilege, and information that might tend to incriminate a person in certain circumstances, is also addressed in Part 4 of the Bill.
10. The protections for witnesses in Part 4 of the Bill include limiting the admissibility of evidence given to the Commissioner in a broad range of criminal proceedings, and making it

an offence for a person to dismiss or prejudice a person in their employment because they have given evidence to the Commissioner.

11. Part 4 of the Bill includes provisions protecting information provided to, and otherwise held by, the Commissioner. In particular, it incorporates an offence for information to be used or disclosed other than for the purposes of performing or exercising the Commissioner's functions or powers. The Commissioner's power to issue, vary and revoke a non-publication direction, and an offence for breach of a direction, are included.

12. This Part also provides an authorisation for the Commissioner to disclose information to a range of agencies or bodies, if, among other things, the Commissioner is satisfied that the information will assist the performance of their functions or powers. This would enable the Commissioner to refer information to police or prosecution bodies if a potential criminal or civil wrongdoing arises during an inquiry, for example. It would also enable the Commissioner to provide information to other bodies which may have a role connected to considering the circumstances of a defence member or veteran death by suicide.

13. This Part also clarifies the circumstances where a person is not liable to a penalty under a Commonwealth secrecy provision because they have provided information to the Commissioner in response to a compulsory request.

14. Part 5 of the Bill provides for additional matters, such as the Commissioner providing an annual report, and other reports as required, for tabling in Parliament. The Commonwealth is required to table its responses to the Commissioner's reports in the Parliament. The protection of the Commissioner, legal practitioners and witnesses from legal proceedings being brought against them for the legitimate undertaking of their roles and functions is also provided for in this Part.

## **FINANCIAL IMPACT**

15. \$42.7 million has been provided over five years to support the establishment and operation of the National Commissioner's function. These costs also include funding for a one-off review of historical ADF member and veteran deaths by suicide, to be led by the National Commissioner. They also include funding for a dedicated legal financial assistance scheme.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### **National Commissioner for Defence and Veteran Suicide Prevention Bill 2020**

1. This Bill is 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 Bill**

2. This Bill establishes the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) as an independent statutory officer holder within the Attorney-General's portfolio. The Commissioner will provide an enduring public accountability and system improvement function, to support the prevention of Australian Defence Force (ADF) member (defence member) and veteran deaths by suicide. The functions and powers of the Commissioner will engage Australia's international human rights obligations.

3. The Bill provides the Commissioner with a broad suite of functions to ensure it can comprehensively consider any past or future defence member or veteran death by suicide. The Commissioner's functions include:

- inquiring into the circumstances of relevant deaths by suicide
- making findings and recommendations following such inquiries, addressing defence and veteran suicide prevention strategies, and any policy, administrative or structural reforms that may be required
- working collaboratively with state and territory Coroners to understand issues contributing to defence and veteran deaths by suicide
- reviewing action taken in response to any findings or recommendations the Commissioner has already made, and
- promoting understanding of suicide risks for members and veterans, and factors that can improve the wellbeing of members and veterans.

4. The Commissioner would have broad discretion when inquiring into the circumstances of relevant deaths by suicide, including considering:

- the person's service in the ADF, including training, the manner or time in which they were recruited, and, for veterans, the person's transition from the ADF
- the availability of health, wellbeing and counselling support services to the deceased person in their capacity as a member or veteran, and the effectiveness of any such services
- the quality and effectiveness of responses to any complaints made by the person or the person's family, friends or associates in relation to the person's health and wellbeing, or access to relevant services
- the extent to which the circumstances of a particular suicide death reflect broader or systemic issues



- any other matter the Commissioner considers relevant and reasonably incidental to defence and veteran deaths by suicide.

5. The Bill provides that, as a guiding principle, the Commissioner should take a trauma-informed and restorative approach in exercising their functions, and should recognise that families and others affected by a suicide death have a unique contribution to make to the Commissioner's work, and may wish to contribute to the Commissioner's inquiries.

6. The Commissioner will have broad information gathering powers, to ensure it can oversee full and genuine inquiries into the factors relevant to defence member and veteran deaths by suicide. The Commissioner's powers include compelling the production of statements and other information, convening public and private hearings, summoning a person to attend a hearing, and taking evidence under oath or affirmation. The Bill creates a number of offences for a failure to comply with a compulsory request made by the Commissioner, and to protect witnesses from dismissal or prejudice in their employment for having appeared as a witness or given evidence to the Commissioner.

7. The Commissioner will provide a report on their findings and recommendations to the Parliament each year, as well as other reports the Commissioner consider necessary. The Government will be required to report to the Parliament on action taken in response to the Commissioner's reports.

### **Human rights implications**

8. The Bill engages the following rights:

- Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the right to just and favourable conditions of work
- Article 9 of the ICESCR – the right to social security
- Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) – the right to life
- Article 12(1) of the ICESCR – the right to health
- Article 14(1) of the ICCPR – fair trial and fair hearing rights
- Article 14(2) of the ICCPR – the presumption of innocence
- Article 17 of the ICCPR – the right to freedom from interference with privacy and attacks on reputation
- Article 19(2) of the ICCPR – the right to freedom of expression

#### *Right to just and favourable conditions of work*

9. The right to work and rights in work are contained in articles 6(1), 7 and 8(1)(a) of the ICESCR. Article 6(1) of the ICESCR recognises the right to work, and article 7 requires that State Parties recognise the right of everyone to enjoy just and favourable conditions of work. Article 7 encompasses a number of elements including remuneration (which at a minimum requires fair wages and equal remuneration for work of equal value without distinction of any kind), safe and health working conditions, equal opportunity to be promoted in employment to the appropriate higher level, and rest, leisure and reasonable limitation of work hours and periodic holidays.

10. The Bill promotes the right to just and favourable conditions of work by implementing a framework for inquiring into, and in future preventing, defence member and veterans deaths by suicide, and by establishing the statutory position of the Commissioner, including the terms and conditions, and arrangements for the remuneration, of the office holder.

11. The Commissioner's functions extend to making findings and recommendations about the wellbeing of defence members and veterans, and defence and veteran suicide prevention strategies. The Commission's functions also include promoting understanding of suicide risks for defence members and veterans, and factors that can improve the wellbeing of defence members and veterans into the future.

12. The Commissioner's role to inquire into past defence member and veteran deaths by suicide, including matters such as the deceased person's service in the ADF, and the health, wellbeing and counselling support services available to the person in their capacity as a defence member or veteran, will promote understanding, awareness and future suicide prevention efforts to support defence members during their service, and veterans following their transition from service. In this way the Bill promotes safe and healthy working conditions for defence members.

13. The Bill also protects the rights and interests of witnesses who engage with the Commissioner to not be unjustly deprived of work. It is an offence for an employer to dismiss or prejudice a witness in their employment on account of appearing before the Commissioner, or giving evidence or information to the Commissioner in a range of circumstances. This offence safeguards people engaging with the Commissioner against unfair dismissal or retribution in the course of their employment. The Bill also provides that a person appearing as a witness at a hearing, or giving or producing certain information, has the same protection as a witness in proceedings in the High Court of Australia, which applies additional protections for a person in any subsequent civil or criminal proceedings which may affect their employment.

#### *Right to social security*

14. The right to social security is contained in article 9 of the ICESCR. The United Nations Committee has stated that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

15. The right to social security may be engaged by the Bill, subject to the way the Commissioner exercises their powers and functions. The Commissioner, in exercising their function to make recommendations in relation to the wellbeing of defence members and veterans and in relation to any policy, legislative, administrative or structural reforms, may recommend future changes be made to certain services, support or benefits, including medical or health benefits, for defence members and veterans.

### *Right to life*

16. The right to life is contained in article 6(1) of the ICCPR, and article 1 of the Second Optional Protocol to ICCPR. The right to life includes a duty on governments to take appropriate steps to protect the right to life of those within its jurisdiction.

17. The Bill promotes this right by empowering the Commissioner to inquire into the circumstances of past, or any future, death or suspected death by suicide of defence members and veterans, in order to support the prevention of future such deaths. The Commissioner's role and powers to inquire into, and to support the future prevention, of suicide deaths promotes the preservation of life.

### *Right to health*

18. The right to health is contained in a number of covenants, including article 12(1) of the ICESCR which states that all people have the right to the 'highest attainable standard of physical and mental health' and that State Parties should take measures necessary for the 'improvement of all aspects of environmental and industrial hygiene'.

19. The United Nations Committee on Economic, Social and Cultural Rights (UNCECSR) has stated that the right to health extends to 'a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment'<sup>1</sup>.

20. The UNCECSR also states in General Comment No 14 that the 'highest attainable standard of health' takes into account the country's available resources, and that this right may be understood as a right of access to a variety of public health and health care facilities, goods, services, programs, and conditions necessary for the realisation of the highest attainable standard of health.

21. The establishment of the Commissioner recognises the need for concerted action to address the unacceptably high rates of suicide among the defence member and veteran communities across Australia.

22. The Bill promotes the right to health through the Commissioner's functions to make findings and recommendations about the wellbeing of defence members and veterans, and defence and veteran suicide prevention strategies. The right to health is also promoted by the Commission's function to promote understanding of suicide risks for defence members and veterans, and factors that can improve the wellbeing of defence members and veterans into the future.

### *Fair trial and fair hearing rights*

23. Article 14(1) of the ICCPR protects the right to a fair and public criminal trial, or a fair and public hearing in civil proceedings. Fair trial and fair hearing rights include the right

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<sup>1</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4

that all persons are equal before courts and tribunals, and the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

24. The Commissioner is not a court or tribunal, and cannot determine criminal charges or civil liability. In performing their functions, the Commissioner must have regard to the need to avoid prejudicing current or future criminal or civil proceedings, or other contemporaneous inquiries (clause 11 refers). The Commissioner does have powers to conduct inquiry processes similar to civil proceedings – for example, it can compel evidence, summon witnesses, convene hearings and administer an oath or affirmation. The Commissioner is also empowered to make findings and recommendations following an inquiry.

25. Article 14(1) of the ICCPR allows a hearing, or part of a hearing, to be held in private ‘for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires’. The Bill sets out limited circumstances where a hearing may be held in private (clauses 27, 28, 42 refer).

26. While the Commissioner will generally conduct hearings that are open to the public, the Bill allows part or all of a hearing to be held in private where:

- personal and private information about a deceased person, or their family, friends or associates, may arise, or
- the evidence a person may give may relate to operationally sensitive or intelligence information.

27. The approach to private hearings in the Bill balances the importance of the Commissioner’s processes being transparent and open, with flexibility for the Commissioner to account for the sensitivity of certain information being disclosed in an open hearing, whether that sensitivity arises because the information is personal and private, or due to operationally sensitive or national security considerations.

28. The framework in the Bill informing the Commissioner’s decision to convene a public or private hearing enables the wishes and interests of the witnesses involved, and the people or agencies who may be affected by the evidence, to be considered by the Commissioner when deciding the most appropriate approach to a hearing in each case. The framework is reasonable, necessary and proportionate to achieving the objectives of both transparency, and appropriate confidentiality.

29. Article 14(3) of the ICCPR establishes that, in the determination of any criminal charge, everyone shall be entitled to certain minimum guarantees, including not to be compelled to testify against themselves or to confess guilt.

30. The Bill partially abrogates the privilege against self-incrimination by providing that a person is not excused from giving information, evidence or a statement, or producing a document or thing to the Commissioner, on the basis it might tend to incriminate the person in certain circumstances (clause 50 refers). This partial abrogation is necessary to ensure the Commissioner can conduct full and genuine inquiries, with access to all relevant information. The approach gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry.

31. The privilege against self-incrimination is preserved in circumstances where the production of information or evidence might tend to incriminate the person in relation to an offence that a person has been charged with, and the charge has not been finally dealt with by a court or otherwise disposed of.

32. The partial abrogation of the privilege against self-incrimination operates alongside subclause 50(3), which limits the use of potentially self-incriminating information in certain criminal proceedings.

33. Potentially self-incriminating evidence produced to the Commissioner could not be used against a natural person in criminal proceedings in any court, except in relation to specific offences against, or that relate to, the Bill including in sections 137.1 and 137.2 of the *Criminal Code* and Part III of the *Crimes Act 1914*. These exemptions enable particular information to be admissible in a limited range of proceedings relevant to false or misleading information being provided to the Commissioner, or to an offence against this Act. Permitting such information being admissible in evidence in these proceedings is necessary to safeguard the integrity of information being provided to the Commissioner, and the enforcement of offences under this Bill.

34. The partial abrogation of the privilege against self-incrimination also operates alongside the protection that a natural person appearing as a witness, or giving or producing evidence or a statement in response to a notice, has the same protection as a witness in the High Court (clause 64 refers). This will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings. The Commissioner also has powers under clause 53 to issue a non-publication order to limit the further disclosure or publication of evidence which may be self-incriminating. The inclusion of these provisions is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which provides that 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained'.

35. If the Commissioner considers it appropriate to do so, they may disclose information or evidence relating to a contravention of a law to certain entities, including the Australian Federal Police and the Director of Public Prosecutions, if the Commissioner is satisfied such information will assist the entity to perform its functions or exercise its powers. In this case, the evidence or information is not being used against a person in a proceeding, but may be used as part of a separate investigation by the relevant entity.

36. The partial abrogation of the privilege against self-incrimination is reasonable, necessary and proportionate to the Commissioner's function to inquire into and report on matters of public importance relevant to the death by suicide of defence members and veterans.

37. The inclusion of a penalty for failing to comply with a notice or summons (including relevant defences) achieves the legitimate objective of ensuring the Commissioner can fully inquire into and report on the circumstances relevant to defence member and veteran deaths by suicide. The potential penalty, which is balanced by the inclusion of relevant defences, is reasonable, necessary and proportionate to the objective of equipping the Commissioner with appropriate inquiry and information gathering powers.

38. The Bill provides that a claim of legal professional privilege is not a reasonable excuse for a failure to attend a hearing, or to give information or produce a document or thing, unless a court has found the information, statement, document or thing to be subject to legal professional privilege (subclause 49(4) refers). Providing discretion for the Commissioner to make a determination whether to accept or reject such a claim in other circumstances is necessary to ensure the Commissioner can conduct full and genuine inquiries, with access to all relevant information. The approach gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry.

39. To the extent the process for claiming legal professional privilege may be viewed as a limitation to fair hearing rights, this limitation is balanced and proportionate. The process is modelled on the equivalent process that a court would undertake in determining a claim of legal professional privilege. A person claiming legal professional privilege is afforded an equivalent ability to press for application of the claim before the Commissioner as they would before a court. The process for claiming legal professional is reasonable, necessary and proportionate as it is not so onerous that it would prevent a person accessing legal advice or assistance. In circumstances where the Commissioner rejects a claim of legal professional privilege, it is not disproportionately burdensome on a person to challenge the determination in a court.

40. Whilst the Commissioner is not a judicial body and is not able to hold trials, the Commissioner has powers and functions to hold inquiries which will uphold fair hearing rights and, to the extent that it may also limit some fair hearing rights, those limitations are reasonable, necessary and proportionate to the legitimate objective of facilitating full and genuine inquiries.

#### *Right to the presumption of innocence*

41. The presumption of innocence is contained in article 14(2) of the ICCPR. Article 14(2) provides that ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Offences that contain ‘reverse burden’ provisions may amount to a limitation on the presumption of innocence. This includes where an ‘evidential’ or ‘legal burden’ defence is created by expressing a matter to be a defence or an exception to the offence.

42. The Bill engages this right by applying the evidential burden set out in subsection 13.3(3) of the Criminal Code to a defendant in certain circumstances (clauses 45, 49, 51 and 58 refer). Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden, the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code).

43. In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the offence-specific defences within the Bill are, in each case, appropriate, and recognise that the relevant matters are peculiarly within the knowledge of the defendant, and that it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

*Right to freedom from interference with privacy and attacks on reputation*

44. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence. The right to privacy includes respect for informational privacy, including in relation to storing, using and sharing private information, as well as the right to control the dissemination of personal and private information. To be permissible as a matter of international human rights law, interferences with privacy must be according to law and not arbitrary. In order not to be arbitrary, they must be reasonable and necessary in the particular circumstances, as well as proportional to the objectives they seek to achieve.

45. The Bill engages the right to privacy by establishing a framework under which the Commissioner may collect, use, disclose and deal with information, including personal information. The Bill includes specific provisions which authorise the collection of personal information which is necessary for the performance of the Commissioner's functions or exercise of their powers, such the issuing of a summons to give evidence or produce documents or things (clause 30 refers), or in response to a notice to give information or a statement (clause 32 refers).

46. Any limitation there may be to the right to privacy is lawful and non-arbitrary, in view of the safeguards for protecting personal information in the Bill. These safeguards include:

- The requirement for the Commissioner to take a trauma-informed and restorative approach to their functions and powers (clause 12 refers). This means the preferences of witness and other persons providing information to the Commissioner about how their personal information will be used or further disseminated by the Commissioner will be given particular weight in the Commissioner's handling of the information, across the full spectrum of their functions.
- It is an offence for the Commissioner, or a staff member assisting the Commissioner, to engage in unauthorised use or disclosure of protected information, including personal information – this offence carries a penalty of imprisonment of 2 years (clause 55 refers).
- The Commissioner may hold a hearing or part of a hearing in private, if the Commissioner is satisfied that information which may be disclosed will be personal and private, including about a deceased individual (clause 28 refers). This is accompanied by processes directing how the evidence at a private hearing can be used and disclosed. If a witness gives evidence at a private hearing, the Commissioner must, before using or disclosing that evidence, consider consulting the witness or any other person whose interests are affected (subclause 29(2) refers). The Commissioner must also consider any risk of prejudice to a person if they are not consulted prior to the use or disclosure, and the preferences of the witness (clause 29(2) refers).
- The Commissioner may issue a non-publication direction over a range of information disclosed to them, enabling them to direct, conditionally or otherwise, that such material must not be published, produced or further disclosed (clause 53 refers). Such

a direction could apply to protect information which may identify a person who has given information or evidence to the Commissioner, for example. Publication in contravention of such a direction is an offence punishable with a term of imprisonment (clause 54 refers).

- The Commissioner's power to further disclosure information to other entities requires that such a disclosure will assist the agency or body to perform its functions or exercise their powers (clauses 56 and 57 refer). Only the Commissioner can disclose such information, meaning this power is not delegable to staff assisting the Commissioner. The disclosure provisions are intended to allow the Commissioner to disclose specific information to assist other entities, as part of working collaboratively on solutions to prevent future deaths by suicide, or in some instances, to enable the investigation of a possible criminal offence or civil penalty. The Commissioner's powers under clauses 56 and 57 could be exercised in a broad range of ways which did not involve disclosing personal information, or could include seeking consent to do so (for example, the Commissioner could disclose de-identified information only, or apply procedures to consult a person whose information may be disclosed).

47. To the extent the Commissioner's powers to seek, use and further disclosure information, including personal information, in the Bill affect the right to privacy, they are lawful, non-arbitrary and are accompanied by effective safeguards within the Bill.

#### *Right to freedom of expression*

48. Article 19(2) of the ICCPR provides that all people 'shall have the right to freedom of expression'. This right includes the freedom to impart information and ideas of all kinds, either orally, in writing or in print or through any other media. Article 19(3) provides that the right to freedom of expression may be subject to certain restrictions, where such restrictions are necessary for the respect of the rights of others or for the protection of national security, public order, or of public health or morals. Any such restrictions must be prescribed by law and be reasonable, necessary and proportionate to achieving a legitimate objective.

49. Division 4 of the Bill includes provisions regulating the unauthorised publication, use or disclosure of information connected to the Commissioner's function. Specifically, it provides for the Commissioner to issue a non-publication direction, with an accompanying offence for breach of a direction (clauses 53 and 54 refer), and an offence for the disclosure of protected information (clause 55 refers). The Bill also provides circumstances when civil or criminal liability will not arise under secrecy provisions (clause 58 refers).

50. These provisions achieve the legitimate objective of protecting the rights of others (being persons who have provided information to the Commissioner, in some cases under compulsion), and in some case may have application to protecting national security related information which may be acquired by the Commissioner in the course of their work. Noting the sensitive and personal nature of inquiring into defence member and veteran deaths by suicide, there are strong arguments that the restrictions within the Bill are for a legitimate objective.

51. To the extent that the issuing of a non-publication direction, and the prohibition on the unauthorised disclosure of protected information, limit the right to freedom of expression, these measures are also reasonable, necessary and proportionate to their objective. In particular:



- only the Commissioner may make a non-publication direction and any direction may subsequently be revoked or varied (clause 53 refers), which provides flexibility
- a prohibition on the unauthorised disclosure of protected information, and variously disclosing information subject to a non-publication direction, is necessary to protect the rights of individuals who appear or provide evidence to the Commissioner, and
- the penalties for the offences of unauthorised use and disclosure, and publication in contravention of a non-publication direction, are generally aligned with similar offences for unauthorised disclosure in other Acts, such as the *Inspector-General of Intelligence and Security Act 1996*, balanced against the need for such penalties to account for the sensitivity of the subject matter the Commissioner will be considering.

## Conclusion

52. The National Commissioner for Defence and Suicide Prevention Bill 2020 is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This Bill promotes the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

## NOTES ON CLAUSES

### LIST OF ABBREVIATIONS

Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
Public Governance, Performance and Accountability Act	<i>Public Governance, Performance and Accountability Act 2013</i>
Defence Act	<i>Defence Act 1903</i>
Independent National Security Legislation Monitor Act	<i>Independent National Security Legislation Monitor Act 2010</i>
Inspector-General of Intelligence and Security Act	<i>Inspector-General of Intelligence and Security Act 1986</i>
Remuneration Tribunal Act	<i>Remuneration Tribunal Act 1973</i>
Royal Commissions Act	<i>Royal Commissions Act 1902</i>
National Security Information (Criminal and Civil Proceedings) Act	<i>National Security Information (Criminal and Civil Proceedings) Act 2004</i>
Crimes Act	<i>Crimes Act 1994</i>
Privacy Act	<i>Privacy Act 1988</i>
Evidence Act	<i>Evidence Act 1995</i>
Legislation Act	<i>Legislation Act 2003</i>
Criminal Code	<i>Schedule to the Criminal Code Act 1995</i>

## **PART 1—PRELIMINARY**

### **Clause 1      Short title**

1. Clause 1 provides for the short title of this Act to be the *National Commissioner for Defence and Veteran Suicide Prevention Act 2020*.

### **Clause 2      Commencement**

2. Clause 2 provides for the commencement of each provision of this Act, as set out in the table at subclause 2(1). The table provides that the whole of this Act commences the day after Royal Assent.

3. Subclause 2(2) specifies that information in column 3 of the table at subclause 2(1) is not part of the Act, and information may be inserted into column 3, or information in it may be edited, in any published version of this Act.

### **Clause 3      Objects of this Act**

4. Clause 3 sets out the objects of this Act. This clause is intended to provide a clear statement of the principles and objectives underpinning the Act.

5. Subclause 3(1) states that the main object of this Act is to provide for a Commissioner to examine the circumstances of defence and veteran deaths by suicide, in order to support the prevention of such future deaths.

6. Subclause 3(2) provides further objects of this Act as being to establish the Commissioner (paragraph 3(2)(a)) and to empower the Commissioner to:

- inquire into the circumstances of defence and veteran deaths by suicide (subparagraph 3(2)(b)(i))
- make findings and recommendations on a range of systemic issues, trends or risk factors (subparagraph 3(2)(b)(ii))
- hear about the impact of defence and veteran deaths by suicide on families and other people affected by such deaths (subparagraph 3(2)(b)(iii)), and
- promote understanding of suicide risks for defence members and veterans, and opportunities for improved wellbeing support (subparagraph 3(2)(b)(iv)).

7. As section 15AA of the Acts Interpretation Act provides that statutes should be interpreted in accordance with their objects, all the other provisions of this Act are to be read, as far as is possible, as being designed to carry out these objects.

### **Clause 4      Simplified outline of this Act**

8. Clause 4 provides a simplified outline of this Act to assist the reader. This outline is not intended to be comprehensive and readers should rely on the substantive provisions.

### **Clause 5      Definitions**

9. Clause 5 defines terms that are used elsewhere in this Act:

‘Accountable authority’ has the same meaning as set out in subsection 12(2) of the Public Governance, Performance and Accountability Act.

‘Australian Defence Force’ or ‘ADF’ has the same meaning as in section 17 of the Defence Act, which provides that the ADF consists of the Royal Australian Navy, Australian Army and the Royal Australian Air Force.

‘Australian intelligence entity’ is defined to mean the six intelligence agencies listed within the definition: the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation, the Australian Signals Directorate and the Office of the National Intelligence.

‘Authorised member’ is a member of the Australian Federal Police, or of the police force of a State or Territory, authorised by the Commissioner in accordance with subclause 36(2) to apply for a search warrant.

‘Commissioner’ means the National Commissioner for Defence and Veteran Suicide Prevention, as appointed under clause 16.

‘Commonwealth body’ is defined to mean a Commonwealth entity or a Commonwealth company within the meaning of the Public Governance, Performance and Accountability Act. ‘Commonwealth entity’ and ‘Commonwealth company’ are defined in subsections 10(1) and 89(1) respectively of the Public Governance, Performance and Accountability Act.

Commonwealth entity is defined to have the same meaning as set out in subsection 10(1) of the Public Governance, Performance and Accountability Act.

‘Defence and veteran death by suicide’ means the death of a defence member or veteran by suicide, or suspected suicide. By way of example, a death may be a suspected suicide where the circumstances of the death indicate as such but a formal assessment or finding that it is a death by suicide has not yet been made by the police or a Coroner.

‘Defence Department’ is defined to mean the Department administered by the Defence Minister.

‘Defence member’ is defined to mean a member of the Defence Force within the meaning of the Defence Act. A ‘member’ is defined in section 4 of the Defence Act to include any officer, sailor, soldier and airman. This includes members of both Permanent and Reserve forces.

‘Defence Minister’ is defined to mean the Minister administering the *Defence Force Discipline Act 1982*.

‘Document’ is defined in a non-exhaustive way to include any book, register or other record of information, however compiled, recorded or stored.

‘Eligible judge’ is a judge who has formally consented, and been declared, in accordance with subclauses 63(2) and (3). An eligible judge may issue a search warrant following application by the Commissioner or an authorised member, in accordance with clauses 36 and 37.

‘Engage in conduct’ is defined to mean the doing of an act, or omitting to perform an act.

‘Entrusted person’ is defined to mean the Commissioner, or a member of staff assisting the Commissioner (clause 14 refers).

‘Head’ is defined to mean the principal office holder of the relevant Australian intelligence entities listed within the definition. This definition is applied, amongst other provisions, in the provisions relating to the arrangements for obtaining and protecting intelligence information (clause 42 refers) and the authorisation for the Commissioner to disclosure intelligence information (clause 57 refers).

‘Home Affairs Department’ is defined to mean the Department administered by the Minister administering the *Australian Border Force Act 2015*.

‘IGIS official’ is defined to mean the Inspector-General of Intelligence and Security or any other person listed in subsection 32(1) of the Inspector-General of Intelligence and Security Act.

‘Inquiry function’ is defined to mean the function set out in paragraph 11(1)(a) of this Act. The inquiry function is further detailed in clause 26.

‘Intelligence information’ is defined to mean information:

- acquired or prepared by or on behalf of an Australian intelligence entity in connection with its functions (for example, intelligence information may include information provided by a foreign government or foreign agency to an Australian intelligence entity)
- related to the performance by an Australian intelligence entity of its functions, or
- which identifies a current or former staff member or agent of the Australian Secret Intelligence Service or Australian Security Intelligence Organisation.

‘Judge’ is defined to mean a person who is a Judge of a court created by the Parliament, as provided in subclause 63(1). The relevant Parliament is the Parliament of the Commonwealth of Australia.

‘Law enforcement or security agency’ is defined to mean the agencies listed within the definition, as well as any other agency prescribed by the rules for the purposes of this definition. The Australian Defence Force is a law enforcement or security agency, as well as a range of other Commonwealth, State and Territory bodies, security agencies and police authorities. The definition of ‘law enforcement or security agency’ is applied in the provisions relating to a private hearing, in particular (clauses 28 and 29 refer).

‘Legal practitioner’ is defined as a barrister, solicitor, barrister and solicitor, or legal practitioner, of the High Court or a Supreme Court of a State or Territory.

‘Official’ is defined to mean a person who is in, or forms part of, the Commonwealth entity. It has the same meaning as set out in subsection 13(2) of the Public Governance, Performance and Accountability Act.

‘Operationally sensitive information’ is defined to mean information about certain activities or methods of a law enforcement or security agency (which is a defined term, as outlined above), as well as information provided by a foreign government, or an agency of such a government, where it does not consent to the public disclosure of the information.

‘Operationally sensitive information’ could capture information such as that dealing with

ADF operational activities, or technologies, for example. The definition of ‘operationally sensitive information’ is applied in the provisions relating to a private hearing and notice of a likely disclosure, in particular (clauses 28, 29 and 33 refer).

‘Paid work’ is defined to mean work for financial gain or reward. The definition of ‘paid work’ is applied in the provisions relating to the Commissioner undertaking paid work outside the duties of the Commissioner’s office, in particular (clauses 20 and 22 refer).

‘Personal information’ is defined to have the same meaning as in section 6 of the Privacy Act. It means information or an opinion about an identified individual, or an individual who is reasonably identifiable; whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not. Personal information includes information kept under Part 5-1A of the *Telecommunications (Interception and Access) Act 1979*.

‘Protected information’ is defined to mean information (including personal information) made or obtained by an entrusted person for the purposes of this Act. This will include information received by the Commissioner or staff assisting the Commissioner, whether it has been provided under a compulsory notice or otherwise, as well as any new information developed by the Commissioner or staff assisting the Commissioner. Protected information is a term applied in clause 55.

‘Reasonable excuse’ is defined by reference to whether the excuse is one which would excuse a person before a court. The definition applies this test to the appropriateness or quality of an excuse in the case of a witness before the Commissioner, a person summoned as a witness, and a person given a notice to produce information, a document or thing. ‘Reasonable excuse’ is defined consistently with the Royal Commissions Act, recognising that the Commissioner’s powers are closely aligned to those of a Royal Commission.

The defence of reasonable excuse ensures a person is not penalised where they may be unable legitimately to produce a document or attend a hearing due to circumstances beyond their control, or where there is some other good and acceptable reason. It also allows for claims such as public interest immunity to be made in defence of material not being produced, for example, and for the quality of that claim to be examined on a case by case basis.

‘Secrecy provision’ is defined to mean a provision of Commonwealth law that prohibits or purports to prohibit the communication, disclosure or publication of information in various forms. The definition extends to anything done under a provision of a law of the Commonwealth to prohibit the communication, disclosure or publication of such information. Secrecy provision is a term applied in clause 58, which provides that a person does not commit an offence under such a provision when complying with certain compulsory requests made by the Commissioner.

‘State body’ is defined to mean a department or authority of a State.

‘Territory body’ is defined to mean a department or authority of a Territory.

‘Use’ is defined to include making a record of information.

‘Veteran’ is defined to mean a person who has served, or is serving, as a member of the Permanent Forces (within the meaning of the Defence Act) or as a member of the Reserves (within the meaning of the Defence Act). ‘Permanent Forces’ is defined in section 4 of the Defence Act to mean the Permanent Navy, the Regular Army and the Permanent Air Force.

‘Reserves’ is defined in section 4 of the Defence Act to mean the Naval Reserve, the Army Reserve and the Air Force Reserve.

Defining ‘veteran’ to capture a person who has or is so serving in these roles ensures that it is appropriately broad, and aligns with the definition of ‘veteran’ in the *Australian Veterans’ Recognition (Putting Veterans and Their Families First) Act 2019*.

#### **Clause 6      Act binds the Crown**

10.      Clause 6 provides that this Act binds the Crown in each of its capacities, but does not make the Crown liable to be prosecuted for an offence.

11.      Accordingly, this Act binds the executive governments of the Commonwealth, of each of the States, and of the Australian Capital Territory and of the Northern Territory.

#### **Clause 7      Extension to external Territories**

12.      Clause 7 extends the operation of this Act to the external Territories. This clause ensures that this Act applies to all States, all internal Territories and all external Territories of Australia.

#### **Clause 8      Extraterritorial operation**

13.      Clause 8 extends the operation of this Act outside Australia and the external Territories.

14.      In practice, the situations where it will be necessary for the Commissioner to exercise their functions or powers overseas are expected to be limited. However, enabling extraterritorial operation of the Commissioner’s functions and powers may assist the Commissioner to take evidence if they were considering, for example, the circumstances of a defence member’s death by suicide that occurred overseas.

15.      The Commissioner will be expected to exercise their powers and functions in a foreign jurisdiction in accordance with Australia’s obligations under international law, and to liaise with the relevant jurisdiction ahead of any intended exercise of functions or powers within its territory.

### **PART 2 — NATIONAL COMMISSIONER FOR DEFENCE AND VETERAN SUICIDE PREVENTION**

#### **Division 1 — Introduction**

#### **Clause 9      Simplified outline of this Act**

16.      Clause 9 provides a simplified outline of Part 2 of this Act to assist the reader. This outline is not intended to be comprehensive and readers should rely on the substantive provisions.

## **Division 2 — Establishment, functions and powers**

### **Clause 10 National Commissioner for Defence and Veteran Suicide Prevention**

17. Clause 10 provides that there is to be a National Commissioner for Defence and Veteran Suicide Prevention. Provisions relating to the appointment of the Commissioner are contained in Part 2, Division 3 of this Act.

### **Clause 11 Functions**

18. Clause 11 sets out the Commissioner's functions. Subclause 11(1) outlines that these functions are:

- inquiring into the circumstances of defence and veteran deaths by suicide (paragraph 11(1)(a)) – the inquiry function is further elaborated in clause 26
- making findings and recommendations following such inquiries, addressing matters such as the wellbeing of defence members and veterans, defence and veteran suicide prevention strategies, and any policy, legislative, administrative or structural reforms that may be required (paragraph 11(1)(b))
- reviewing action taken in response to any findings or recommendations the Commissioner has made (paragraph 11(1)(c))
- working collaboratively with State or Territory Coroners to understand issues contributing to defence and veterans deaths by suicide (paragraph 10(1)(d))
- maintaining a record of defence and veteran deaths by suicide notified to the Commissioner (paragraph 10(1)(e))
- promoting understanding of suicide risks for defence members and veterans, and factors that can improve defence members and veterans wellbeing (paragraph 11(1)(f))
- considering any related matter referred to the Commissioner by the Prime Minister or Minister (paragraph 11(1)(g)), and
- anything incidental or conducive to the performance of the above functions (paragraph 11(1)(h)), which will ensure the Commissioner could undertake functions closely related to those expressly listed within subclause 11(1).

19. Subclause 11(2) confirms matters which are not functions of the Commissioner. These matters are making findings of civil or criminal wrongdoing, or making findings on the cause of death in relation to a defence or veteran death by suicide (paragraphs 11(2)(a) and (b)). Excluding these matters from the Commissioner's functions is intended to clarify that the Commissioner will not be undertaking the role of a court (which may make a finding of civil or criminal wrongdoing) or a Coroner (which, among other things, may make a finding on a cause of death).

20. Subclause 11(3) provides that the Commissioner must have regard to the need to avoid prejudicing current or future criminal or civil proceedings, or other contemporaneous inquiries, in performing their functions. The requirement for the Commissioner to have regard to these matters will assist to ensure that their work is complementary to the work other bodies may undertake examining circumstances related to a defence or veteran death by suicide. The note to subclause 11(3) provides an example of a contemporaneous inquiry as



one conducted by the Inspector-General of the Australian Defence Force (IGADF) under section 110C of the Defence Act.

21. Subclause 11(4) clarifies that the Commissioner has power to do all things necessary or convenient to be done for or in connection with the performance of their functions. This subclause clarifies the Commissioner has the necessary powers to undertake their functions, as provided in subclause 11(1).

## **Clause 12 General principles for the performance of the Commissioner's functions**

22. Clause 12 provides the general principles that should guide the work of the Commissioner.

23. Subclause 12(1) confirms that the Commissioner is to take into account certain general principles in exercising their functions or powers.

24. Subclause 12(2) requires that the Commissioner take a trauma-informed and restorative approach. Subclause 12(3) provides that the Commissioner should:

- recognise that families and others affected by defence and veteran deaths by suicide have a unique contribution to make to the Commissioner's functions (paragraph 12(3)(a)), and
- recognise such families and other affected persons may wish to be consulted (paragraph 12(3)(b)).

25. The guiding principles in subclauses 12(2) and (3) recognise the fundamental role that families and others affected by a defence or veteran death by suicide will have to assist the Commissioner to understand the full circumstances, and tragic consequences, of each death. They also recognise and respect that some people may not wish to share their experiences with the Commissioner, and should have choice about whether or not to contribute.

26. Taking a restorative and trauma-informed approach means that the principles of safety, confidentiality, consultation and informed participation will underpin the way the Commissioner exercises their functions and powers.

## **Clause 13 Application of finance law**

27. Clause 13 provides that the finance law (which is a defined term within the Public Governance, Performance and Accountability Act) applies to the Commissioner as if they were an official of the Attorney-General's Department. The clause does not affect the standing of the Commissioner as an independent statutory office holder.

28. Clause 13 has the effect that the Public Governance, Performance and Accountability Act, the rules or any instrument made under that Act, and an Appropriation Act (together making up the 'finance law' referred to in clause 13) apply to the Commissioner in the same way as if they were an official of the Attorney-General's Department.

29. Applying the requirements of the finance law to the Commissioner is appropriate to ensure the proper use of any Commonwealth resources entrusted to the Commissioner. Complying with the requirements of the finance law will not be expected to affect the exercise of any of the Commissioner's functions or powers, and will provide certainty about the relevant requirements for the Commissioner's use of any Commonwealth resources.

30. An example of a Commonwealth resource that may be entrusted to the Commissioner and attract the requirements of the finance law is the use of a departmental credit card. The Commissioner will be required to comply with the accountable authority instructions made by the Secretary of the Attorney-General's Department under section 20A of the Public Governance, Performance and Accountability Act, for example, in relation to the appropriate use of such a credit card.

#### **Clause 14 Arrangements relating to staff of the Department**

31. Clause 14 sets out the arrangements for staff assisting the Commissioner.

32. Clause 14 provides that the staff assisting the Commissioner are to be APS employees in the Attorney-General's Department (paragraph 14(a)), or persons engaged as contractors by, or on behalf of, the Commonwealth (paragraph 14(b)). These staff are to be made available to the Commissioner by the Secretary of the Attorney-General's Department, for the purpose of performing any of the Commissioner's functions.

33. The staff assisting the Commissioner within the Attorney-General's Department, including any contractor staff, will be administratively separate to confirm their independence from other departmental functions.

34. The staff assisting the Commissioner (including contractors) are 'entrusted persons', which is a defined term in clause 5.

#### **Clause 15 Delegation by Commissioner**

35. Clause 15 provides for the delegation of certain functions or powers by the Commissioner.

36. Subclause 15(1) provides that the Commissioner may delegate all or any of the functions or powers under clauses 32 or 53 to a person who is an SES employee of the Attorney-General's Department and made available to assist the Commissioner (see clause 14 above). A delegation under subclause 15(1) must be in writing.

37. The functions or powers the Commissioner could delegate relate to:

- requiring a person to give information or produce a document or thing (clause 32), and
- issuing a non-publication direction in relation to the publication, production or disclosure of evidence or certain other information (clause 53).

38. Enabling an SES official assisting the Commissioner to exercise these functions under a delegation arrangement will assist the Commissioner to manage their workload and to facilitate a number of concurrent inquiries. It will also provide practical assistance if a relevant function needed to be exercised under urgent circumstances and the Commissioner was not personally available.

39. Subclause 15(2) requires that the delegate comply with any written directions of the Commissioner in exercising the delegation.

### **Division 3 — Terms and conditions etc.**

#### **Clause 16 Appointment**

40. Clause 16 provides for the appointment of the Commissioner.
41. Subclause 16(1) provides that the Commissioner is to be appointed by the Governor-General by written instrument. The note to this subclause clarifies that the Commissioner is eligible for reappointment, in accordance with section 33AA of the Acts Interpretation Act.
42. Subclause 16(2) requires that a person must not be appointed as the Commissioner unless the Governor-General is of the opinion the person is suitable for appointment because of their qualifications, training or experience. This will enable a broad range of potential candidates, with diverse backgrounds and experience, to be considered for appointment.

#### **Clause 17 General terms and conditions of appointment**

43. Clause 17 sets out the general terms and conditions of the Commissioner's appointment and service.
44. Subclause 17(1) provides that the Commissioner holds office in accordance with the period specified in the instrument of appointment, and that this period must not exceed five years.
45. Subclause 17(2) confirms that the Commissioner will hold office on a full-time basis.
46. Subclause 17(3) clarifies that, to the extent the terms and conditions of the Commissioner are not covered by this Act, the Commissioner holds office on the terms and conditions determined by the Governor-General.

#### **Clause 18 Remuneration**

47. Clause 18 provides the remuneration arrangements for the Commissioner.
48. Subclause 18(1) provides that the Commissioner is to be paid the remuneration determined by the Remuneration Tribunal. In the absence of such a determination, the Commissioner is to be paid the remuneration prescribed by rules made under the Act.
49. Subclause 18(2) provides that the Commissioner is to be paid the allowances prescribed by the rules.
50. Subclause 18(3) confirms that this clause has effect subject to the Remuneration Tribunal Act.

#### **Clause 19 Leave of absence**

51. Clause 19 sets out the basis for the Commissioner taking a leave of absence.
52. Subclause 19(1) provides that the Commissioner has the recreation leave entitlements determined by the Remuneration Tribunal.

53. Subclause 19(2) specifies that the Minister may grant the Commissioner other leave of absence. Such additional leave of absence is on the terms and conditions as determined by the Minister, including as to remuneration.

## **Clause 20 Other paid work**

54. Clause 20 sets out the obligations of the Commissioner in respect of paid work outside the duties of the Commissioner's office.

55. Clause 20 specifies that the Commissioner must not engage in paid work outside the duties of their office without the approval of the Minister. 'Paid work' is defined in clause 5 to mean any work for financial gain or reward.

56. If the Commissioner does engage in outside paid work in contravention of clause 20, paragraph 22(2)(c) provides that the Governor-General must terminate the Commissioner's appointment.

## **Clause 21 Resignation**

57. Clause 21 provides that the Commissioner may resign their appointment.

58. Subclause 21(1) specifies that the Commissioner may resign their appointment by tendering a written resignation to the Governor-General.

59. Subclause 21(2) specifies that such resignation takes effect on the day it is received by the Governor-General or, if specified, a later day.

## **Clause 22 Termination of appointment**

60. Clause 22 provides circumstances in which the Governor-General may terminate the Commissioner's appointment, and circumstances in which the Governor-General must terminate the appointment.

61. Subclause 22(1) provides that the Governor-General may terminate the Commissioner's appointment for misbehaviour (paragraph 22(1)(a)) or if the Commissioner is unable to perform the duties of the office due to physical or mental incapacity (paragraph 22(1)(b)).

62. Subclause 22(2) provides mandatory grounds for termination. Accordingly, the Governor-General must terminate the Commissioner's appointment if the Commissioner:

- becomes bankrupt or takes certain steps in relation to insolvency or bankruptcy (paragraph 22(2)(a))
- is absent from duty for specified periods of time, except on leave of absence (paragraph 22(2)(b))
- engages in paid outside work without the approval of the Minister, as specified in clause 20 (paragraph 22(2)(c)), or
- fails, without reasonable excuse, to disclose relevant interests as specified in clause 23 (paragraph 22(2)(d)).

## **Clause 23      Disclosure of interests**

63. Clause 23 provides for the disclosure of interests by the Commissioner. Failure to comply with this clause, without reasonable excuse, is a ground for the Governor-General to terminate the appointment of the Commissioner under paragraph 22(2)(d).

64. Subclause 23(1) requires the Commissioner to make a disclosure to the Minister under section 29 of the Public Governance, Performance and Accountability Act.

65. Section 29 of the Public Governance, Performance and Accountability Act requires an official who has a material personal interest that relates to the affairs of the entity, to disclose the details of the interest.

66. Subclause 23(2) clarifies that subclause 29(1) applies in addition to any rules made under this Act for the purposes of subclause 29(1).

67. Subclause 23(3) clarifies that the Commissioner is taken to not have complied with section 29 of the Public Governance, Performance and Accountability Act if the Commissioner does not comply with subclause 23(1).

## **Clause 24      Acting appointments**

68. Clause 24 provides for the appointment of an acting Commissioner.

69. Clause 24 provides that the Minister may appoint a person to act as Commissioner during a vacancy in the office, or periods where the ordinary office holder is absent from duty or from Australia, or for any reason is unable to perform the duties of the office. Such an appointment must be by written instrument.

## **PART 3 — INFORMATION GATHERING**

### **Clause 25      Simplified outline of this Part**

70. Clause 25 provides a simplified outline of Part 3 of the Act to assist the reader. This outline is not intended to be comprehensive and readers should rely on the substantive provisions.

### **Clause 26      Inquiries**

71. Clause 26 sets out the circumstances the Commissioner may inquire into when exercising their inquiry function, as provided for in paragraph 11(1)(a).

72. Subclause 26(1) lists matters the Commissioner may inquire into as part of their inquiry function, without limiting or exhaustively identifying the matters the Commissioner may consider. The matters listed are:

- the person's service in the ADF (including training), and for a person who had ceased serving in the ADF at the time of their death, their transition from the ADF (paragraph 26(1)(a))
- issues, including relevant personal circumstances, connected to the person's recruitment to the ADF, and their transition from the ADF (paragraph 26(1)(b)) –

relevant personal circumstances could include a range of the person's life circumstances, for example, their age, health, or family context

- the health, wellbeing and counselling support services available to the person during their ADF service, or as a veteran, and whether these services were effective (paragraph 26(1)(c))
- any complaints made by the person, or their family, friends or associates, about the wellbeing and support services available to person, and the quality and effectiveness of responses to any such complaints (paragraph 26(1)(d))
- the extent to which the circumstances of a particular death by suicide reflect broader or systemic issues contributing to rates of defence and veteran deaths by suicide (paragraph 26(1)(e)), and
- any other matters the Commissioner considers relevant and reasonably incidental to defence and veteran deaths by suicide (paragraph 26(1)(f)).

73. The capacity for the Commissioner to consider matters in addition to those expressly listed in subclause 26(1), and matters the Commissioner considers relevant and reasonably incidental to defence and veteran deaths by suicide (paragraph 26(1)(f)), is intended to provide the necessary flexibility of scope for inquiries in each case.

74. Other circumstances that may be relevant for the Commissioner to consider could include the social and family context of the person, or their economic or employment circumstances, for example.

75. Subclause 26(2) clarifies that the Commissioner may exercise their inquiry function on their own initiative. The capacity for the Commissioner to self-initiate an inquiry reflects their independence.

76. Subclause 26(3) confirms the Commissioner may inquire into defence and veteran deaths by suicide that occurred prior to the commencement of this Act. It is intended that in doing so, the Commissioner will have close regard to any Coronial or other inquiries that have been undertaken, or which may be continuing (subclause 11(3) refers), so the Commissioner is building upon, and not duplicating, other processes or findings.

## **Clause 27     Hearings**

77. Clause 27 relates to the Commissioner holding a hearing as part of performing their functions.

78. Subclause 27(1) provides that the Commissioner may hold a hearing for the purposes of performing their functions.

79. Subclause 27(2) requires that a hearing be held in public. The note to subclause 27(2) clarifies that there are circumstances where hearings may be held in private which are addressed at subclauses 28(1), 28(2) and 42(6). Subclause 27(2) also enables the Commissioner to determine the procedure for a hearing.

80. Subclause 27(3) confirms that the Commissioner is not bound by the rules of evidence. This effect of this provision is to provide procedural flexibility to the

Commissioner in how it can undertake inquiries and draw conclusions from the evidence and other material presented to it.

81. Subclause 27(4) requires the Commissioner to make a record of each hearing. A record of this kind could include, but is not limited to, a transcript or an audio recording.

## **Clause 28 Private hearings**

82. Clause 28 confers discretion on the Commissioner to hold a private hearing in certain circumstances.

83. Subclause 28(1) provides the Commissioner may hold a hearing, or part of a hearing, in private, despite subclause 27(2), if they are satisfied information relating to a deceased person, or the family, friends or associates of a deceased person, may be disclosed and that information is personal and private. ‘Personal and private’ information is not a defined term in the Act. It is intended that, in practice, the wishes and interests of the witnesses involved, and the people or agencies who may be affected by the evidence, will be carefully considered by the Commissioner when deciding how a hearing should most appropriately occur in each case.

84. Subclause 28(2) provides that a hearing or part of a hearing may be held in private, despite subclause 27(2), if the Commissioner is satisfied that a person giving evidence at a hearing may give evidence that discloses operationally sensitive information. ‘Operationally sensitive information’ is a defined term in clause 5 of this Act.

85. The note to subclause 28(2) alerts the reader to the requirement in clause 33 that a person must give written notice of a likely disclosure of operationally sensitive information to the Commissioner.

86. Subclause 28(3) provides considerations the Commissioner must have regard to when considering whether to hold a hearing, or part of a hearing, in private. These matters are:

- the potential risk of prejudice to national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act) or to the operations of a law enforcement or security agency (paragraph 28(3)(a))
- whether holding a hearing in private would have a substantial negative effect on the exercise or performance of the Commissioners functions or powers (paragraph 28(3)(b))
- any submissions received in response to an invitation for submissions under subclause 33(3) (see further below) (paragraph 28(3)(c))
- the safety and security of any person (paragraph 28(3)(d))
- any privileges, immunities or other restrictions that may apply to the disclosure of relevant information (paragraph 28(3)(e)), and
- any other matters the Commissioner considers relevant (paragraph 28(3)(f)).

87. The National Security Information (Criminal and Civil Proceeding) Act defines ‘national security’ broadly to mean ‘Australia’s defence, security, international relations or law enforcement interests’.

## **Clause 29      Consultation in relation to certain private hearing evidence**

88. Clause 29 sets out consultation requirements for the Commissioner following a private hearing held on the basis of operationally sensitive information. The consultation process will support procedural fairness for a person or body whose interests may be affected by the future use and disclosure of evidence connected to a private hearing, and ensure that relevant agencies are consulted about the future use of any operationally sensitive information.

89. Subclause 29(1) requires that, following a private hearing held on the basis of operationally sensitive information, the Commissioner must:

- consult with any law enforcement or security agency to which the evidence relates and consider any information received from such agencies following that consultation (paragraph 29(1)(a))
- consider any potential risk of prejudice to national security (as defined in the National Security Information (Criminal and Civil Proceeding) Act) (paragraph 29(1)(b)), and
- consider the safety and security of any person (paragraph 29(1)(c)).

90. The Commissioner is to do these things before using or disclosing any evidence given at, or in relation to, the private hearing (see subclause 29(2)).

91. Subclause 29(2) provides that, before using or disclosing the evidence given in any private hearing, the Commissioner must:

- consider consulting the witness, and any other person whose interests are affected by the evidence (paragraph 29(2)(a))
- consider any potential prejudice to a person not consulted before the Commissioner uses or discloses information given at, or in relation to, a private hearing (paragraph 29(2)(b)), and
- consider any preferences that a witness to a private hearing has expressed about consultation (paragraph 29(2)(c)).

## **Clause 30      Summons**

92. Clause 30 provides for the Commissioner to summon a person to attend a hearing to give evidence or produce documents or things.

93. Subclause 30(1) provides that the Commissioner may summon a person to attend a hearing to give evidence or produce documents or things, at a time and place specified in a written notice.

94. Subclause 30(2) provides that the notice of a summons must be in writing, signed by the Commissioner and served on the person required to attend a hearing.

95. Subclause 30(3) provides the Commissioner must give a person at least 14 days after the day on which the notice is given to comply with the notice. This is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.



96. Subclause 30(4) provides that the 14 day timeframe requirement in subclause 30(3) does not apply if the Commissioner reasonably believes the circumstances relating to the summons are urgent or serious. Urgent or serious are not defined terms in the Act. It is at the Commissioner's discretion to determine if circumstances are urgent or serious enough to warrant a shorter time for a person to comply with a summons.

97. Subclause 30(5) provides that the power of the Commissioner to require a person to give information or produce a document or thing includes the power to require these things even if they are subject to legal professional privilege.

98. Subclause 30(6) provides that if the Commissioner issues a notice under subclause 30(1) to an official of a Commonwealth entity, the Commissioner must also give a copy of the notice to the head of the Australian intelligence entity (if the official performs duties in, or services for, an Australian intelligence entity), or otherwise to the accountable authority of the Commonwealth entity, or to both.

### **Clause 31 Evidence on oath or by affirmation**

99. Clause 31 confers powers on the Commissioner to require a witness to take an oath or affirmation at a hearing.

100. Subclause 31(1) provides the Commissioner may require a witness at a hearing to take an oath or affirmation, and may administer an oath or affirmation to the witness.

101. Note 1 to subclause 31(1) alerts the reader that it is an offence under clause 46 to not take an oath or make an affirmation.

102. Note 2 clarifies that a consequence of the power of the Commissioner under subclause 31(1) to compel a witness to take an oath or affirmation, is that hearings overseen by the Commissioner are considered 'judicial proceedings' under Part III of the Crimes Act. This means that the offences attaching to 'judicial proceedings', as set out in Part III of the Crimes Act, are applicable. The offences in Part III of the Crimes Act are, for example, giving false testimony, fabricating evidence, intimidation of witnesses, corruption of witnesses, deceiving witnesses and destroying evidence.

103. The fact that hearings convened by the Commissioner are considered 'judicial proceedings' under Part III of the Crimes Act does not mean that the Commissioner is purporting to exercise judicial power, or operating as a court of law, in any of their functions or powers.

104. Subclause 31(2) clarifies that an oath or affirmation administered by the Commissioner is an oath or affirmation that a witness will give true evidence.

105. Subclause 31(3) provides the Commissioner the discretion to allow a person attending a hearing who has taken an oath or affirmation to give evidence by submitting a witness statement, and to verify its truth by oath or affirmation.

### **Clause 32 Commissioner may require information etc.**

106. Clause 32 confers power on the Commissioner to require a person to give information or produce a document or thing.

107. Subclause 32(1) provides that the Commissioner may require, by notice in writing, a person to give the information or a statement in writing, or produce documents or things, which are specified in the written notice. The note to subclause 32(1) alerts the reader that it is an offence under clause 45 to not comply with a notice issued under subclause 32(1).

108. Subclause 32(2) requires that a notice be in writing, and stipulate the timeframe in which the person is to comply with the notice.

109. Subclause 32(3) provides the Commissioner must give a person at least 14 days after the day after the notice is given to comply with the notice. This is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

110. Subclause 32(4) provides that the 14 day timeframe requirement in subclause 32(3) does not apply if the Commissioner reasonably believes the circumstances relating to the notice are urgent or serious. Urgent or serious are not defined terms in the Act. It is at the Commissioner's discretion to determine if circumstances are urgent or serious enough to warrant a shorter time for a person to comply with a notice.

111. Subclause 32(5) provides that the power of the Commissioner to require a person to give information or produce a document or thing includes the power to require these things even if they are subject to legal professional privilege.

112. Subclause 32(6) provides that if the Commissioner issues a notice under subclause 36(1) to an official of a Commonwealth entity, the Commissioner must also give a copy of the notice to the head of the Australian intelligence entity (if the official performs duties in, or services for, an Australian intelligence entity), or otherwise to the accountable authority of the Commonwealth entity, or to both.

### **Clause 33 Notice of likely disclosure of operationally sensitive information**

113. Clause 33 requires a person to give written notice to the Commissioner in a range of circumstances where they may disclose operationally sensitive information.

114. Subclause 33(1) creates an obligation on a person to give written notice to the Commissioner if information, a statement, document or thing they may give to the Commissioner may involve the disclosure of operationally sensitive information. The written notice must be provided before the evidence or document is disclosed to the Commissioner.

115. The note to subclause 33(1) alerts the reader that it is an offence under subclause 47(1) for a person who holds or has held an Australian Government security clearance to fail to give notice.

116. Subclause 33(2) provides the written notice must describe the evidence, information, statement, document or thing the person considers may be operationally sensitive information. In practice, the notice will describe the evidence in general terms to assist the Commissioner in their assessment as to whether a hearing or part of a hearing may be held in private (clause 28 refers), or to otherwise alert the Commissioner to the need for considered handling of the information.

117. Subclause 33(3) provides discretion for the Commissioner to invite submissions from relevant persons or bodies where the Commissioner believes that operationally sensitive information may be disclosed at a hearing. Relevant persons or bodies include law

enforcement or security agencies, as defined in clause 5 of this Act. The Commissioner must consider any submissions received in determining whether to hold a private hearing under paragraph 28(3)(c). A submission provided in response could be made orally, or in writing.

118. Subclause 33(4) clarifies that if the Commissioner invites submissions under subclause 33(3), the Commissioner must ensure that information that may be operationally sensitive is not inappropriately disclosed in the course of inviting submissions.

#### **Clause 34 Notice of likely disclosure of intelligence information**

119. Clause 34 requires a person to give written notice to the Commissioner in a range of circumstances where they may disclose intelligence information.

120. Clause 34 creates an obligation on a person to give written notice to the Commissioner if information, a statement, document or thing they may give to the Commissioner may involve the disclosure of intelligence information. ‘Intelligence information’ is a defined term in clause 5 of this Act. The written notice must be provided before the evidence or document is disclosed to the Commissioner.

121. The notice requirement in clause 34 will alert the Commissioner to the sensitivity of the incoming information, and the need to handle it in accordance with an arrangement under clause 42.

122. The note to clause 34 alerts the reader that it is an offence under subclause 47(2) for a person who holds or has held an Australian Government security clearance to fail to give notice.

#### **Clause 35 Powers of Commissioner in relation to documents or other thing**

123. Clause 35 relates to the powers of the Commissioner to inspect, retain and copy documents or other things produced or given to it, including pursuant to a requirement under clause 30 or clause 32.

124. Clause 35 provides the Commissioner may:

- inspect any document or thing (paragraph 35(a))
- retain the document or thing for as long as is reasonably necessary to enable the Commissioner to perform their function (paragraph 35(b)), and
- make copies of documents produced or given to the Commissioner that contain material relevant to the Commissioner’s functions or powers (paragraph 35(c)).

#### **Clause 36 Search warrants**

125. Clause 36 provides for the Commissioner, or an authorised member, to apply to an eligible judge for a search warrant to be issued in particular circumstances. In practice, it is expected that a search warrant would only be sought in exceptional circumstances connected with a potentially imminent concealment, loss or destruction of relevant material, rather than forming part of the Commissioner’s usual information and evidence gathering processes.

126. Subclause 36(1) provides that the Commissioner, or an authorised member, may make an application for a search warrant under subclause 36(4) in relation to a matter that is relevant to the Commissioner's functions.

127. Subclause 36(2) clarifies that an 'authorised member' is a person, or each person in a class of persons, that the Commissioner may authorise for the purposes of this clause. The person or class of persons are to be a member of the Australian Federal Police (AFP) or a State or Territory police force.

128. Subclause 36(3) provides that the Commissioner, or authorised member, may apply to an eligible Judge for a search warrant to be issued under subclause 36(3) if the Commissioner, or authorised member, has reasonable grounds:

- for suspecting that there may be, at a time within the next 24 hours, on any land, premises, vessel, aircraft or vehicle, things of a particular kind that are connected with a matter into which the Commissioner is inquiring (paragraph 36(3)(a)), and
- that, if a summons were issued for the production of the thing or things, the thing or things may be concealed, lost, mutilated or destroyed (paragraph 36(3)(b)).

129. Subclause 36(4) enables an eligible Judge to issue a search warrant following an application by the Commissioner or an authorised member. The search warrant may authorise a member of the AFP, the police force of a State or Territory, or any other person authorised in the warrant, with such assistance as the authorised person may require, to execute the warrant. An 'eligible Judge' is a defined term in clause 5.

130. Subclause 36(4) provides that, in executing a search warrant, relevant police or authorised persons may, with reasonable force if necessary, enter onto land or premises of certain kinds, search it for things of the relevant kind, and seize any things of a relevant kind found. The seized things are to be delivered to the Commissioner.

131. Subclause 36(5) specifies certain information that must be contained in a search warrant that is issued:

- a statement of the purpose for which the warrant was issued, its connection to the matter into which the Commissioner is inquiring, and with which things of the relevant kind are connected (paragraph 36(5)(a))
- whether entry is limited to specific periods of time or if it is authorised to be made at any time of day (paragraph 36(5)(b))
- a description of the kind of things to be seized (paragraph 36(5)(c))
- a date on which the warrant expires – this date is to be no later than one month after the date of issue of the warrant (paragraph 36(5)(d)).

132. Subclause 36(6) provides that a person executing a search warrant is taken to be authorised to seize a thing that is not included in the description of the things to be seized in the search warrant if the person reasonably believes:

- the other thing(s) are connected with the matter into which the Commissioner is inquiring (paragraph 36(6)(a)), or
- the other thing(s) are connected with another matter into which the Commissioner is inquiring (paragraph 36(6)(b)).

133. The person must also believe on reasonable grounds that it is necessary for the other thing(s) to be seized to prevent its concealment, loss, mutilation or destruction.

#### **Clause 37 Application by telephone for search warrants**

134. Clause 37 sets out the process for a search warrant application to be made by telephone.

135. Subclause 37(1) provides that an application for a search warrant under subclause 36(1) may be made by telephone, if the applicant considers it necessary to do so due to urgent circumstances.

136. Subclause 37(2) sets out that if an eligible Judge issues a search warrant on an application made by telephone, the eligible Judge must complete and sign the warrant, inform the applicant of the terms of the warrant and date and time at which it was signed, and provide a copy to the applicant.

137. Subclause 37(3) provides that if a warrant made by telephone application is issued, the Commissioner, a member of the AFP or a State or Territory police force may complete a form of warrant in the terms set by the eligible Judge at subclause 37(2).

138. Subclause 37(4) confirms that a warrant completed in accordance with subclause 37(3) is considered to be a warrant issued under clause 36.

#### **Clause 38 Witnesses subject to questioning**

139. Clause 38 clarifies who may question a witness on matters relevant to a hearing.

140. Subclause 38(1) provides that the Commissioner may allow a legal practitioner assisting the Commissioner, a legal practitioner who represents any person and is granted leave to appear, or any person authorised by the Commissioner to appear, to examine or cross-examine a witness on a matter relevant to a hearing. ‘Legal practitioner’ is a defined term in clause 5.

141. Subclause 38(2) provides that, subject to this Act, a witness who is examined or cross-examined has the same protections and is subject to the same liabilities as if they were questioned by the Commissioner. This provision clarifies that the fact of a person being examined or cross-examined by another person does not affect the application of the witness protections or obligations elsewhere within the Act to the witness. The note to subclause 38(2) alerts the reader that other witness protections are addressed at clause 64.

#### **Clause 39 Witnesses etc. to be paid expenses**

142. Clause 39 relates to witness expenses for appearance at a hearing.

143. Subclause 39(1) provides that a witness appearing at a hearing may be paid a reasonable amount for their expenses connected with appearing. It also provides that rules made under this Act may prescribe a scale for determining witness expenses.

144. Subclause 39(2) provides that if there is no prescribed scale for witness expenses in rules made under the Act, the Commissioner may authorise payment of an amount the Commissioner considers reasonable.

## **Clause 40      Disclosure of information to the Commissioner – Commonwealth**

145. Clause 40 authorises Commonwealth bodies (including appointed office holders) to disclose information to the Commissioner, including on their own initiative, to assist the work of the Commissioner. The intention is that this clause will facilitate information being proactively disclosed to the Commissioner, and clarify the capacity for relevant bodies to so disclose despite other laws or obligations.

146. Subclause 40(1) provides that a Commonwealth body or office holder may disclose information (including personal information, which is a defined term in clause 5), to assist the performance of the Commissioner's functions or powers. A disclosure of information may be at the initiative of the body or office holder, or at the request of the Commissioner. A request of the Commissioner in this context is intended to be less formal than the issuing of a compulsory notice under clause 32, for example.

147. Subclause 40(2) confirms that a disclosure of information is not taken to have been made by the relevant Commonwealth body or office holder under subclause 40(1) if the individual making the disclosure is acting outside of their authority in relation to the body. A person could be acting outside of their authority if they were not permitted to have access to the information they purported to disclose to the Commissioner, for example.

148. Subclause 40(3) authorises the Commissioner to use information disclosed to it under subclause 40(1) for the purpose of performing their functions or exercising their powers.

149. Subclause 40(4) provides that the authorisation in subclause 40(1) has effect despite any law of a State or Territory, or the general law, that restricts or prohibits the disclosure of information. The intended effect of this provision is that State or Territory legislation, or common law obligations, which may otherwise affect the capacity for a Commonwealth body or office holder to disclose information to the Commissioner are displaced. A Commonwealth body or office holder disclosing information could continue to apply necessary due diligence and approval processes within that body, to ensure information is being provided following necessary consultation, or with certain requests as to its future use, for example. It is intended that this provision remove the potential for a Commonwealth body or office holder to be liable for a penalty, or face potential liability for an action at common law, for example, because of disclosing information to the Commissioner.

150. Subclause 58(2) confirms that a person who discloses information under clause 40 does not commit an offence, and is not liable to a penalty, under a secrecy provision (which is a defined term in clause 5).

## **Clause 41      Disclosure of information to the Commissioner – States and Territories**

151. Clause 41 authorises State and Territory bodies, appointed office holders, a Coroner or a Coroner's Court (relevant bodies), to disclose information to the Commissioner, including on their own initiative, to assist the work of the Commissioner. The intention is that this clause will facilitate information being proactively disclosed to the Commissioner, and clarify the capacity for relevant bodies to so disclose despite other laws or obligations.

152. Subclause 41(1) provides that relevant bodies may disclose information (including personal information, which is a defined term in clause 5), to assist the performance of the Commissioner's functions or powers. A disclosure of information may be at the initiative of

the relevant bodies, or at the request of the Commissioner. A request of the Commissioner in this context is intended to be less formal than the issuing of a compulsory notice under clause 32, for example.

153. Subclause 41(2) confirms that a disclosure of information is not taken to have been made by relevant bodies under subclause 41(1) if the individual making the disclosure is acting outside of their authority in relation to the body. A person could be acting outside of their authority if they were not permitted to have access to the information they purported to disclose to the Commissioner, for example.

154. Subclause 41(3) authorises the Commissioner to use information disclosed to it under subclause 41(1) for the purpose of performing their functions or exercising their powers.

155. Subclause 41(4) provides that the authorisation in subclause 41(1) has effect despite any law of a State or Territory, or the general law, that restricts or prohibits the disclosure of information. The intended effect of this provision is that State or Territory legislation, or common law obligations that may otherwise affect the capacity for relevant persons and bodies to disclose information to the Commissioner are displaced. Relevant bodies disclosing information could continue to apply necessary due diligence and approval processes within that body, to ensure information is being provided following necessary consultation, or with certain requests as to its future use, for example. It is intended that this provision remove the potential for relevant bodies to be liable for a penalty, or face potential liability for an action at common law, for example, because of disclosing information to the Commissioner.

156. Subclause 58(2) confirms that a person who discloses information under clause 41 does not commit an offence, and is not liable to a penalty, under a secrecy provision (which is a defined term in clause 5).

## **Clause 42 Arrangements for obtaining and protecting intelligence information**

157. Clause 42 requires the Commissioner to take all reasonable steps to enter into an arrangement with the head of an Australian intelligence entity relating to the obtaining, protection and disclosure of intelligence information.

158. The protections proposed for intelligence information under this clause reflect the particular importance of information of this kind not being inadvertently disclosed in a hearing, public report or other work released by the Commissioner, nor deliberately disclosed in a manner which is inappropriate in all the circumstances. Arrangements entered into under clause 42 will support the Office of the National Commissioner in its consideration of how to receive, store, use and disclose intelligence information.

159. Subclause 42(1) requires that the Commissioner must take all reasonable steps to ensure that entrusted persons obtain, store, access, use and disclose intelligence information relating to an Australian intelligence entity in accordance with an arrangement between the Commissioner and the head of the entity. All reasonable steps would include engagement in good faith as required.

160. Entrusted person is a defined term in clause 5 and includes both the Commissioner and staff assisting the Commissioner (clause 14 refers). This arrangement will deal with:

- the manner in which entrusted persons obtain intelligence information (paragraph 42(1)(a))

- the protection of intelligence information whilst in the possession of an entrusted persons (paragraph 42(1)(b)), and
- the disclosure of intelligence information by entrusted persons (paragraph 42(1)(c)).

161. Subclause 42(2) requires the Commissioner to take all reasonable steps to ensure that an arrangement under subclause 42(1) is in place with the head of an Australian intelligence entity before obtaining intelligence information relating to that intelligence entity.

162. Subclause 42(3) specifies that subclauses 42(1) and (2) apply despite any other provision of this Act.

163. Subclause 42(4) provides, without limiting subclause 42(1), that an arrangement may limit the circumstances in which intelligence information may be disclosed in a report under subclause 60 or 62, Subclause 42(4) also provides that an arrangement may set out matters the Commissioner must regard in considering a disclosure of intelligence information in accordance with subclause 57.

164. Subclause 42(5) clarifies that, except to the extent outlined in subclause 42(4), an arrangement cannot prevent the Commissioner from exercising their powers or performing their functions under any provision of this Act, including clause 57.

165. Paragraph 42(6)(a) provides that despite subclause 27(2), if the Commissioner is satisfied that a person appearing at a hearing may disclose intelligence information, the Commissioner may conduct a hearing in public or private. Subclause 42(6) also provides that the conduct of the hearing must be consistent with the arrangement the Commissioner entered into with the head of the relevant Australian intelligence entity (paragraph 42(6)(b)).

166. Subclause 42(7) clarifies that any arrangement entered into in writing for the purposes of subclause 42(1) is not a legislative instrument. Subclause 42(7) is intended to assist the reader to understand that clause 42 is administrative in nature and is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act.

### **Clause 43      Application of this Act in relation to current and former IGIS officials**

167. Clause 43 clarifies that sections 34 and 34A of the Inspector-General of Intelligence and Security Act applies to this Act.

168. Clause 43 provides:

- an entrusted person may obtain information from another person who acquired the information as an IGIS official (paragraph 43(a)), and
- a person who acquired information as an IGIS official may disclose information to an entrusted person (paragraph 43(b)).

169. The obtaining and disclosing of information under clause 43 may only occur in accordance with sections 34 and 34A of the Inspector-General of Intelligence and Security Act. Clause 43 operates despite any other provision in this Act. ‘IGIS official’ and ‘entrusted person’ are defined terms in clause 5.

170. The Inspector-General of Intelligence and Security (Inspector-General) holds a unique role within the Australian intelligence community as an independent office holder with



powers to review the activities of intelligence entities. As such, IGIS officials are subject to strict secrecy offences under section 34 of the Inspector-General of Intelligence and Security Act which prevent IGIS officials from disclosing ‘any information’ obtained in the course of their duties to any person, including to a court.

171. Consistent with section 34A of the Inspector-General of Intelligence and Security Act, which allows for voluntary disclosure to prescribed Royal Commissions, an IGIS official may volunteer information to the Commissioner if regulations declare section 34A applies in relation to the Commissioner. This preserves the secrecy provisions of the Inspector-General of Intelligence and Security Act by ensuring that an IGIS official cannot be compelled to give information or produce documents, whilst preserving a pathway for the Commissioner to receive information. This recognises that the Commissioner’s powers are closely aligned to those of a Royal Commission.

172. The National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020 amends section 34A of the Inspector-General of Intelligence and Security Act to allow the Commissioner to be prescribed under the regulations to permit the Inspector-General to give information or documents to the Commissioner to assist the Commissioner’s inquiries.

## **PART 4 — INFORMATION SHARING**

### **Clause 44 Simplified outline of this Part**

173. Clause 44 provides a simplified outline of Part 4 of the Act to assist the reader. This outline is not intended to be comprehensive and readers should rely on the substantive provisions.

### **Clause 45 Failure to attend hearing, give information or produce documents etc.**

174. Clause 45 provides offences, and relevant defences, where a person fails to comply with a summons or notice issued by the Commissioner.

175. Subclause 45(1) provides it is an offence for a person to fail to attend at a hearing if required to do so under a notice served under clause 30. This offence is punishable by a maximum penalty of imprisonment for 2 years. Under subsection 4B(2) of the Crimes Act, the term of imprisonment can be converted into penalty units.

176. Subclause 45(2) provides it is an offence for a person to fail to give information or produce a document or thing if required to do so under a notice served under clause 30 or 32. This offence is punishable by imprisonment for 2 years. Under section 4B of the Crimes Act, the term of imprisonment can be converted into penalty units.

177. Subclause 45(3) provides that a person required to attend a hearing or to give information or produce a document or thing under subclauses 45(1) and (2), does not commit an offence if the person has a reasonable excuse. The note to subclause 45(3) specifies that the defendant bears an evidential burden of proof in relation to this defence. This adopts existing policy in subsection 13.3(3) of the Criminal Code. Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden,

the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code). In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* this offence-specific defence is appropriate, as the defendant would be best placed to raise evidence demonstrating a reasonable excuse in the circumstances, and it would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.

178. 'Reasonable excuse' is defined broadly in clause 5 of this Act. The defence of reasonable excuse ensures a person is not penalised where they may be unable legitimately to produce a document or attend a hearing due to circumstances beyond their control or where there is some other good and acceptable reason. The definition of 'reasonable excuse' in clause 5 requires the excuse to be one which would excuse a witness before a court. The defence of reasonable excuse would not extend to a person acting intentionally to defeat the purpose of the notice, such as destroying a document and stating they are no longer in possession of it, for example.

179. Subclause 45(4) provides a defence of relevance. It provides that the offence for failure to give information or produce a document or thing under subclause 45(2) does not apply if the information, statement, document or thing required to be provided is not relevant to the matters into which the Commissioner was inquiring. This defence ensures that a person does not commit an offence if they fail to provide information which is not within the scope of the notice issued to them, for example. The note to subclause 45(4) specifies that the defendant bears an evidential burden of proof in relation to this defence. This adopts existing policy in subsection 13.3(3) of the Criminal Code.

180. Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden, the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code). In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* this offence-specific defence is appropriate, because the defendant would be best placed to adduce evidence as to why the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring. It would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.

181. Subclause 45(5) clarifies that the offences in subclause 45(1) and (2) are applicable despite any State or Territory law, or the general law. This ensures that a person cannot rely on a State or Territory law, or the general law, to justify a failure to comply with a notice under clause 30 or 32, except to the extent that such laws might give rise to a reasonable excuse (as defined in clause 5) for the purposes of subclause 45(3).

182. The general defences under Part 2.3 of the Criminal Code, such as mistake of fact, duress, lawful authority, and sudden or extraordinary emergency, would be available, in addition to the reasonable excuse and relevance defences expressly provided for in this Act.

#### **Clause 46 Refusal to swear an oath, make an affirmation or answer a question**

183. Clause 46 provides offences for refusal to swear an oath, make an affirmation or answer a question.

184. Subclause 46(1) makes it an offence for a person served with a notice under clause 30 requiring them to attend a hearing, to refuse to swear an oath or make an affirmation at that hearing, or to refuse to answer a question that the Commissioner requires them to answer at the hearing (subparagraphs 46(1)(b)(i) and (ii)).

185. This offence is punishable by a maximum penalty of imprisonment for 2 years. Under subsection 4B(2) of the Crimes Act, the term of imprisonment can be converted into penalty units.

186. The offence of refusing to answer a question has a narrow application. In practice, it would be expected to apply in circumstances where a person refuses to provide an answer to a question. This would be distinguishable from a situation where a person provides an answer to the extent of their knowledge or experience and in good faith, even if it is of limited assistance to an inquiry.

187. The general defences under Part 2.3 of the Criminal Code, such as mistake of fact, duress and sudden or extraordinary emergency, would be available. The general defences would give appropriate coverage to the range of circumstances which may, in practice, justify a refusal to swear an oath or make an affirmation at a hearing, or to refuse to answer a question. On this basis, the defences of reasonable excuse and relevance are not available in respect of the offences in this clause.

#### **Clause 47      Failure to give written notice to the Commissioner**

188. Clause 47 provides for an offence for certain persons to fail to give written notice of disclosure of operationally sensitive information or intelligence information to the Commissioner. ‘Operationally sensitive information’ and ‘intelligence information’ are defined terms in clause 5.

189. Subclause 47(1) provides it is an offence for a person who holds or has held an Australian Government security clearance that allows or had allowed, access to operationally sensitive information, to fail to give written notice in accordance with clause 33 where required to do so.

190. This offence is punishable by a maximum penalty of imprisonment for 3 years. Under subsection 4B(2) of the Crimes Act, the term of imprisonment can be converted into penalty units.

191. Subclause 47(2) provides it is an offence for a person who holds or has held an Australian Government security clearance that allows or had allowed access to intelligence information, to fail to give written notice in accordance with clause 34 where required to do so.

192. ‘Australian Government security clearance’ is defined in the Dictionary of the Criminal Code as a security clearance given by the Australian Government Security Vetting Agency or by another Commonwealth, State or Territory agency that is authorised or approved by the Commonwealth to issue security clearances. The same definition is to be applied to clause 47.

193. Structured in this way, the offence would avoid applying to a person that may not realise they are providing operationally sensitive or intelligence information, and instead is

directed at persons that have had official access to such information. This offence is punishable by a maximum penalty of imprisonment for 3 years. Under subsection 4B(2) of the Crimes Act, the term of imprisonment can be converted into penalty units. As section 5.6 of the Criminal Code applies to this clause, intention is the fault element relevant to this offence.

194. The general defences under Part 2.3 of the Criminal Code, such as mistake of fact, duress and sudden or extraordinary emergency, would be available. The general defences would give appropriate coverage to the range of circumstances which may, in practice, justify failure to provide notice. On this basis, the defences of reasonable excuse and relevance are not available in respect of the offence in this clause.

#### **Clause 48      Legal professional privilege**

195. Clause 48 sets out the process for a person claiming legal professional privilege and the consideration of such a claim.

196. Subclause 48(1) provides that a claim of legal professional privilege is not a reasonable excuse for a failure to attend a hearing, or to give information or produce a document or thing under subclauses 45(1) and (2). This is subject to particular exceptions, set out in paragraphs 48(1)(a) and (b).

197. Legal professional privilege may be a reasonable excuse for the purposes of subclause 45(3), where:

- a court has found the information, statement or document or thing (or relevant part of it) is subject to legal professional privilege (paragraph 48(1)(a)), or
- a claim of legal professional privilege has been made to the Commissioner within the timeframe allowed for the giving of the information, or the production of the document or thing, or within a further time permitted by the Commissioner (paragraph 48(1)(b)).

198. Subclause 48(2) provides that the Commissioner may then decide whether to accept or reject a claim of legal professional privilege.

199. Subclause 48(3) confirms that the Commissioner may, by written notice, require a person claiming legal professional privilege to produce the information, statement, document or thing over which the claim is made, for the Commissioner to inspect, to determine whether to accept or reject the claim.

200. Legal professional privilege is not a defined term in the Act. Legal professional privilege is derived from the meaning of client legal privilege in Part 3.10 of the Evidence Act. The following elements must be satisfied for legal professional privilege to apply:

- the existence of a client and lawyer relationship
- the confidential nature of the communication or document, and
- the communication or document was brought into existence for the dominant purpose of either enabling the client to obtain, or the lawyer to give legal advice or provide legal services, or for use in actual or anticipated litigation.

201. Subclause 48(4) sets out that in circumstances where the Commissioner decides to accept a claim for legal professional privilege, the information, statement, document or thing, if it has been provided to the Commissioner, must be:

- returned to the person (paragraph 48(4)(a)), and
- disregarded, to the extent the claim of legal professional privilege is accepted, for the purposes of any report, recommendation or finding the Commissioner makes (paragraph 48(4)(b)).

202. Subclause 48(5) clarifies that if the claim for legal professional privilege is rejected by the Commissioner and the information, statement, document or thing has been produced, the Commissioner may use the information, statement, document or thing for the purposes of performing their functions.

203. Legal professional privilege has been overridden in the qualified way outlined above, to ensure the Commissioner can conduct full and genuine inquiries, with access to all relevant information. The approach gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry and is modelled on the approach to this privilege in the Royal Commissions Act (section 6AA of that Act refers).

#### **Clause 49      Offences relating to claims for legal professional privilege**

204. Clause 49 creates offences related to claims for legal professional privilege.

205. Subclause 49(1) provides it is an offence if:

- a person fails to give information or a statement, or produce a document or thing as required in a notice under clause 30 or 32 (paragraph 49(1)(a)); and
- the Commissioner has rejected a claim for legal professional privilege (or part thereof) (paragraph 49(1)(b)); and
- the person fails to give the information or statement, or produce the document or thing as the Commissioner requires after that decision has been made (paragraph 49(1)(c)).

206. This offence is punishable by a maximum penalty of imprisonment for 2 years. Under subsection 4B(2) of the Crimes Act, the term of imprisonment can be converted into penalty units.

207. Clause 49(2) provides it is an offence if a person fails to comply with a notice issued by the Commissioner to give information or a statement, or produce a document or thing for inspection under subclause 48(3).

208. Subclause 49(3) provides that a person does not commit an offence under subclauses 49(1) and (2) if the person has a reasonable excuse. Reasonable excuse is a defined term in clause 5.

209. Subclause 49(4) clarifies that legal professional privilege is not a reasonable excuse for the purposes of the defence in subsection 49(3) unless a court has found the information, statement, document or thing to be subject to legal professional privilege. The note to subclause 49(4) specifies that the defendant bears an evidential burden in relation to the matters in subclause 49(4). This adopts existing policy in subsection 13.3(3) of the Criminal Code.

210. Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden, the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code). In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* it is appropriate to place an evidential burden on the defendant with respect to the matters in subclause 49(4) because the defendant would be best placed to raise evidence demonstrating whether a court has made a finding about the relevant information being subject to legal professional privilege. It would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.

211. Subclause 49(5) provides a defence of relevance. A person will not commit an offence if the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring. The note to subclause 49(5) specifies that the defendant bears an evidential burden in relation to this defence. This adopts existing policy in subsection 13.3(3) of the Criminal Code.

212. Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden, the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code). In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* this offence-specific defence is appropriate as the defendant would be best placed to raise evidence that the information, statement, document or thing required is not relevant to the matters into which the Commissioner was inquiring. It would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.

## **Clause 50 Self-incrimination**

213. Clause 50 relates to an individual providing information to the Commissioner which may tend to incriminate or expose that individual to a penalty.

214. Subclause 50(1) provides that an individual is not excused from giving information, evidence or a statement, or producing a document or thing, under clause 30 or 32 on the basis that giving that information might tend to incriminate the individual in relation to an offence. The note to subclause 50(1) clarifies that a body corporate cannot claim the privilege against self-incrimination.

215. Subclause 50(2) provides that subclause 50(1) does not apply if:

- giving the information, evidence or statement, or producing the document or thing, might self-incriminate the individual (paragraph 50(2)(a)), and
- the individual has been charged with that offence (paragraph 50(2)(b)), and
- the charge has not been finalised by a court or otherwise been disposed of (paragraph 50(2)(c)).

216. The privilege against self-incrimination has been overridden in the qualified way outlined above to support the Commissioner's function to inquire into, and report on, matters

of public importance. The approach gives weight to the public benefit in equipping the Commissioner with appropriate inquiry powers.

217. The abrogation of the privilege against self-incrimination operates alongside subclause 50(3), which would limit the use of potentially self-incriminating information in certain criminal proceedings. It also operates alongside the protection that a natural person appearing as a witness or giving or producing evidence or a statement in response to a notice has the same protection as a witness in the High Court (clause 64 refers). This will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings. The Commissioner also has powers under clause 53 to issue a non-publication order to limit the disclosure and use of evidence which may be self-incriminating. The inclusion of these provisions is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which provides that ‘if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained’.

218. Subclause 50(3) provides that information, evidence or a statement given, or a document or thing produced to the Commissioner (including the act of giving) are not admissible in evidence in any criminal proceedings, subject to the exemptions specified. The exemptions specified are proceedings:

- for an offence of giving false or misleading information, evidence or documents under section 137.1 or 137.2 of the Criminal Code that relates to this Act (paragraph 50(3)(c))
- for an offence against Part III of the Crimes Act that relates to this Act (paragraph 50(3)(d)), or
- for an offence against this Act (paragraph 50(3)(e)).

219. These exemptions are intended to enable information or a statement given, or a document or thing produced to the Commissioner to be admissible in a limited range of proceedings that relate to false or misleading information being provided to the Commissioner, or that relate to an offence under this Act. Permitting such information being admissible in evidence in these proceedings is necessary to safeguard the integrity of information being provided to the Commissioner, and the enforcement of offences under this Act.

220. Subclause 50(4) provides an individual is not excused from giving information, evidence or a statement, or producing a document or thing under clause 30 or 32 on the basis that at general law, a person would otherwise be able to claim the privilege against self-exposure to a penalty (other than a penalty for an offence). The note to subclause 50(4) clarifies that a body corporate cannot claim the privilege against self-exposure to a penalty.

221. Penalty privilege is the privilege against self-exposure to a civil or administrative penalty. It is a common law privilege that applies in the context of judicial proceedings and may be claimed by an individual to resist compulsion in the course of such proceedings. Subclause 50(4) clarifies that an individual is not excused from giving information or documents in response to a summons under clause 30 or a notice issued under clause 32, on the basis that compliance may expose them to a civil or administrative penalty. This reflects

the non-judicial character of the Commissioner's information-gathering powers, and ensures that compliance with clauses 30 and 32 is mandatory.

222. The privilege of self-exposure has been overridden to ensure the Commissioner may access all relevant information to fully inform their inquiries. This clause operates alongside subclause 64(4) which provides that a witness at a hearing, or a person giving or producing information, evidence, statement or a document under clause 30 or 32 will have the same protection as a witness in proceedings in the High Court.

#### **Clause 51 Dismissal etc. of witness**

223. Clause 51 provides an offence for a person dismissing or prejudicing a witness in their employment.

224. Subclause 51(1) provides that a person commits an offence if they dismiss or prejudice an employee, or dismiss or discipline a member of the Defence Force, on the basis that the person or member has

- appeared as a witness before the Commissioner (paragraph 51(1)(c))
- given evidence before the Commissioner (paragraph 51(1)(d)), or
- given information or a statement, or produced a document or thing, under clause 30 and 32 (paragraph 51(1)(e)).

225. This offence is punishable by a maximum penalty of imprisonment for 1 year or 10 penalty units.

226. Subclause 51(2) clarifies that the offence in subclause 51(1) does not apply if the employee or defence member is dismissed, prejudiced or disciplined for some reason other than the reasons mentioned in subclause 51(1).

227. The note to subclause 51(2) specifies that the defendant bears an evidential burden in relation to the matters in subclause 51(2). This adopts existing policy in subsection 13.3(3) of the Criminal Code.

228. Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden, the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code). In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* this offence-specific defence is appropriate as the defendant (for example, the employee's employer) would be best placed to raise evidence demonstrating the basis on which relevant action against an employee or defence member was taken. It would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.

#### **Clause 52 Contempt of Commissioner**

229. Clause 52 creates the offence of contempt of the Commissioner.

230. Subclause 52(1) makes it an offence for a person to engage in conduct that obstructs or hinders the Commissioner in the performance or exercise of their functions or powers.



This offence is punishable by a maximum penalty of imprisonment for 3 months or two penalty units.

231. Subclause 52(2) makes it an offence for a person to engage in conduct that would, if the Commissioner were a court of record, constitute contempt of that court. This offence is punishable by a maximum penalty of imprisonment for 3 months or 2 penalty units.

232. This offence is intended to protect the integrity of the Commissioner's processes and inquiries, and is modelled on section 63 of the *Administrative Appeals Tribunal Act 1975*.

#### **Division 4—Unauthorised publication, use or disclosure of information etc.**

##### **Clause 53 Non-publication direction**

233. Clause 53 relates to the issuing of a non-publication direction.

234. Subclause 53(1) provides that the Commissioner may direct that certain material must not be published, produced or disclosed, or only done so in the manner specified by the Commissioner. The material over which the Commissioner may issue a non-publication direction is:

- evidence given before the Commissioner (paragraph 53(1)(a))
- the contents of a document, or a description of a thing, produced or given to the Commissioner (paragraph 53(1)(b))
- information that might enable a person who has given evidence before the Commissioner to be identified (paragraph 53(1)(c)).

235. Contravention of a non-publication direction is an offence under clause 54 of this Act.

236. Subclause 53(2) provides that the Commissioner may, in writing, vary or revoke a non-publication direction.

237. Subclause 53(3) confirms that the Commissioner may direct that the material must not be published, produced or disclosed to a court or a tribunal, authority or person with the power to require the production of documents or the answering of questions (paragraphs 53(3)(a) and (b)).

238. This clause is intended to provide certainty about the potential future interaction of information subject to a non-publication direction issued by the Commissioner, and information which may be the subject to a production order or request for information issued by a court, tribunal or another authority.

239. The Commissioner may delegate the power to issue a non-publication direction to an SES employee who is a member of staff assisting the Commissioner (clause 15 refers).

##### **Clause 54 Publication in contravention of non-public direction**

240. Clause 54 provides that it is an offence for a person to publish information in contravention of a non-publication direction issued under subclause 53(1).

241. The maximum penalty for this offence is imprisonment for 3 years.

242. The general defences under Part 2.3 of the Criminal Code, such as mistake of fact, duress and sudden or extraordinary emergency, would be available.

### **Clause 55      Unauthorised use or disclosure of protected information**

243. Clause 55 provides an offence for the unauthorised use or disclosure of information made, or obtained by, the Commissioner or a member of staff assisting the Commissioner.

244. Clause 55 provides that a person commits an offence if the person is or has been an ‘entrusted person’, and the person uses or discloses ‘protected information’ where the use or disclosure is for the purposes of performing or exercising the Commissioner’s functions or powers, or the information is disclosed by the Commissioner in accordance with clause 56 or 57.

245. ‘Entrusted person’ is a defined term in clause 5 and includes the Commissioner and staff assisting the Commissioner (clause 14 refers). ‘Protected information’ is also a defined term in clause 5 of this Act.

246. The note to subclause 55(1) clarifies that offences relating to secrecy of information under Part 5.6 of the Criminal Code may also apply to relevant staff assisting the Commissioner.

247. The maximum penalty for this offence is imprisonment for 2 years.

248. The general defences under Part 2.3 of the Criminal Code, such as mistake of fact, duress and sudden or extraordinary emergency, would be available.

### **Clause 56      Authorisation to disclose information (other than intelligence information)**

249. Clause 56 authorises the Commissioner to disclose information (other than intelligence information) to a range of entities. This authorisation is limited to the Commissioner and may not be delegated to staff assisting the Commissioner.

250. Subclause 56(1) provides that the Commissioner may disclose information (including personal information) to the entities outlined in subclause 56(2) where:

- the information was given to the Commissioner in accordance with a notice under clauses 30 or 32, or in accordance with clause 40 and 41 (paragraph 56(1)(a)),
- the Commissioner is satisfied that the information will assist the entity to perform any of its functions or exercise any of its powers (paragraph 56(1)(b)), and
- the information is not intelligence information (paragraph 56(1)(c)).

251. These requirements ensure that the Commissioner is only authorised to disclose information in accordance with this clause where it has been obtained, in accordance with a summons or notice, or in accordance with the authorisations for Commonwealth, State and Territory bodies and office holders in clause 40 and 41. The requirement that the Commissioner be satisfied that a disclosure would assist the prospective receiving body in its functions or powers, provides an additional safeguard. The disclosure of intelligence information is separately addressed at clause 57.

252. Subclause 56(2) provides the list of entities to which the Commissioner may disclose information (including personal information) under subclause 56(1). The entities include the Attorneys-General of the Commonwealth, of a State or Territory (paragraph 56(2)(a)), the AFP (paragraph 56(2)(b)) or the police force of a State or Territory (paragraph 56(2)(c)), a Coroner or a Coroner's court (paragraph 56(2)(j)), and any other Commonwealth, State or Territory body (paragraphs 56(2)(k) and (l)).

253. The entities listed in subclause 56(2) include a range of police and law enforcement related bodies. As the Commissioner will not be permitted to make findings of civil or criminal wrongdoing, it is appropriate that the Commissioner be able to refer material raising potential civil or criminal wrongdoing, which might arise in the course of an inquiry, to such authorities. This models the approach in section 6P of the Royal Commissions Act.

254. Subclause 56(2) extends to any other Commonwealth, State and Territory body, as well as a Coroner or a Coroner's Court. This will enable the Commissioner to share information with a broad range of bodies which may have a role connected to considering the circumstances of a defence or veteran death by suicide, such as the Inspector-General of the Australian Defence Force, the Commonwealth Ombudsman and Comcare, as well as bodies with a research and analysis focus, such as the Australian Institute of Health and Welfare.

255. Subclause 56(3) confirms that an entity to which information is disclosed under subclause 56(1) may use and disclose the information for the purposes for which the information was disclosed.

256. Subclause 56(4) defines 'contravention of a law' as referenced in paragraph 56(2)(g). A contravention of a law is a contravention for which a person may be liable to a criminal penalty or a civil or administrative penalty.

## **Clause 57 Authorisation to disclose intelligence information**

257. Clause 57 authorises the Commissioner to disclose intelligence information to specified entities in particular circumstances. This authorisation is limited to the Commissioner and may not be delegated to staff assisting the Commissioner.

258. Subclause 57(1) provides that the Commissioner may disclose intelligence information (including personal information) to the entities specified in subclause 57(2) where:

- the information was given to the Commissioner in accordance with a notice under clauses 30 or 32, or in accordance with clause 40 and 41 (paragraph 57(1)(a))
- the Commissioner is satisfied the information relates to or may relate to the commission or evidence of the commission of an offence against the law of the Commonwealth or a State or Territory – except where the disclosure is to the Inspector-General (paragraph 57(1)(b)), and
- the Commissioner is satisfied that the information will assist the entity to perform any of its functions or exercise any of its powers (paragraph 57(1)(c)).

259. The note to subclause 57(1) clarifies that this authorisation is limited to the Commissioner and may not be delegated to staff assisting the Commissioner.

260. Subclause 57(2) provides lists the entities or office holders to which the Commissioner may disclose intelligence information under subclause 57(1). The entities include the AFP (paragraph 57(2)(a)) or the police force of a State or Territory (paragraph 57(2)(c)), the Inspector-General (paragraph 57(2)(e)) or an agency or body or holder of an office prescribed under the rules (paragraph 57(2)(f)).

261. Subclause 57(3) requires the Commissioner, before disclosing intelligence information, to consult the relevant person of the entity listed in subclause 57(4) receiving the information, and the head of a relevant Australian intelligence entity to which the information relates. This is required for all disclosures under subclause 57(1) unless the disclosure is to the Inspector-General, where prior consultation would not be appropriate, given the independent oversight role of the Inspector-General in reviewing the activities of intelligence entities.

262. Subclause 57(4) lists the persons for the entities which the Commissioner must consult for the purposes of paragraph 57(3)(a).

263. Subclause 57(5) specifies that a consultation with the person for the relevant entity under paragraph 57(3)(a) must cover the protection of the intelligence information while it remains in the entity's possession. This may include consideration of the capacity of that entity to appropriately protect intelligence information of the type and security classification which may be disclosed by the Commissioner.

264. An arrangement under clause 42 cannot prevent the exercise of the Commissioner's power under clause 57 (subclause 42(5) refers), but can set out matters to which the Commissioner must have regard to in deciding whether or not to disclose intelligence information under clause 57 (paragraph 57(6)(a) refers). The Commissioner may also have regard to any other matter it considers relevant (paragraph 57(6)(b)).

## **Clause 58 No criminal or civil liability under secrecy provisions**

265. Clause 58 relates to criminal or civil liability under secrecy provisions. 'Secrecy provision' is a defined term in clause 5.

266. Subclause 58(1) provides circumstances where a person who is served with a notice under clause 30 or clause 32 does not commit an offence, and is not liable to a penalty, under a secrecy provision. These circumstances are where the person:

- answers a question at a hearing that the Commissioner requires the person to answer (paragraph 58(1)(a))
- gives information or a statement that the person is required to give in accordance with the notice (paragraph 58(1)(b), or
- produces a document or thing that the person is required to produce in accordance with the notice (paragraph 58(1)(c)).

267. Providing that a person acting in compliance with a compulsory request made by the Commissioner does not commit an offence under a secrecy provision supports the operation of the Commissioner's processes, and enables a person giving evidence to do so with certainty that they will not face a penalty for breach of a secrecy provision. This provision is modelled on an equivalent facilitation provision in section 26 of the Independent National Security Legislation Monitor Act.

268. The note to subclause 58(1) states the defendant bears the evidential burden in relation to the matter in subclause 58(1). This adopts existing policy in subsection 13.3(3) of the Criminal Code.

269. Placing the evidential burden on the defendant would require the defendant to adduce or point to evidence that suggests a reasonable possibility that the matters comprising the defence exist or do not exist (subsection 13.3(6) of the Criminal Code). If the defendant discharges the evidential burden, the prosecution then has the legal burden of disproving that matter (subsection 13.1(2) of the Criminal Code). In line with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, it is appropriate to place this evidential burden on the defendant because the defendant would be best placed to raise or point to evidence that their conduct was in accordance with a requirement imposed by the Commissioner (or the Commissioner's authorised delegate) under subclause 58(1). It would be significantly more difficult and costly for the prosecution to disprove this than for the defendant to establish the matter.

270. Subclause 58(2) provides that a person who discloses information under clause 40 or 41 does not commit an offence under a secrecy provision because the person disclosed information in accordance with clause 40 or 41. This provision operates in conjunction with subclauses 40(4) and 41(4), which relate to State and Territory laws and the general law.

## **PART 5 — MISCELLANEOUS**

### **Clause 59      Simplified outline of this Part**

271. Clause 59 provides a simplified outline of Part 5 of this Act to assist the reader. This outline is not intended to be comprehensive and readers should rely on the substantive provisions.

### **Clause 60      Commissioner's reports**

272. Clause 60 outlines the arrangements for the Commissioner to provide reports for tabling in the Parliament.

273. Subclause 60(1) provides that the Commissioner is to give an annual report to the Prime Minister and the Minister on any matter relating to, or arising in connection with, the exercise of powers, or performance of the Commissioner's functions. The reporting period is the financial year. The Commissioner must report as soon as practicable after 30 June each year.

274. Subclause 60(2) allows the Commissioner to give additional reports from time to time to the Prime Minister and the Minister. An additional report may be in relation to any matter relating to, or arising in connection with, the exercise of the powers, or the performance of the functions, of the Commissioner.

275. Subclause 60(3) provides the tabling requirements for the annual report and any additional reports given to the Prime Minister and the Minister under subclauses 60(1) and 60(2). The Minister must table the report before each House of Parliament within 15 sitting days of the relevant House.

## **Clause 61      Response to report by the Commonwealth**

276. Clause 61 requires the Commonwealth to respond in writing to any report provided by the Commissioner under subclauses 60(1) and (2).

277. The Commonwealth response must be tabled in each House of Parliament as soon as is reasonably practicable after the Commissioner's report is tabled in accordance with subclause 60(3).

278. In practice, it is intended that the Defence and Veterans' Affairs portfolios will lead work preparing the Commonwealth's response to the Commissioner's reports, with input from relevant portfolios, consistent with their policy responsibility for defence and veterans' affairs matters.

## **Clause 62      Reports if appropriate action not taken on Commissioner's report**

279. Clause 62 provides the Commissioner may provide additional reports to the Prime Minister and Minister if the Commissioner is of the opinion that appropriate action is not taken by the Commonwealth on a Commissioner's report.

280. Subclause 62(1) provides the Commissioner may provide an additional report to the Prime Minister and Minister if the Commissioner is of the opinion that action taken in response to a report under subclause 60(1) or (2) is not adequate and appropriate in the circumstances.

281. Subclauses 62(2) and (3) provide that the Commissioner may give a report relating to the action or response given by the Commonwealth under clause 61, to the Prime Minister and the Minister. In preparing this report, the Commissioner must consider any response already provided by the Commonwealth under clause 61.

282. The Minister must table the report before each House of Parliament within 15 sitting days of the relevant House.

283. This clause reflects the importance of the Commissioner's ongoing role to monitor the implementation of their recommendations (paragraph 11(1)(c) refers).

## **Clause 63      Judges**

284. Clause 63 defines the terms 'Judge' and 'eligible Judge', and sets out the process for a Judge to consent to being declared an eligible judge.

285. Subclause 63(1) provides that 'Judge' is defined to mean a person who is a Judge of a court created by the Parliament. The relevant Parliament is the Parliament of the Commonwealth of Australia. It also provides that 'eligible Judge' is defined to mean a judge who has formally consented, and been declared, in accordance with subclauses 63(2) and (3).

286. Subclause 63(2) provides that a Judge may, by writing, consent to be nominated as an eligible judge by the Attorney-General under subclause 63(3).

287. Subclause 63(3) provides that the Attorney-General may, by writing, declare Judges in relation to whom consents are in force under subclause 63(2) to be eligible Judges.

288. An eligible judge may issue a search warrant following application by the Commissioner or an authorised member, in accordance clauses 36 and 37.

289. Conferring the power to issue a warrant on eligible Judges recognises that these individuals are well-placed to conduct independent assessments of evidence, and to balance the rights and liberties of individuals with the interests of the Commissioner. This approach is consistent with other Commonwealth legislation, under which Judges can be authorised to exercise functions in their personal capacity (*persona designata*), as a means of ensuring accountability in the course of a sensitive investigation. When an eligible Judge performs certain *persona designata* functions, as would be the case when issuing a search warrant under clause 36, they are not exercising the formal judicial powers of the court of which they are a member, but acting as an independent decision-maker.

#### **Clause 64      Protection of Commissioner, legal practitioners, eligible Judges and witnesses**

290. Clause 64 provides certain protections and immunities to the Commissioner and other persons.

291. This clause ensures the Commissioner and others persons assisting or appearing before the Commissioner can effectively perform their function or role without concern about potential proceedings being brought against them for the legitimate undertaking of their roles and functions.

292. Subclause 64(1) provides the Commissioner with the same protection and immunity as a Justice of the High Court when the Commissioner is performing or exercising functions or powers under this Act. This clause protects the Commissioner from legal action being brought against them in relation to anything they have done or omitted to do in the performance of their functions, or the exercise of their powers. This does not prevent legal action from being brought against the Commissioner if the Commissioner is acting outside their functions or powers.

293. Subclause 64(2) provides a legal practitioner assisting the Commissioner or appearing on behalf of a person at a hearing with the same protection and immunity as a barrister appearing before the High Court. Legal practitioner is defined in clause 5 of this Act as a barrister, solicitor, barrister and solicitor or legal practitioner of the High Court or a Supreme Court of a State or Territory.

294. Subclause 64(3) provides an eligible Judge with the same protection and immunity as a Justice of the High Court in relation to proceedings in the High Court, when performing or exercising functions or powers conferred on an eligible Judge under this Act. Eligible Judge is defined in subclause 63(1).

295. Subclause 64(4) provides that, subject to this Act, a person appearing as a witness at a hearing, or giving or producing information, evidence, a statement or document under clauses 30 or 32, has the same protection as a witness in proceedings in the High Court. This aligns with the protection of witnesses before a Royal Commission as provided in section 7 of the Royal Commissions Act, and will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings.

## Clause 65 Rules

296. Clause 65 enables the Minister to make rules under this Act.

297. Subclause 65(1) provides that the Minister may, by legislative instrument, make rules that prescribe matters which are required or permitted, or are necessary or convenient to carrying out or giving effect to this Act.

298. The Act expressly provides for rules to be made for certain matters, such as to list additional agencies within the definition of ‘law enforcement or security agency’ in clause 5, and to prescribe a scale of witness expenses in clause 39.

299. Subclause 65(2) clarifies matters that rules made under this Act may not address, such as creating an offence or civil penalty (paragraph 65 (2)(a)), provide powers of arrest or detention (paragraph 65(2)(b)(i)), impose a tax (paragraph 65(2)(c)), and directly amend the text of this Act (paragraph 65(2)(e)).

300. This instrument making power provides flexibility and acts as a safeguard in the event that the Act does not fully anticipate procedures or practices required by the Commissioner to perform their functions or exercise their powers.

301. Dealing with these matters in rules rather than regulations accords with the Office of Parliamentary Counsel’s (OPC) *Drafting Direction No. 3.8 – Subordinate legislation* (Drafting Direction). The Drafting Direction states that OPC’s starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is a good reason not to do so.

302. Consistent with the Drafting Direction, the approach of dealing with these matters in rules has a number of advantages including:

- it facilitates the use of a single type of legislative instrument (or a reduced number of types of instruments) being needed for the Act
- it enables the number and content of the legislative instruments under the Act to be rationalised
- it simplifies the language and structure of the provisions in the Act that provide the authority for the legislative instruments, and
- it shortens the Act.

303. Due to these advantages, the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

304. The Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of these matters. This is clarified by subclause 65(2), which specifically prevents the rules from including these types of matters.

305. This clause also clarifies that the rules made under clause 65 are a legislative instrument for the purposes of the Legislation Act. Under the Legislation Act, legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament



within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee for the Scrutiny of Delegated Legislation), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled.

2019-2020

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

*Presented and read a first time*

**National Commissioner for Defence and  
Veteran Suicide Prevention  
(Consequential Amendments) Bill 2020**

**No.     , 2020**

*(Attorney-General)*

**A Bill for an Act to make amendments relating to  
the enactment of the *National Commissioner for  
Defence and Veteran Suicide Prevention Act 2020*,  
and for related purposes**



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1 column 2 of the table. Any other statement in column 2 has effect  
2 according to its terms.

3

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	At the same time as the <i>National Commissioner for Defence and Veteran Suicide Prevention Act 2020</i> commences.  However, the provisions do not commence at all if that Act does not commence.	

4 Note: This table relates only to the provisions of this Act as originally  
5 enacted. It will not be amended to deal with any later amendments of  
6 this Act.

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

### 10 3 Schedules

11 Legislation that is specified in a Schedule to this Act is amended or  
12 repealed as set out in the applicable items in the Schedule  
13 concerned, and any other item in a Schedule to this Act has effect  
14 according to its terms.

## Schedule 1—Amendments

### *Freedom of Information Act 1982*

#### **1 Division 1 of Part I of Schedule 2 (after the table item dealing with Inspector-General of Intelligence and Security)**

Insert:

National Commissioner for Defence and Veteran Suicide Prevention

#### **2 Division 1 of Part II of Schedule 2 (at the end of the table item dealing with the Attorney-General's Department)**

Add:

; and (e) documents in respect of the performance or exercise of functions or powers of the National Commissioner for Defence and Veteran Suicide Prevention under the following provisions of the *National Commissioner for Defence and Veteran Suicide Prevention Act 2020*:

- (i) section 26 (inquiries);
- (ii) section 28 (private hearings);
- (iii) sections 30 (summons) and 32 (Commissioner may require information etc.);
- (iv) sections 40 and 41 (disclosure of information to the Commissioner);
- (v) section 42 (arrangements for obtaining and protecting intelligence information);
- (vi) sections 56 (authorisation to disclose information (other than intelligence information)) and 57 (authorisation to disclose intelligence information).

### *Inspector-General of Intelligence and Security Act 1986*

#### **3 Section 34A (heading)**

After “Royal Commissioners”, insert “or National Commissioner”.

#### **4 Subsections 34A(1), (3), (4), (5) and (6)**

After “Commission”, insert “or, subject to subsection (6A), the National Commissioner”.

#### **5 After subsection 34A(6)**

Insert:



1           (6A) This section does not apply in relation to the National  
2           Commissioner unless the regulations declare that this section  
3           applies in relation to the National Commissioner.

4       **6 Subsection 34A(7)**

5           Insert:

6           *National Commissioner* means:

- 7           (a) the National Commissioner for Defence and Veteran Suicide  
8           Prevention; or  
9           (b) a member of the staff assisting the Commissioner as  
10          mentioned in section 14 of the *National Commissioner for*  
11          *Defence and Veteran Suicide Prevention Act 2020*.

2019-2020

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIONAL COMMISSIONER FOR DEFENCE AND VETERAN SUICIDE  
PREVENTION (CONSEQUENTIAL AMENDMENTS) BILL 2020**

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Attorney-General, the Honourable Christian Porter MP)

# **NATIONAL COMMISSIONER FOR DEFENCE AND VETERAN SUICIDE PREVENTION (CONSEQUENTIAL AMENDMENTS) BILL 2020**

## **GENERAL OUTLINE**

1. The National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020 (the Bill) operates in conjunction with the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020.
2. The Bill amends the *Freedom of Information Act 1982* to exclude the National Commissioner for Defence and Veteran Suicide (the Commissioner), and the Attorney-General's Department to the extent they hold documents related to the performance and exercise of functions or powers of the Commissioner, from the application of that Act.
3. The Bill also amends the *Inspector-General of Intelligence and Security Act 1986* to allow the Commissioner to be prescribed under the regulations to the Inspector-General of Intelligence and Security Act. If so prescribed, the Inspector-General of Intelligence and Security (IGIS), or a person having previously held this office, may voluntarily disclose information to the Commissioner to assist their inquiries, in accordance with section 34A of the Inspector-General of Intelligence and Security Act.

## **FINANCIAL IMPACT**

4. \$42.7 million has been provided over five years to support the establishment and operation of the National Commissioner's function. These costs also include funding for a one-off review of historical Australian Defence Force (ADF) member and veteran deaths by suicide, to be led by the National Commissioner. They also include funding for a dedicated legal financial assistance scheme.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### **National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Bill 2020**

1. This Bill is 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 Bill**

2. This Bill is intended to operate in conjunction with the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020, which establishes the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) as an independent statutory officer holder. The Bill amends relevant Commonwealth legislation to give effect to, or as a consequence of, the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020.
3. The relevant Commonwealth legislation to be amended by the Bill is the *Freedom of Information Act 1982* (Freedom of Information Act) and the *Inspector-General of Intelligence and Security Act 1986* (Inspector-General of Intelligence and Security Act).
4. In summary, the amendments exempt the Commissioner, and the Attorney-General's Department to the extent they hold documents related to the performance and exercise of functions or powers of the Commissioner, from the application of the Freedom of Information Act. The amendments also support the operation of clause 43 of the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020, by enabling the Commissioner to be prescribed under regulations made pursuant to section 34A of the Inspector-General of Intelligence and Security Act.

#### **Human rights implications**

5. The Bill engages article 17 of the International Covenant on Civil and Political Rights (ICCPR) – the right to freedom from interference with privacy and attacks on reputation.

*The right to freedom from interference with privacy and attacks on reputation*

6. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence. The right to privacy includes respect for informational privacy, including in respect of storing, using and sharing private information and the right to control the dissemination of personal and private information. To be permissible as a matter of international human rights law, interferences with privacy must be according to law and not arbitrary. In order not to be arbitrary, they must be reasonable and necessary in the particular circumstances, as well as proportional to the objectives they seek to achieve.
7. The Bill engages the right to privacy by amending the Freedom of Information Act to exclude the statutory office of the Commissioner from the application of that Act, and the Attorney-General's Department in respect of documents related to the performance or exercise of functions or powers of the Commissioner.

8. The proposed amendments to the Freedom of Information Act reflect the importance of effectively protecting documents which relate to the internal operations of the Commissioner, including documents which have been obtained as evidence by the Commissioner via the use of a compulsory power. The amendment is necessary to provide certainty to persons providing information (including personal information) to the Commissioner, that such information will not be disclosed through a freedom of information request.

9. Due to the operation of section 7 of the *Privacy Act 1988* (Privacy Act), the proposed amendments to the Freedom of Information Act would also exempt the Commissioner and the Attorney-General's Department to the extent described, from the operation of the Privacy Act. To the extent that this amendment may affect the right to freedom from interference with privacy and attacks on reputation, it is lawful and non-arbitrary.

10. The amendment is required to achieve the legitimate objective of ensuring the Commissioner can obtain information relevant to, and properly undertake, their inquiries. Any limitation there may be to the right to privacy is lawful and non-arbitrary, in view of the safeguards for protecting personal information contained in the National Commissioner for Defence and Suicide Prevention Bill 2020. These safeguards include:

- The requirement for the Commissioner to take a trauma-informed and restorative approach to their functions and powers (clause 12 refers). This means the preferences of witness and other persons providing information to the Commissioner about how their personal information will be used or further disseminated by the Commissioner will be given particular weight in the Commissioner's handling of the information, across the full spectrum of their functions.
- It is an offence for the Commissioner, or a staff member assisting the Commissioner, to engage in unauthorised use or disclosure of protected information, including personal information – this offence carries a penalty of imprisonment of 2 years (clause 55 refers).
- The Commissioner may hold a hearing or part of a hearing in private, if the Commissioner is satisfied that information which may be disclosed will be personal and private, including about a deceased individual (clause 28 refers). This is accompanied by processes directing how the evidence at a private hearing can be used and disclosed. If a witness gives evidence at a private hearing, the Commissioner must, before using or disclosing that evidence, consider consulting the witness or any other person whose interests are affected (subclause 29(2) refers). The Commissioner must also consider any risk of prejudice to a person if they are not consulted prior to the use or disclosure, and the preferences of the witness (subclause 29(2) refers).
- The Commissioner may issue a non-publication direction over a range of information disclosed to them, enabling it to direct, conditionally or otherwise, that such material must not be published, produced or further disclosed (clause 53 refers). Such a direction could apply to protect information which may identify a person who has given information or evidence to the Commissioner, for example. Publication in contravention of such a direction is an offence punishable with a term of imprisonment (clause 54 refers).

- The Commissioner's power to further disclosure information to other entities requires that such a disclosure will assist the agency or body to perform its functions or exercise their powers (clauses 56 and 57 refer). Only the Commissioner can disclose such information, meaning this power is not delegable to staff assisting the Commissioner. The disclosure provisions are intended to allow the Commissioner to disclose specific information to assist other entities, as part of working collaboratively on solutions to prevent future deaths by suicide, or in some instances, to enable the investigation of a possible criminal offence or civil penalty. The Commissioner's powers under clauses 56 and 57 could be exercised in a broad range of ways which did not involve disclosing personal information, or could include seeking consent to do so (for example, the Commissioner could disclose de-identified information only, or apply procedures to consult a person whose information may be disclosed).

11. To the extent the Commissioner's powers to seek, use and further disclosure information, including personal information, in the National Commissioner for Defence and Suicide Prevention Bill, operating in conjunction with this Bill, affect the right to privacy, they are lawful, non-arbitrary and are accompanied by effective safeguards.

## **Conclusion**

12. The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. This Bill promotes the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

## NOTES ON CLAUSES

### List of abbreviations

Freedom of Information Act	<i>Freedom of Information Act 1982</i>
National Commissioner for Defence and Veteran Suicide Prevention Act	<i>National Commissioner for Defence and Veteran Suicide Prevention Act 2020</i>
Privacy Act	<i>Privacy Act 1988</i>
Inspector-General of Intelligence and Security Act	<i>Inspector-General of Intelligence and Security Act 1986</i>

## **Clause 1      Short title**

1. Clause 1 provides for the short title of the Act to be the *National Commissioner for Defence and Veteran Suicide Prevention (Consequential Amendments) Act 2020*.

## **Clause 2      Commencement**

2. Clause 2 provides for the commencement of each provision of the Act, as set out in the table at subclause 2(1). The table provides that the whole of this Act commences at the same time as the National Commissioner for Defence and Veteran Suicide Prevention Act.

3. Subclause 2(2) specifies that information in column 3 of the table at subclause 2(1) is not a part of the Act, and information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## **Clause 3      Schedules**

4. Clause 3 provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule. This Act has only one Schedule (Schedule 1), which amends the Freedom of Information Act and the Inspector-General of Intelligence and Security Act.

## **Schedule 1 — Amendments**

### ***Freedom of Information Act 1982***

#### **Item 1**

5. Item 1 exempts the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) from the application of the Freedom of Information Act.

6. Item 1 implements this exemption by adding the Commissioner to the list of agencies and office holders in Division 1 of Part I of Schedule 2 to the Freedom of Information Act.

7. Subsection 7(1) of the Freedom of Information Act provides that the bodies listed in Division 1 of Part I of Schedule 2, and a person holding and performing the duties of that office, are deemed to not be prescribed authorities, and are therefore exempt from the operation of the Freedom of Information Act.

8. This approach aligns with the exclusion of other statutory office holders with similar information gathering and inquiry powers to the Commissioner from the Freedom of Information Act in Division 1 of Part I of Schedule 2, and in other parts of the Freedom of Information Act. For example, it is consistent with the exclusion of Royal Commissions from being a ‘prescribed authority’ under section 4 of the Freedom of Information Act.

#### **Item 2**

9. Item 2 exempts certain documents held by the Attorney-General’s Department in relation to the Commissioner from the application of the Freedom of Information Act.



10. Item 2 implements this exemption by adding a further reference to the Attorney-General's Department in Division 1 of Part II of Schedule 2 to the Freedom of Information Act.

11. Subsection 7(2) of the Freedom of Information Act provides that the persons, bodies and Departments listed in Division 1 of Part II of Schedule 2 are exempt from the operation of the Freedom of Information Act in relation to the documents referred to in that Schedule.

12. This item excludes documents in respect of the following functions or powers of the Commissioner that are held by the Attorney-General's Department:

- section 26 (inquiries)
- section 28 (private hearing)
- sections 30 (summons) and 32 (Commissioner may require information)
- sections 40 and 41 (disclosure of information to the Commissioner)
- section 42 (arrangements for obtaining and protecting intelligence information), and
- sections 56 (authorisation to disclose information (other than intelligence information)) and 57 (authorisation to disclose intelligence information).

13. The proposed exemption is targeted to specific functions or powers of the Commissioner under the National Commissioner for Defence and Veteran Suicide Prevention Act, as outlined below.

14. The proposed exemptions in item 2 reflect the importance of effectively protecting documents which are internal to the operation of the Commissioner's role, including documents which have been obtained as evidence by the Commissioner via the use of a compulsory power. The proposed approach is necessary to provide certainty to persons providing information to the Commissioner, including about sensitive personal matters, about how that information will be handled and protected.

15. Excluding the Attorney-General's Department from the application of the Freedom of Information Act in this way is a necessary extension to the exclusion of the Commissioner under item 1, as the Attorney-General's Department is the entity providing administrative support to the Commissioner (including record keeping), and will engage the staff assisting the Commissioner.

16. Section 26 of the National Commissioner for Defence and Veteran Suicide Prevention Act sets out, in a non-exhaustive way, the circumstances the Commissioner may consider when exercising their inquiry function. Excluding documents connected to the Commissioner's inquiry function will ensure that documents in respect of a hearing or other deliberative process undertaken by the Commissioner, for example, are appropriately protected.

17. Section 28 of the National Commissioner for Defence and Veteran Suicide Prevention Act confers discretion on the Commissioner to hold a private hearing (as does subsection 42(6), which is captured under Item 2, paragraph (v)). The potential disclosure of private hearing related information under the Freedom of Information Act would undermine the necessary confidentiality of records related to a private hearing.

18. Sections 30 and 32 of the National Commissioner for Defence and Veteran Suicide Prevention Act relate to the Commissioner's powers to require information or the production of documents through a summons or written notice. Excluding documents obtained under these sections ensures that a freedom of information request cannot circumvent the Commissioner's role to direct the future use or disclosure of formal evidence of this kind, as relevant to their functions and powers.

19. Sections 40 and 41 of the National Commissioner for Defence and Veteran Suicide Prevention Act authorise Commonwealth, State and Territory bodies and office holders to disclose information to the Commissioner, to assist their functions and powers. The information disclosed to the Commissioner under these sections will be official information, having being provided by another government entity, and is expected to provide critical assistance the Commissioner's work. Excluding documents obtained under these sections ensures that a freedom of information request cannot circumvent the Commissioner's role to direct the future use or disclosure of information of this kind, as relevant to their functions and powers.

20. Section 42 of the National Commissioner for Defence and Veteran Suicide Prevention Act requires the Commissioner to take all reasonable steps to enter into an arrangement with an Australian intelligence entity for obtaining and protecting information relating to an Australian intelligence entity. 'Australian intelligence entity' is a defined term in section 5 of the National Commissioner for Defence and Veteran Suicide Prevention Act. The approach to exclude such documents is consistent with the broader exclusion in subsection 7(2A) of the Freedom of Information Act, which exempts an agency in relation to documents that originate with, or have been received from an intelligence agency, among other things.

21. Section 56 of the National Commissioner for Defence and Veteran Suicide Prevention Act authorises the Commissioner to disclose information, including personal information, to other bodies and office holders, if the Commissioner is satisfied that the information will assist the agency or body to perform any of its functions or powers. This section does not apply to intelligence information. This authorisation is limited to the Commissioner and could include information related to law enforcement. Section 57 authorises the Commissioner to disclose intelligence information, including personal information, to a limited number of bodies and office holders, following prescribed steps. This authorisation is also limited to the Commissioner personally. It would not be appropriate for documents about the Commissioner's exercise of a power to disclose, or the disclosed documents themselves, to be accessed through a freedom of information request. A decision to disclose such information is appropriately a matter for the Commissioner to determine, as part of the exercise of their functions and powers.

22. Documents in respect of the Commissioner's functions or powers which are held by the Attorney-General's Department in relation to functions or powers of the Commissioner which are not listed in item 2 will be subject to the application of the Freedom of Information Act. This could include, for example, documents about administrative aspects of the Commissioner's role.

23. Due to the operation of section 7 of the Privacy Act, the amendments to Schedule 1 of the Freedom of Information Act would also exempt the Commissioner and the Attorney-General's Department to the same extent as specified in item 2, from the operation of the Privacy Act. Royal Commissions are also exempt from the Privacy Act.

24. The National Commissioner for Defence and Veteran Suicide Prevention Act provides for the protection of information, including personal information, given to or developed to assist the Commissioner, through section 55. Section 55 makes it an offence for the Commissioner, or a current or former member of staff assisting the Commissioner, to use or disclose protected information for a purpose other than relevant to performing or exercising the Commissioner's functions or powers. It is also provided by the Commissioner's power to issue, vary and revoke a non-publication direction over information, including personal information, and an offence for breach of a direction, in sections 53 and 54.

25. If a person wished to access or correct their own personal information held by the Commissioner or the Attorney-General's Department, for example, this could be facilitated administratively, notwithstanding the Privacy Act exemption.

### ***Inspector-General of Intelligence and Security Act 1986***

26. Items 3 – 6 amend section 34A of the Inspector-General of Intelligence and Security Act to allow the Commissioner to be prescribed by the regulations to that Act, and subsequently provide for the provision of information to the Commissioner in certain circumstances.

27. The IGIS holds a unique role within the Australian intelligence community, being an independent officer holder with powers to review the activities of intelligence entities. Rather than making the IGIS compellable by the Commissioner, the approach reflected in this Bill and the accompanying National Commissioner for Defence and Veteran Suicide Prevention Act will achieve equivalence with a Royal Commission and enable information to be provided to the Commissioner only in accordance with section 34 and 34A of the Inspector-General of Intelligence and Security Act.

28. Section 34A of the Inspector-General of Intelligence and Security Act provides that the Inspector-General, or a former Inspector-General, may give information or documents to a prescribed Royal Commission to assist its inquiry. The Inspector-General may also authorise a staff member or former staff member to give information or documents to a Royal Commission.

29. Items 3 and 4 amend section 34A to allow for the giving of information to the Commissioner. Item 3 amends the title in section 34A, and item 4 amends subsections 34A(1)-(6) to insert references to the 'National Commissioner'.

30. Item 5 inserts a new subsection 34A(6) enabling the Commissioner to be prescribed under the regulations made pursuant to the Inspector-General of Intelligence and Security Act.

31. Section 43 of the National Commissioner for Defence and Veteran Suicide Prevention Act provides that, in accordance with sections 34 and 34A of the Inspector-General of Intelligence and Security Act:

- an entrusted person may obtain information from another person that the other person acquired as an IGIS official (paragraph 43(a)); and
- a person that acquired information as an IGIS official may disclose information to an entrusted person (paragraph 43(a)).

32. An ‘entrusted person’ is defined in section 5 of the National Commissioner for Defence and Veteran Suicide Prevention Act as the Commissioner or members of staff assisting the Commissioner. ‘IGIS official’ is also a defined term in section 5. The amendments to section 34A of the Inspector-General of Intelligence and Security Act operate in conjunction with section 43 of the National Commissioner for Defence and Veteran Suicide Prevention Act.

33. Item 6 defines ‘National Commissioner’ as the statutory office holder of the National Commissioner for Defence and Veteran Suicide Prevention, or a member of staff assisting the Commissioner, as provided in section 14 of the National Commissioner for Defence and Veteran Suicide Prevention Act.