



ADMINISTRATIVE REVIEW COUNCIL

REPORT TO THE
ATTORNEY- GENERAL

DEFENCE FORCE OMBUDSMAN



Report No. 5

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INTRODUCTION

1. On 12 April 1979, the Attorney-General wrote to the President, and requested that the Council, in conjunction with its review of the jurisdiction of the Ombudsman, consider the proposal for the creation of the office of Defence Force Ombudsman which was contained in draft Drafting Instructions received from the Department of Defence. The Council asked the Working Party, which reviewed the Ombudsman Act to consider the reference, and suggested that they consult the Department of Defence. A copy of their report is enclosed.
2. The Department of Defence proposes that a Defence Force Ombudsman be separately established to investigate the administrative actions of public authorities which relate to or arise in consequence of service as a member of the Defence Force. His jurisdiction would, however, not extend to disciplinary proceedings, and would be subject to the prior operation of the internal redress of wrongs system where the complainant was a serving member. His procedures and remedies would duplicate those of the Commonwealth Ombudsman.
3. In its review of the Ombudsman Act, the Council decided to make no recommendation on the exclusion of 'employment matters' from the jurisdiction of the Commonwealth Ombudsman pending the completion of a current study by the Public Service Board of grievance processes within the Australian Public Service. However, servicemen are outside that study, and the Council accepts that it would be appropriate and beneficial to provide a right to seek an ombudsman investigation of complaints relating to service in the Defence Forces.
4. The Council has considered whether it is appropriate for a separate ombudsman to be established if his procedures and powers are to be virtually the same as those of the Commonwealth Ombudsman. It considers that the small scale of a Defence Force Ombudsman's operations and the existence of two ombudsmen with overlapping jurisdiction pose significant administrative difficulties in establishing a separate office, and favour the incorporation of the proposed jurisdiction in the Commonwealth Ombudsman's Office.
5. There are, however, valid demands that the Defence Force jurisdiction be exercised by a person who can be identified readily by servicemen as somebody concerned with their complaints only. *The Council recommends* that the jurisdiction be exercised by the Commonwealth Ombudsman, but that it be specially identified in a separate Part of the Ombudsman Act which creates the office of Defence Force Ombudsman and confers it upon the person occupying the office of Commonwealth Ombudsman, and defines his jurisdiction. It may also be appropriate for a special Deputy Ombudsman (Defence Force) to be appointed with all the powers of the Ombudsman except the powers conferred by section 15, 16, 17, 18 or 19 of the Ombudsman Act. The Council considers that these new provisions should, as with the rest of the Ombudsman Act, be administered by the Prime Minister.
6. Should the Government decide not to accept the recommendation of the Council in the preceding paragraph, the Council recommends that the comments made by the Working Party in paragraph 24 of their report should be incorporated into the present drafting instructions.

16 July 1979

THE REFERENCE

1. In a letter to the President dated 12 April 1979, the Attorney-General stated that the Department of Defence proposed to revive the Defence Force Ombudsman Bill of 1975, and requested that the Council consider the proposal for the creation of the office of Defence Force Ombudsman in conjunction with its review of the jurisdiction of the Ombudsman. He enclosed a copy of the draft Drafting Instructions received from the Department of Defence.

2. This report to the Council on the reference has been prepared with the assistance of the Working Party previously established to report on all aspects of the Ombudsman Act. The Working Party consisted of:

Dr G. D. S. Taylor, Director of Research, Mr M. B. Smith and
Mr L. M. Blacklow, Administrative Review Council

Mr M. Williamson and Mr D. G. Wheen, Ombudsman's Office

Mr I. Cunliffe and Mr R. Cooper of the Department of Prime Minister
and Cabinet

Mr B. Candler attended as liaison officer for the Attorney-General's
Department

The Working Party met to consider the reference on two occasions, and had the benefit of consultations with representatives of the Department of Defence.

BACKGROUND TO PROPOSAL

3. The proposal to create a Defence Force Ombudsman originated as part of the platform of the 1972 Labor Government. A Bill to establish this Ombudsman passed the House of Representatives in 1975 but lapsed in the Senate with the dissolution of Parliament in November 1975. However, the proposal was adopted by the new Government, and a new Bill was prepared in June 1976 but not proceeded with. The Defence Department's draft Drafting Instructions on the proposal substantially adopt the 1976 draft Bill, with changes to reflect the removal of a jurisdiction to investigate actions taken under a law of the Northern Territory. It is understood that it is hoped that a Bill can be introduced in the Autumn Session of Parliament next year.

REDRESS OF WRONGS SYSTEM

4. Before discussing the elements of the proposal for legislation this report examines two subjects providing necessary background. These are the system of redress of wrongs in the Defence Force; and the operations of the existing office of Defence Force Ombudsman.

5. An internal system for the redress of wrongs has long been incorporated in the regulations of the three Services. In line with the movement towards uniform regulation of the three Services, a single regulation covering redress of wrongs in all Services is currently being considered, but it will preserve the essential pattern of the present system. In essence, the present system allows any serving member to make a complaint in writing on any topic to his commanding officer. The officer may correct the grievance if it is in his power to do so or, if it is not in his power, he may forward the complaint to the next higher authority in the chain of command, or he may reject the grievance; but if he rejects it the complainant may require his officer to forward the complaint to the next person in the chain of command. This process of reference to a more senior officer may ultimately reach the respective Chief of Staff of the Service concerned, and in relation to Army officers on certain matters the complaint may reach the Governor-General. Under the proposed new regulation the process of reference will be extended, so that the complaints of officers may reach the Chief of Defence Force Staff and, where the officer believes that his honour, integrity or professional standing is affected, the Governor-General. Where the subject of the complaint concerns a department or agency other than the Services, it may be referred to that department or agency by the service through the Department of Defence. It appears that, although the redress of wrongs system may consolidate essential values of the Defence Force, it is not well adapted to correct grievances about the actions of civilian administrators.

OFFICE OF DEFENCE FORCE OMBUDSMAN

6. In 1975 a Defence Force Ombudsman was designated by way of Ministerial directive to conduct investigations pending the enactment of legislation. His jurisdiction covered complaints by serving members of the Services or former members and dependants of former members relating to actions alleged 'to infringe the rights they have accrued because of their service with the Defence Force'. Although this Defence Force Ombudsman was not replaced when he was appointed to another office, his jurisdiction continued to be exercised by an Office of the Defence Force Ombudsman. The Office is currently staffed by one executive director, one archivist, and one receptionist-typist, who are on loan from the Department of Defence. It conducts investigations in a manner largely comparable to investigations by the Commonwealth Ombudsman. The Office considers that its functioning within the terms of the Ministerial directive has not been hampered by the lack of statutory basis,

since it has received excellent co-operation from government agencies. Further, while the Office was not established as a result of strong pressure from the Defence Force itself, the Services assisted its introduction and have found its operations beneficial. The Defence Force now strongly supports the proposal for the establishment of a Defence Force Ombudsman in legislation.

7. Statistics provided in the four annual reports of the Defence Force Ombudsman indicate the level and pattern of complaints received by it. Subject to two important reservations discussed below, the statistics provide some guide to the anticipated workload of the proposed Defence Force Ombudsman. The number of new written complaints was 259 in 1975, 201 in 1976, 195 in 1977, and 155 in 1978. The Office handles about twice as many complaints informally by telephone. About two-thirds of the written complaints received are considered to be within jurisdiction, and of these about 30% are resolved in favour of the complainant. Many more complaints on matters which the Defence Force Ombudsman might investigate are made to the Minister and investigated by his office without reference to the Defence Force Ombudsman.

8. The major areas giving rise to complaint are:

- administrative decisions on pay, allowances and conditions of service;
- discharge decisions;
- accommodation, including married quarters and rentals; and
- removals, including compensation for damage to chattels.

About a third of complaints received come from ex-servicemen or dependants, and of complaints from serving members about one half come from officers or N.C.O.s.

9. As has been the experience of the Commonwealth Ombudsman, the number of complaints received by the Defence Force Ombudsman has reflected the level of publicity about his operations. In 1975 his establishment received publicity within the Services, and the Defence Force Ombudsman himself addressed several meetings at Service establishments. However, in the absence of legislation he felt it inappropriate to take further initiative to publicise his operations. The Office therefore received little attention in subsequent years apart from mentions of annual reports in Service newspapers, and the practice of at least one Chief of Staff who advised rejected complainants in the redress of wrongs system of their right to approach the Office. Given that a Defence Force Ombudsman once established by legislation would take steps to publicise his facilities, a reasonable forecast might be that he would receive at least as many complaints as the Defence Force Ombudsman Office received in 1975.

10. An increase in complaints may also result from his jurisdiction taking several areas of complaint from the jurisdiction at present exercised by the Commonwealth Ombudsman.

The Commonwealth Ombudsman has been referring matters to the Office of the Defence Force Ombudsman (see his First Annual Report page 21), but he has investigated complaints on repatriation, D.F.R.D.B., and other matters linked to service in the Defence Force, which would be excluded from his jurisdiction by section 5(2) (f) of his Act once the Defence Force Ombudsman was appointed under statute. It might be estimated that this overlapping' jurisdiction accounted for about 160 written complaints in the Commonwealth Ombudsman's first year of operations.

THE PROPOSAL

11. The present proposal is that a Bill be introduced entitled 'Defence Force Ombudsman Bill', which would establish the Office of Defence Force Ombudsman. The Bill would be closely modelled upon the *Ombudsman Act 1976*, and the provisions relating to receipt and investigation of a complaint, reporting procedures and remedies, appointment of the Defence Force Ombudsman, and the staffing of his Office, would duplicate the Ombudsman Act. This aspect of the proposal poses the question whether it is appropriate for a separate Ombudsman to be established if his procedures and powers are to be virtually the same as those of the Commonwealth Ombudsman. The history of the proposal indicates that it is unlikely that this question has previously been fully canvassed by the Government. It is considered later in this paper.

12. The central element of the proposal is the jurisdiction of the Defence Force Ombudsman. By clause S of the draft Bill the Defence Force Ombudsman would be authorised to investigate action 'being action that relates to a matter of administration, that is taken, either before or after the commencement of the Act, by the Defence Force or by a public authority, with respect to a matter that is related to the service of a member of the Defence Force or arises in consequence of a member of the Defence Force serving or having served in the Defence Force'. The jurisdiction is expressed to include action with respect to the payment of an allowance or pension or the provision of a benefit for a member of the Defence Force or his dependant which is payable by reason of service in the Defence Force. The agencies whose actions are covered are indicated in provisions which almost exactly duplicate the definitions and approach of the Ombudsman Act, although in contrast to the Ombudsman Act the Governor-General would become subject to the Defence Force Ombudsman, since the draft Bill defines 'action taken by the Defence Force' to include action of the Governor-General relating to appointment, promotion, termination of employment, and transfer of members of the Defence Force (see clause 3(5) and (6)).

13. The draft Bill contains express exclusions of jurisdiction which duplicate the Ombudsman Act, except that they omit an exclusion of actions in relation to employment (section 5(2)(d) of the Ombudsman Act), and exclude action by way of or in connection with proceedings against a member of the Defence Force in relation to a naval, military or air force offence. It is also intended to exclude action taken by way of

or in connection with the grant or refusal of an honour or award; this exclusion does not appear in the Ombudsman Act. Circumstances allowing the Defence Force Ombudsman to decline to investigate a complaint are defined identically to those in the Ombudsman Act, with additional provisions designed to ensure that the redress of wrongs system is pursued before a Defence Force Ombudsman investigates. These provisions state that, where a complainant is able to seek but has not sought redress, the Defence Force Ombudsman shall not investigate unless it is his opinion that the member was, by reason of special circumstances, justified in refraining from seeking redress. Where the member has sought redress, the Ombudsman may not investigate until 28 days after the complainant sought his redress, and until the complainant notifies him in writing that the redress was not adequate. Further, the Ombudsman shall not investigate a complaint when he is satisfied that reasonable redress was granted.

14. Comparing the jurisdictions of the proposed Defence Force Ombudsman and the Commonwealth Ombudsman, it can be seen that a major part of the Defence Force Ombudsman's jurisdiction enters the area of employment matters from which the Ombudsman is excluded, but retains a limitation that this jurisdiction does not extend to disciplinary proceedings and is dependent upon the redress of wrongs system being used first, the Commonwealth Ombudsman is also excluded by section 5(2)(f) of the Ombudsman Act from investigating action 'that the Defence Force Ombudsman is authorised to investigate'. But for this exclusion, there would be areas where the two jurisdictions would overlap. These would concern actions taken relating to matters consequential upon service in the Defence Force but not taken in relation to that service, for instance, where the action relates to an ex-serviceman, or to benefits to dependants of servicemen. There might also be a grey area where difficulties of characterisation could occur in deciding whether an action is related to or arises in consequence of service in the Defence Force, for instance: actions concerning the taxation of pay or benefits; the provision of telephone or other services to members of the Services or their dependants; or the provision of Government housing to servicemen.

15. The draft Bill recognises that there would be occasions when investigation of a matter within the jurisdiction of the Defence Force Ombudsman could be more conveniently investigated by the Commonwealth Ombudsman, and clause 7 would allow the Defence Force Ombudsman to refer the complaint to the Commonwealth Ombudsman for investigation. Upon so doing, the Defence Force Ombudsman would be deemed not authorised to investigate the action. It may be noted in passing that there are problems in the wording of this provision, because it is not clear whether it attempts to enlarge the jurisdiction of the Commonwealth Ombudsman.

JUSTIFICATION FOR JURISDICTION

16. The question whether there are special reasons justifying the creation of an ombudsman jurisdiction over matters connected with service in the Defence Force is

related to the Working Party's discussion of the existing exclusion of employment matters from the jurisdiction of the Ombudsman (see paragraphs 180 to 188 of its Working Paper on review of the Ombudsman Act). The Paper noted divergent views on the appropriateness of the Ombudsman's jurisdiction covering administrative actions concerning the employment of public servants as well as administrative action affecting citizens outside the Public Service. It reached no conclusion, because it was aware that the Public Service Board was conducting a review of grievance processes within the Australian Public Service. However, it noted that the First Annual Report of the Ombudsman pointed to a need for some additional grievance machinery in employment matters. No suggestion was made that the administration of employment matters involved processes, which at a practical level rendered the procedures and remedies of an Ombudsman inapplicable to this area.

17. It can be argued in favour of the proposed Bill that servicemen are in a distinctively different position from ordinary members of the Public Service, and that these differences give rise to a special need for an Ombudsman to be available. The differences are apparent and relate to the terms of employment, the elements constituting a disciplined service, and the incidents of continual shifts in residence. Moreover, essential to the ethos of the Services is an emphasis on the distinctiveness of their relationship to their employer. This psychological aspect assists the case for a special need for a Defence Force Ombudsman, and also is the basis of the claim that his Office should appear as an identifiable privilege attaching to membership of the Services. The special need is asserted to arise from the necessary unavailability to servicemen of access to external grievance mechanisms such as membership of unions or arbitration processes. It is argued that, provided the redress of wrongs system is maintained, the availability of an Ombudsman's investigation and remedy would be an acceptable and beneficial attribute of service in the Defence Force.

18. The Working Party accepts that there are special reasons for servicemen having a right to seek an ombudsman investigation of complaints relating to their service, and that the introduction of this right would not jeopardise the proper functioning of the Defence Force. Since employment in the Defence Force is outside the review of grievance processes by the Public Service Board, there is no reason for the Council to withhold comment on extending ombudsman jurisdiction to this area. The Working Party recommends that the Council should endorse an ombudsman jurisdiction of this kind provided that its introduction may be made in a manner compatible with the continued effectiveness of the jurisdiction of the Commonwealth Ombudsman,

ALTERNATIVE MODES OF ESTABLISHMENT

19. The Working Party considers that there are three possible methods of introducing an ombudsman jurisdiction relating to service in the Defence Force. These are:

- (a) the establishment of a separate office by a separate enactment;
- (b) the absorption of the proposed field into the existing operations of the Commonwealth Ombudsman; and
- (c) the conferring of a specially identified jurisdiction on the Commonwealth Ombudsman.

20. Option (a) is the method envisaged in the present proposal. It has the advantage of meeting the requirement of the Defence Force that a Defence Force Ombudsman be individually identifiable as a special right attaching to service. However, the proposal presents possible practical difficulties. To achieve fully the appearance of an independent investigator, as is strongly desired by the Defence Force, the Defence Force Ombudsman must be established separately from the Defence Force and from the Defence Department. On present indications his workload would justify only a small office, and it may be questioned whether such an office would be viable or desirable, given its necessary detachment from the Department with whose activities he would be chiefly concerned. The drafting instructions refer to an intention to appoint a part-time Defence Force Ombudsman, but it may not be possible to find an appropriate person able to maintain the necessary independent status, while engaged only part time. Further, the overlap in jurisdiction with the Commonwealth Ombudsman referred to in paragraphs 10 and 14 above would have practical significance, since it would remove some present jurisdiction exercised by the Commonwealth Ombudsman in which he has already developed a considerable degree of expertise and background knowledge in handling complaints and, although a satisfactory working relationship would probably develop between the two Ombudsmen, there would be continual difficulties in determining jurisdictions and an appreciable additional administrative workload involving mutual consultations and references. It would not be possible to meet the reasonable expectation of departments and authorities that they should know clearly to which Ombudsman they were subject. The proposal has the final feature that a separate piece of legislation would be necessary even though it would seek to duplicate exactly most of the provisions of the Ombudsman Act. This would require constant attention to ensuring that the Act did not become out of step when one or other was amended. Although this is perhaps a minor problem, it may have the short-term consequence that the Defence Force Ombudsman Bill would need to be delayed until final decisions are taken on any amendments to the Ombudsman Act arising out of the Council's review of that Act. Moreover, the Working Party considers that the establishment of a completely separate office of Defence Force Ombudsman in a separate Part of the Ombudsman Act, either prior to or at the time of the Act being generally amended, would not be appropriate.

21. Option (b) has much appeal in terms of efficient administration. Given that the proposed Defence Force Ombudsman would not have procedures or functions different from those of the Commonwealth Ombudsman, and given that the administrative actions covered by the proposal have characteristics like those now investigated by him,

it is suggested that apart from the practical effects of an additional workload the Ombudsman would have no difficulty absorbing this jurisdiction. The option would be achieved by extending the provisions of the Ombudsman Act, which define the Ombudsman's jurisdiction and adjusting other sections where appropriate. On this approach any overlap in the wording of the jurisdictions would be of no consequence, and there would be no need for the exercise of the jurisdictions to be separated. Because the functions and procedures of the two jurisdictions are identical, a Defence Force Ombudsman jurisdiction would not create the difficulties arising out of the suggested jurisdiction of the Commonwealth Ombudsman over complaints against police. If the Ombudsman were given Defence Force jurisdiction he would no doubt need some additional staff to conduct the investigations, but much of his office establishment would already be available to assist the jurisdiction. This option therefore would entail less cost than option (a). A further advantage would be that the Ombudsman would probably be able to provide a better service to members of the Defence Force than a smaller office, as a result of his decentralised administration and greater flexibility of operations. This option is, however, open to the major objection that the absorption of a Defence Force jurisdiction into general Commonwealth Ombudsman operations would not enable servicemen to identify readily a person to whom they can complain and who will appear concerned with their complaints only.

22. Option (c) would have the practical advantages of option (b), and would attempt to meet the 'identification' objection to that option. The jurisdiction over Defence Force matters could be made especially identifiable within the Ombudsman Act by inserting a special Part, which would create a special office of Defence Force Ombudsman, although it would also vest it on the holder of the office of Commonwealth Ombudsman. The Part could also require a separate annual report relating to this jurisdiction, and could provide for the appointment and designation of a special 'Deputy Ombudsman (Defence Force)'. Such a Deputy Ombudsman would have the direct supervision of complaints in this jurisdiction, and could either be comparable to that provided for in section 23 with respect to the Australian Capital Territory with all the powers of the Ombudsman except the power to report to Parliament under section 17 or 19, or hold a delegation under section 34 of the Act. A separate Part of the Act would define the special jurisdiction and then adopt the procedures and powers of the Commonwealth Ombudsman, and thus avoid the problems of maintaining consistent enactments. It would be appropriate that the Prime Minister remain the Minister responsible for administering the whole of the Ombudsman Act, since this would be consistent with the independent status of the Defence Force Ombudsman and be the most practical arrangement.

23. The Working Party considers that option (c) is the preferable method for establishing an ombudsman jurisdiction over matters relating to service in the Defence Force. It sees significant advantages in the one office receiving the complaints in this jurisdiction and investigating them in conjunction with the jurisdiction of the

Commonwealth Ombudsman. In doing so it accepts the principle referred to by the Bland Committee: that there should be only one Ombudsman for Australia and its Territories to ensure the maintenance of a common approach to ombudsman procedures and jurisdictions (see paragraphs 14 to 19 of the Final Report). The Working Party considers that some weight should be given to the call for the Defence Force jurisdiction to be especially designated, but considers that this principle may be sufficiently met by the designation of a special office held by the Commonwealth Ombudsman and by the designation of a special Deputy Ombudsman. Since the jurisdiction would concern matters at a national level, it would be appropriate that the person occupying the office of Commonwealth Ombudsman be ultimately responsible for it, and the Working Party therefore considers that the powers of a Deputy Ombudsman (Defence Force) should not extend beyond the powers of other Deputies. With this approach there could be no confusion as to who was the Ombudsman concerned with a grievance, and the incorporation of the jurisdiction in the Ombudsman's Office would allow the jurisdiction to be immediately accessible to most servicemen and their dependants. In addition, this option has appeal in terms of a timetable for the introduction of legislation to establish the Defence Force Ombudsman, since it may be possible to insert a part in the Ombudsman Act establishing the Defence Force Ombudsman prior to the consideration of any general amendments to the Act.

OTHER ASPECTS OF PROPOSAL

24. If the proposal of the Working Party indicated in the last paragraph were adopted, it would be necessary to rewrite the present drafting instructions. However, the Working Party would make some brief observations upon some aspects of the instructions to meet the contingency that its proposal is not accepted. If separate Ombudsmen are to be established the Working Party considers it necessary that each has power to refer matters to each other where they both agree that this would be convenient. Clause 7 of the Bill is deficient in this respect, and should also show that the two jurisdictions were extended for the purposes of these references. Generally, the Working Party recommends that all its recommended amendments to the Ombudsman Act be incorporated within the Defence Force Ombudsman Bill, unless they are clearly inconsistent with the essence of the proposal. Additionally, the instructions show a number of departures from the Ombudsman Act of a minor nature, which do not appear essential to the proposal. The Working Party makes the following comments on two of these:

- (a) Clause 32 of the Defence Force Ombudsman Bill confers immunity from some types of judicial review of a Defence Force Ombudsman's actions, which is not present in section 33 of the Ombudsman Act. The Working Party does not consider that the Defence Force Ombudsman should be immune from such review; and

- (b) Clause 34(5) of the Defence Force Ombudsman Bill would permit the Attorney-General to issue a certificate preventing the Defence Force Ombudsman disclosing information on the ground that disclosure was 'contrary to the public interest'. This ground is considerably wider than the ground contained in section 35(5) of the Ombudsman Act, and the Working Party considers that this is not appropriate.

RECOMMENDATION

25. The Working Party recommends that the Council endorse the proposal reflected in the drafting instructions referred by the Attorney-General, in so far as they described an ombudsman jurisdiction relating to service in the Defence Force and the procedures and remedies applicable. The Working Party further recommends that the Council recommend to the Attorney-General that the jurisdiction should be exercised by the Commonwealth Ombudsman, but should be specifically identified in a separate Part of the Ombudsman Act which creates a special office of Defence Force Ombudsman to be held by the Commonwealth Ombudsman and allows the appointment of a further Deputy Ombudsman to be designated Deputy Ombudsman (Defence Force).