

## TWENTY-FIVE YEARS OF THE DEFENCE FORCE OMBUDSMAN\*

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It is a great pleasure to present the opening address at this seminar to mark the twenty-fifth anniversary of the establishment of the Defence Force Ombudsman. Accountability milestones are always worthy of special celebration.

I will start by briefly sketching the development of the DFO role, and then talk about the work that we have undertaken over the past twenty-five years, and the lessons that emerge from that work.

### **DEVELOPMENT OF THE ROLE OF DEFENCE FORCE OMBUDSMAN**

The idea that there should be an independent office of Defence Force Ombudsman predates the creation of the office of Commonwealth Ombudsman. The DFO was first created by executive action – a Ministerial directive – in January 1975. Later that year a bill was introduced into the Parliament, but was a casualty of the double dissolution in November 1975.

The next definitive step was a report by the Administrative Review Council in 1979, which recommended that the office be created by statute as a special office located in the office of the Commonwealth Ombudsman.<sup>1</sup> The Government accepted the ARC recommendation, and the legislative amendments commenced operation on 5 December 1983.

Three noteworthy features of the legislative scheme were, firstly, that the Act provides for a special position designated as Deputy Ombudsman (Defence Force). Retired Air Vice-Marshal Jordan was the first appointee to that position, followed by two further appointees – one a retired military officer, the other a civilian. The office has not been filled since 1996, when the number of Deputy Ombudsmen was reduced to one because of budgetary restrictions.

A second feature of the scheme is that the idea of conferring specialist titles on the Ombudsman's office has since been followed in other areas. In this new model, of a generalist office with a cluster of specialities, the office is also the Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman, and Taxation Ombudsman. Some of those roles have additional statutory functions for which additional funding has been provided.

Thirdly, the office of Defence Force Ombudsman, as initially conceived, was an office that could investigate complaints from current and former members of the Defence Force, and their dependants, about the infringements of the rights they had accrued through Defence service. It was, in a sense, a role of employment Ombudsman, recognising that employment issues extend into many areas of the lives of Service personnel and their families, and that Defence personnel lack access to the external employment grievance mechanisms that are typical in civilian and other public sector employment.

The creation of the office of DFO supplemented the internal redress of grievance system. This is acknowledged in the legislative scheme, which provides that in the

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\* The examples in this paper are mostly drawn from a companion paper that provides greater detail and references to Ombudsman annual reports, *Defence Force Ombudsman – Twenty-Five Years*. I acknowledge the substantial assistance provided by Di Nash in the preparation of this paper.

<sup>1</sup> Administrative Review Council, *Defence Force Ombudsman*, Report No 5 (1981)

absence of special reasons the DFO is not to investigate until a person has first exercised a right available to them to seek redress.

That focus on employment rights and conditions remains a strong focus in DFO work, but is not the sole focus. Over time, the DFO role has become as concerned as in other Ombudsman work with broader themes about the need for sound administration, that is publicly accountable, and that is guided by administrative law values of legality, fairness, rationality, and transparency.

The workload of the DFO, like other Ombudsman work, has had peaks and troughs. The largest number of complaints received in a single year was in 1987-88, when nearly 1200 complaints were received. There was a similar peak in 1996-97 of just under 1000 complaints, followed by a steady decline to a low of 562 last year.

Some complaints received by the Ombudsman about Defence matters arise in the general Commonwealth Ombudsman jurisdiction, and concern non-employment matters such as freedom of information processing, and contracting and tendering.

The decrease in complaint investigation has been offset by an increase in other activity. For example, the office has undertaken seven major investigation reports arising from own motion investigations. Five of those have been undertaken in the last four years, on matters such as the management of service personnel under 18, a review of the redress of grievance system, management of complaints of unacceptable behaviour, and allegations arising from the HMAS *Westralia* fire.<sup>2</sup>

The office has also embarked on an expanded program of consultation with Defence personnel. For example, in the last year the office has given nine presentations to Defence seminars around Australia.

## **ISSUES TAKEN UP BY THE DFO**

Complaint and investigation work is usually of four kinds, and this is as true for Defence complaints:

- most complaint issues are of a continuing or routine nature that do not differ markedly from one year to the next
- other complaints, individually or together, raise deeper questions about the integrity, transparency or accountability of public administration, which require examination through a major or more extended investigation
- some other complaints highlight important policy decisions facing government, arising usually from shifts that are occurring in social policy
- complaints generally can raise questions about the adequacy of internal agency procedures on complaint handling, administrative investigations, and administrative decision making.

Those four themes will be illustrated by some complaints handled by the DFO during the last twenty-five years.

### ***Complaint issues of a continuing or routine nature that do not differ markedly from one year to the next***

The majority of the work of the DFO is of this kind, as illustrated by the following examples:

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The reports are available at [www.ombudsman.gov.au](http://www.ombudsman.gov.au)

- *promotion* – an investigation in 1986 concluded that an Army promotion policy that was designed to improve the promotion prospects for a particular officer group was unreasonable and discriminatory as to other officers
- *career assessment* – other investigations in the same period were critical of tri-service differences in the level of access members were given to their performance evaluation reports
- *involuntary discharge* – this is a frequent complaint topic, especially complaints about termination of a member's service for prohibited drug use. Ombudsman recommendations have dealt with issues such as the standard of proof applied by Defence in concluding that there was illegal drug use, the failure to take account of other considerations when making a discharge decision, proper documentation of discharge decisions, and observance of natural justice in the termination process
- *pay and conditions of service* – issues that have been taken up include inappropriate housing offered to mature age members without children, removal and storage entitlements, misleading information given to members about their pay and allowances, underpayment errors, and lack of flexibility in repayment and waiver of overpayments made through administrative error and received in good faith
- *Defence housing* – complaints have led to a clarification on housing loan entitlements, for example, on when building can commence, when occupation must occur, and on portability of loans
- *Reserves* – issues taken up include compensation for illness suffered on reserve training, procedural irregularities in the discharge process for reservists, and improvements in the pay system for reservists.

Problems of those kinds arise in every administrative system. The examples are nevertheless a reminder that such problems do exist, that minor administrative problems can have significant adverse personal and financial consequences for people, that it is sometimes necessary for a person to go to the trouble of complaining to an external complaint agency such as the Ombudsman to have the problem corrected, and that commonly more than one person is affected by the same problem.

***Complaints that raise deeper questions about the integrity, transparency or accountability of public administration that require examination through a major or more extended investigation***

One example of this theme was a few complaints that led to an own motion investigation into the ADF's management of Service personnel under the age of 18.<sup>3</sup> The complaints that triggered the investigation were mostly received from the parents of young people in the ADF, and included cases in which a young person had attempted self-harm. The DFO report in 2005 made numerous recommendations that were accepted by Defence – to clarify in Defence Instructions and training the extent of the duty of care owed to minors, to ensure consistency across the ADF in dealing with young people, to correct the message given to young people about their expectations of service life, and to be more informative in dealing with inquiries from parents of enlisted young people.

<sup>3</sup>

Commonwealth Ombudsman, *Australian Defence Force: management of Service personnel under the age of 18 years*, Report No 4/2005.

A second example was a major investigation undertaken into the fatal crash of a Nomad aircraft in 1990.<sup>4</sup> This crash had already been investigated three times by the RAAF, and the adequacy of those investigations was a major focus of the DFO investigation. However, the DFO investigation extended as well to the design of the aircraft, its use for test flying, and whether disciplinary action should be taken against Defence personnel. One upshot of that investigation and a subsequent Senate Committee inquiry was an amendment of the Defence Force Disciplinary Act to extend the time for laying disciplinary charges for many offences.

A third and more recent example was an investigation into another major Defence accident, the fire on the HMAS *Westralia* in 1998 that led to four fatalities.<sup>5</sup> This investigation was into allegations that Defence had failed to act on warnings about faulty fuel lines that caused the fire, and had failed properly to investigate those allegations. The Ombudsman report, which cleared Defence of all the allegations after an exhaustive review of records dating back over ten years, was a reminder that integrity questions can resurface many years after an event, and can only be laid to rest if adequate records were created and maintained.

***Complaints that highlight important policy decisions facing government, arising usually from shifts that are occurring in social policy***

This theme is illustrated by complaints about Defence policies on homosexuality. The initial complaints in the 1980s were from those who alleged harsh treatment after acknowledging or being accused of homosexuality. The focus at that time in the Ombudsman reports was on the need for Defence to be clearer about its policy stance, and to have a stronger evidentiary basis for any adverse action taken against a member. Those findings fed into a broader community debate that led in 1992 to an announcement by the Prime Minister that that it was ending the policy of discrimination against homosexual behaviour in the ADF.

Another social challenge facing Defence has been the issues thrown up by the enlistment of women into nearly all employment categories in the ADF. There have been many complaints to the Ombudsman over nearly twenty years concerning Defence's handling of allegations of sexual assault or inappropriate behaviour. A recurring theme in Ombudsman reports and submissions was inadequate Defence investigation of those allegations. The Ombudsman findings fed into the formation of a Defence Advisory Forum on Discrimination, the preparation of a new manual on *Administrative Inquiries and Investigations in the ADF*, and the establishment of the Complaint Resolution Agency.

***The adequacy of internal agency procedures on complaint handling, administrative investigations, and administrative decision making***

This theme has been taken up by the Ombudsman in many annual reports, in specialist reports, and in submissions to parliamentary inquiries. Two examples of specialist reports are the 2005 joint Ombudsman and Defence review of the Redress of Grievance system,<sup>6</sup> which made 72 recommendations for legislative, policy and

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<sup>4</sup> Commonwealth Ombudsman, *Investigation into the adequacy of RAAF response to loss of Nomad A18-401*.

<sup>5</sup> Commonwealth Ombudsman, *Department of Defence: allegations concerning the HMAS Westralia fire*, Report No 3/2008.

<sup>6</sup> Commonwealth Ombudsman, *Review of Australian Defence Force redress of grievance system: joint report by the Department of Defence and the office of the Commonwealth Ombudsman*, Report No 1/2004.

administrative change; and a 2007 Ombudsman report into the management of complaints of unacceptable behaviour.<sup>7</sup>

Criticisms of Defence that have figured prominently in DFO work include delay in decision making and grievance resolution (discussed in all but four of the Ombudsman annual reports), and inadequacies in natural justice compliance, reasons for decision, evidentiary support for decisions, investigation training, case management systems, and data collection and reporting.

The reports and submissions that have been made over the years have fed into recent and substantial reform of the military justice system. The most recent assessment of those reforms by the Senate Standing Committee on Foreign Affairs, Defence and Trade in September 2008 is that '*Defence has implemented significant reforms that, without doubt, have improved the system*'.<sup>8</sup> The improvements are reflected in a steady decline in complaint numbers to the Ombudsman in recent years.

## CONCLUSION

I will end with three broad reflections on twenty-five years of Defence Force Ombudsman oversight.

Firstly, the examples given in this paper illustrate the important role that an external, independent complaint agency – a watchdog – can play in highlighting problems and improving government. Complaint investigation by the DFO has played a role in numerous changes over the years to legislation, Defence policy, administrative systems, and decision making. As importantly, those investigations have provided assistance and redress to many thousands of complainants. It is that personal and individual benefit that must be the ultimate objective of administrative and military justice.

Secondly, the role of the Defence Force Ombudsman has altered, particularly in recent times, as a consequence of the establishment of the Fairness and Resolution Branch in Defence and of the office of Inspector-General of the Australian Defence Force. Comparatively those offices play a larger role than the DFO in complaint handling, monitoring, auditing and analysis. They are special purpose bodies with a focus only on Defence. However, their work has not altered the need for oversight from an Ombudsman office with a more general jurisdiction. There is a continuing need for oversight agencies such as the Ombudsman that look across government, that are not unduly focussed on relationship management with a single client agency, that locate themselves within an overarching system of administrative law and external accountability, and that draw strength from their special relationship with the public.

Thirdly, the effectiveness of the Defence Force Ombudsman role hinges in no small measure on building, with Defence, mutual trust, respect and understanding. There have been occasional disagreements and tensions, as one would expect, but throughout the relationship has been good. Many of the larger inquiries undertaken by the Ombudsman's office have occurred at the request of Defence. There have also been joint investigations. There has been a ready acceptance of a large number of the recommendations that have been made for reform. Those positive trends have

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<sup>7</sup> Commonwealth Ombudsman, *Australian Defence Force: management of complaints about unacceptable behaviour*, Report No 4/2007.

<sup>8</sup> Senate Standing Committee on Foreign Affairs, Defence and Trade, *Reforms to Australia's military justice system: fourth progress report* (2008) at xii.

enhanced the effectiveness of the DFO to the benefit of Defence personnel and administration.