



## **Defence Force Ombudsman**

TWENTY-FIVE YEARS OF SERVICE

December 2008

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## PART 1—INTRODUCTION

1.1 The role of the Defence Force Ombudsman (DFO) was vested in the Commonwealth Ombudsman on 5 December 1983. The DFO is an independent statutory appointment. The DFO investigates complaints arising from the service of a member of the Australian Defence Force (ADF). Serving and ex-serving members of the ADF and their families can make a complaint to the DFO.<sup>1</sup>

1.2 The role of the DFO recognises the special nature of the employment relationship that exists between members of the Defence Force and their employer. This relationship extends into many facets of the lives of ADF members and their families. The DFO role also acknowledges that ADF members do not have access to external grievance and advocacy mechanisms, such as union membership and industrial relations courts and tribunals.

1.3 The challenges faced by the ADF have changed dramatically over the 25 years of the existence of the DFO. Changes have arisen from developments in military technology and the transition from the last part of the Cold War, through a period of comparative peace with an increased focus on peace-keeping operations, to a time of major conflict in a number of areas and the demands of dealing with global terrorism.

1.4 Changes in society have also affected the ADF. For example, women now play a more active role in the ADF than at the time of creation of the DFO. The ADF's capacity to recruit and retain certain categories of staff has fluctuated with external economic conditions. Demographic and social changes have led to changes in family compositions, and other family members, such as spouses and children, hold different expectations in relation to career and education opportunities. In addition, it is arguable that people in the Australian community have a greater sense of their rights, including their right to complain, than they did 25 years ago.

1.5 Looking back at 25 years of the operation of the DFO provides a view of some of the changes that have occurred in the ADF. It also reinforces how themes of good administration, such as providing natural justice; having fair, reasonable and timely decision making; providing good information and advice; having good complaint-handling process in place; learning from complaints; and ensuring adequate recordkeeping and training are just as relevant to the ADF as to other organisations.

### Creation of office

1.6 The office of Commonwealth Ombudsman was created as part of a comprehensive reform of Australian administrative law in the 1970s. The office was established by the *Ombudsman Act 1976*, and commenced operation on 1 July 1977. A proposal to create a Defence Force Ombudsman was part of the platform of the 1972 Labor Government. However, a bill to establish a DFO lapsed in the Senate

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<sup>1</sup> The DFO is not able to investigate action taken in connection with disciplinary proceedings against a member of the ADF. This recognises the other review paths open in relation to disciplinary proceedings. Unless there are special reasons, the DFO cannot investigate a complaint if a person has a right of redress they have not used, or, if they are pursuing a complaint through the redress of grievance system, until 28 days after the application for redress has been lodged.

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when Parliament was dissolved in November 1975. The proposal was adopted by the new Government, although it did not proceed with a new bill.

1.7 On 2 January 1975 a DFO in Defence was designated by Ministerial directive, pending the enactment of legislation. The role of the Ombudsman was to investigate complaints by serving members 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'.<sup>2</sup>

1.8 After the incumbent of the position took up another appointment, complaints continued to be investigated by an Office of the DFO under an administrative direction from the Minister for Defence.

1.9 In 1978–79 Defence proposed new legislation to establish the DFO. The Attorney-General referred the proposal to the Administrative Review Council (ARC), asking the Council to consider the proposal in conjunction with the Council's concurrent review into the Commonwealth Ombudsman's jurisdiction.

1.10 The ARC reported to the government on 16 July 1979. It recommended that, because of the small scale of the DFO operations and potential problems with overlapping jurisdiction, the DFO jurisdiction should be incorporated into the Ombudsman Act.

1.11 The ARC also recommended that the DFO jurisdiction be specifically identified in a separate part of the Ombudsman Act. This would include creating a special office of Defence Force Ombudsman to be held by the Commonwealth Ombudsman, and allowing for the appointment of an additional Deputy Ombudsman to be designated by the Minister as 'Deputy Ombudsman (Defence Force)'.

1.12 The government accepted the ARC's recommendations, but once again the legislation lapsed when Parliament was dissolved in February 1983.

1.13 The new government introduced legislation to amend the Ombudsman Act in May 1983. In his second reading speech, the Minister introducing the legislation (the Hon Mr Willis MP, Minister for Employment and Industrial Relations and Minister assisting the Prime Minister for Public Service Matters) stated:

The creation of a statutory office of Defence Force Ombudsman will provide an important advance in the conditions of employment for Service members. Servicemen and women differ from most other Australians in that their relations with their employers can extend into almost every aspect of their lives. It is in the nature of Defence Force service that members do not have the advantage of external grievance mechanisms typical in civil employment. With the creation of a Defence Force Ombudsman an independent avenue for the review of grievances will be established.

and

Review by the Defence Force Ombudsman will complement, rather than compete with, existing internal redress procedures: For effective management in the Defence Force, officers should usually hear and have the first opportunity to remedy the grievances of those under their command.<sup>3</sup>

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<sup>2</sup> Administrative Review Council report *Defence Force Ombudsman* 1979 page 3.

<sup>3</sup> House of Representatives Hansard 26 May 1983, page 1021.

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1.14 As with the creation of the office of Commonwealth Ombudsman, these amendments had bipartisan support. The Act passed through Parliament and received royal assent on 12 October 1983.

1.15 The provisions relating to the DFO took effect from 5 December 1983 and the Commonwealth Ombudsman, Prof. Jack Richardson, became the Defence Force Ombudsman. Air Vice-Marshal JC Jordan AO (ret'd) was appointed to a position of Deputy Ombudsman and designated Deputy Ombudsman (Defence Force) from 1 January 1984. This was the only additional resource provided to the office for the DFO function.

1.16 On creation of the DFO, the office assumed responsibility from the Office of the DFO in Defence for the files and some 25 complaints awaiting finalisation. In the first seven months of DFO operations, the Ombudsman received a total of 166 complaints in the DFO jurisdiction. Of these, 121 would previously have been out of jurisdiction because they related to the employment of serving ADF members. The other 45 were about agencies such as the Department of Veterans' Affairs (DVA), the Defence Service Homes Corporation and the Defence Force Retirement and Death Benefits Authority (DFRDBA), and would have been dealt with previously under the Commonwealth Ombudsman jurisdiction.

1.17 In his first annual report as Commonwealth and Defence Force Ombudsman, Prof. Richardson noted that the new service-related complaints covered a wide range of issues, such as involuntary discharge, postings, allowances payable, lack of promotion, and annual assessment reporting.

1.18 Such complaints have continued over the years. Despite the different subject matter, common themes emerge, such as the need for good complaint handling and sound investigation methodologies, ensuring good recordkeeping, providing natural justice, and making decisions in a timely manner. In addition, while many cases under the DFO jurisdiction solve problems for individuals, others have highlighted systemic issues.

1.19 In his next annual report, covering the first full year of operation of the DFO jurisdiction, Prof. Richardson noted:

... I am pleased to say that as a result of the co-operation of the Secretary to the Department of Defence and the Chief of the Defence Force there are now very satisfactory working arrangements.

1.20 However he also injected two notes of caution which were to establish a pattern for most of the next 25 years. In referring to the internal redress of grievance (ROG) process, he said:

It is my experience that unless the matter is very simple the complaints of serving members take far too long to resolve internally.

1.21 He also raised concerns about the timeliness of Defence responses to his enquiries:

I must say, however, that the time taken for formal answers to my enquiries has often been disappointing. It frequently seems to be attributable to the complicated nature of Defence's machinery for the administration of personnel matters.

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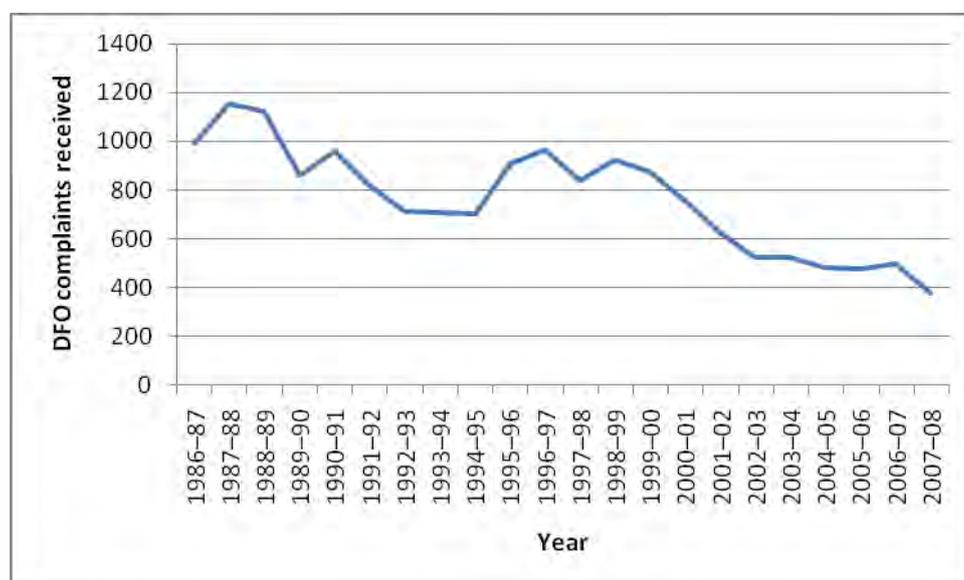
1.22 In summarising the results of the first full year of DFO work, the Ombudsman noted:

Many complaints are complex and not amenable to rapid resolution and our work has involved consideration of some important and fundamental policy issues not the least of which are the occasions on which the principles of natural justice should apply. We have also been instrumental in initiating policy reviews of personnel management procedures—one example being the notice periods to be given to individuals about to be discharged or dismissed from the service.

### Workload

1.23 Figure 1 shows the trend in DFO complaints since 1986–87. While the figures are not completely comparable year by year, they indicate that the level of DFO complaints has decreased by nearly two-thirds from its peak several years after the creation of the DFO role.

**Figure 1—Defence Force Ombudsman complaint trends, 1986–87 to 2007–08**



1.24 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 conducted in the last four years, on matters such as the management of service personnel aged under 18 years, a review of the ROG system, management of complaints of unacceptable behaviour, and allegations arising from the 1998 fire on HMAS *Westralia*.

## PART 2—CHANGING COMMUNITY ATTITUDES

2.1 Over the years changes in community attitudes have led to major changes in Defence Force personnel policies, giving rise to changes in the pattern of some complaints to the Ombudsman.

### Homosexuality

2.2 In the 1987–88 annual report, the Ombudsman noted that he had asked the Defence Force to clarify its policy on homosexuality. This followed a number of complaints about the treatment of members who had admitted to, or been accused of, homosexual behaviour. The office was also considering some complaints concerning the quality of evidence required by the Defence Force to justify action against a member suspected of engaging in homosexual behaviour, and the methods used to obtain it.

2.3 After receiving a response from the Chief of the Defence Force, the Ombudsman concluded he had few problems with the policy, although he believed ‘much of the statement is conjectural rather than evidential’. The main concern was with the investigative techniques and the application of the policy. The Ombudsman noted that: ‘There are adequate safeguards within the system which, if applied properly, protect the individual’. He also suggested that the ADF’s policy on homosexuality be publicised in recruiting material to alert potential applicants to the policy at the earliest point of contact.

2.4 The Ombudsman’s 1991–92 annual report noted that the government was considering whether or not to retain the policy on homosexuality. The Ombudsman expressed hope that, if it was retained, the relevant Defence Instruction would be revised to make it clearer what the implications of involvement in homosexual behaviour might be—for example, if it meant discharge or the circumstances when a member might be retained.

2.5 In November 1992 the Prime Minister announced the government had decided to end the policy of discrimination against homosexuals in the Australian Defence Force.<sup>4</sup>

### Women in the ADF

2.6 Over the past 25 years the role of women in the ADF has changed substantially. For example, in September 1984 all women who joined the Royal Australian Navy (RAN) from 3 September 1984 were advised they would be liable for sea service. On 30 May 1990 the Minister for Defence Science and Personnel announced that women would have access to combat-related roles in the ADF.<sup>5</sup> Women are now eligible to serve in about 90% of employment categories in the ADF, up from 73% in 2003.<sup>6</sup>

2.7 This has led to a number of challenges for the ADF in setting the standards of appropriate behaviour and dealing with alleged transgressions. Some of these issues have been reflected in complaints to the DFO.

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<sup>4</sup> Cited in Senate Hansard, 27 September 1993, page 1,225.

<sup>5</sup> Cited in Senate Hansard, 31 May 1990, page 1,571.

<sup>6</sup> Defence submission to inquiry by Senate Standing Committee on Legal and Constitutional Affairs into the effectiveness of the *Commonwealth Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equity.

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2.8 For example, the Ombudsman's 1991–92 annual report referred to an investigation into a case involving unacceptable sexual behaviour between instructing staff and students in an ADF training establishment. The Ombudsman recommended that a board of inquiry be conducted into matters raised by the complainant. The board of inquiry found that a number of issues had no foundation, but criticised service and service police procedures and their failure to follow procedures. The Ombudsman noted that this case, and others, indicated that 'integration of men and women in the ADF will continue to cause problems in maintaining good order and discipline'. He also noted that in June 1992 the Minister for Defence had released a draft Defence Instruction *Unacceptable sexual behaviour by members of the Australian Defence Force* that set out the ADF policy in some detail and the consequences of transgression.

2.9 In 1992 the Minister for Defence referred to the Ombudsman a complaint about an investigation into allegations of fraternisation at the Australian Defence Force Academy. Amongst other things, the complaint investigation revealed that the original investigation had been inadequate and one-sided and the cadet who complained had been denied natural justice. In addition, the Ombudsman concluded it was unreasonable to offer resignation to her as an alternative to taking disciplinary or administrative action 'the processes of which are intended to protect members' rights to natural justice'.

2.10 In June 1994, in light of a number of complaints about sexual harassment, the Ombudsman made a submission to the inquiry into sexual harassment in the ADF, held by the Senate Standing Committee on Foreign Affairs, Defence and Trade. The Committee reported in August 1994. One of its recommendations was that if a complainant had difficulty pursuing internal investigation of a complaint, or was not satisfied with an internal investigation, information should be readily available for them about alternative options, including the DFO and the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission). Another recommendation was that an advisory panel, including the DFO, should be established to meet periodically with the Defence Force Policy Committee and assist the ADF to develop, implement and monitor a policy on sexual harassment. The Defence Advisory Forum on Discrimination was subsequently formed, with the Ombudsman being a member.

2.11 The office continued to receive complaints about the ADF's handling of allegations of sexual assault and harassment, including some referred to the office by the Senate Committee.

2.12 In July 1995 the Chief of the Defence Force asked the Ombudsman to investigate the adequacy of the ADF's rules and procedures in response to allegations of serious offences. The request was triggered by concerns about the handling by the Royal Australian Air Force (RAAF) of a sexual assault allegation.

2.13 A number of ADF investigations of serious incidents were reviewed. The incidents included some serious offences which were also offences under civilian criminal law and other serious human rights 'offences' such as serious harassment, discrimination and unacceptable sexual behaviour.<sup>7</sup>

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<sup>7</sup> Commonwealth and Defence Force Ombudsman—*Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures*, January 1998, paragraphs 1.17–1.18.

## Defence Force Ombudsman—Twenty-five years of service

2.14 The Ombudsman released a report in January 1998 *Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of practices and procedures*. The report made a number of recommendations covering areas such as:

- the referral of matters where there may be a criminal offence to the appropriate authority for investigation under the Defence Force Discipline Act 1982 (DFDA) and/or civil criminal law
- placing greater emphasis on alternative dispute resolution, particularly for complaints of harassment or discrimination
- removing references in Defence instructions to ‘informal investigations’ and providing guidance on preliminary inquiries
- instructions should include guidance on the factors to be taken into account in selecting investigating officers and the development of terms of reference
- all investigating officers under both the DFDA and the Defence Inquiry Regulations be required to declare any actual or potential conflict of interest before commencing an investigation
- the planning and conduct of investigations
- training of investigating staff
- monitoring, supervising and reporting on investigations
- support services for complainants
- the principles of procedural fairness to be spelt out in the Defence Inquiry Regulations and Defence Instructions.

2.15 The ADF accepted the majority of the recommendations. This apparently was the first review of the ADF’s investigative capability.<sup>8</sup> Amongst the outcomes from the investigation were the preparation of a new manual, Australian Defence Force Publication (ADFP) 202 *Administrative Inquiries and Investigations in the ADF*, and the establishment of the Complaint Resolution Agency (CRA).<sup>9</sup>

2.16 While some improvements may have occurred, these apparently did not have as great an effect as desired. For example, in an internal 2006 audit of the ADF’s investigative capability, released publicly, the audit team noted:

Quite early, audit team members perceived that the recommendations of the reports of a number of earlier reviews, including that undertaken of the Army’s investigative capability by Ernst and Young in 2004 ... all of which identified deficiencies in the ADF investigative capability, did not seem to have produced decisive, measurable reforms or improvements.<sup>10</sup>

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<sup>8</sup> Senate Standing Committee on Foreign Affairs, Defence and Trade. *Reforms to Australia’s Military Justice System: fourth progress report*, September 2008, paragraph 3.2.

<sup>9</sup> Cited in Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry report, *Military Justice Procedures in the Australian Defence Force*, June 1999, page 6. Another impetus for the development of the Complaint Resolution Agency was the 1997 Defence Efficiency Review *Future Directions for the Management of Australia’s Defence*.

<sup>10</sup> Executive summary of 2006 *Report of an audit of the Australian Defence Force investigative capability* paragraph 2, from the Department of Defence website ([www.defence.gov.au](http://www.defence.gov.au)).

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2.17 In 2004 the Ombudsman released an abridged report of an investigation of a complaint by a young person (under 18) of an incident involving unacceptable behaviour at a RAN training establishment in 1996 (Commonwealth Ombudsman Report No 4/2004). The investigation did not look at whether sexual assault had occurred, as this was more properly a matter for the courts. The investigation focused on whether appropriate action had been taken given the nature of the allegation and the complainant's age and circumstances, whether further action should be considered, and whether RAN practices and procedures were sufficient to address any similar situation that might arise in the future.

2.18 The RAN accepted all the recommendations, and agreed to apologise to the complainant for the way the matter was handled; provide appropriate investigative training for relevant personnel; revise instructions to require alleged sexual assault cases to be referred to the civilian police at an early stage; reinforce the importance of proper recordkeeping; and equip divisional officers to provide proper support to any person making an allegation of sexual assault.

2.19 Further discussion regarding the ADF's investigation capability is contained in the later sections *Internal complaint handling* and *Military justice*.

## PART 3—ONGOING ISSUES

3.1 While many complaint issues dealt with each year are of a continuing or routine nature, they raise important concerns for members or former members of the ADF and their families. A snap-shot of some of these types of complaints highlights important changes in policies or procedures.

### Assessment and promotion

3.2 Complaints about assessment processes and promotion have been a feature of DFO work since the earliest days. For example, the Ombudsman's 1985–86 annual report described a case where an Australian Army (Army) captain complained that he had been disadvantaged in that more junior officers were being considered for promotion ahead of him. The circumstances had arisen with a change in promotion policy designed to improve the promotion prospects for an older group of new officers. The Ombudsman considered the policy was unfair, unreasonable and discriminatory. The Army accepted this position and convened a special promotion board to consider the merits of all the officers adversely affected by the change in policy.

3.3 The report also raised the issue of members' access to their assessment reports, used for purposes such as deciding promotions and postings and for career planning. After considering some complaints about assessments, the Ombudsman noted that it was difficult or impossible to evaluate an assessment made some considerable time before the complaint, and that:

... the best safeguard against inaccurate or unfair assessments is for assessments to be shown to the member concerned at the time they are made, so that he or she can challenge any inaccuracies immediately.

3.4 The Ombudsman expressed concern that the RAN and RAAF operated 'semi-open' systems. This contrasted with Army which operated an 'open' system, showing evaluation reports to its members as a matter of course. In January 1987 the Acting Prime Minister decided that the RAN and RAAF would move to open reporting systems, and their members would be given access to past reports.

3.5 Another potential systemic issue was reported in the Ombudsman's 1999–2000 annual report. During the year the office received three complaints from members of one of the Services, alleging that they had been assessed according to rules that were stricter than those applied to many other members, placing them out of contention for promotion. While the outcome of the three complaints was not reported, the following year the Ombudsman noted that Defence was working towards the introduction of a standardised reporting system for all Services, and the office had provided its input. The Ombudsman expressed the view that all of his concerns would be met under the new system, which should provide proper safeguards for the member evaluated while placing an onus on supervisors to provide honest assessments.

### Drugs and discharge

3.6 Similarly, complaints about discharge, or pending discharge, have been a feature of the DFO's work since inception. Involuntary discharge can occur for a number of reasons, including for medical reasons or being incompatible with service life.

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3.7 Over the years the office has dealt with many complaints relating to decisions to discharge members because of the use of illegal drugs. The ADF has very strict policies in place. The office has consistently taken the view that Defence is entitled to have such strict policies, but the proper administrative processes must be followed and the circumstances of each case considered.

3.8 For example, the Ombudsman's 1993–94 annual report raised concerns that two Service discharge authorities were asserting that use of illegal drugs automatically led to discharge. This was not the case.

3.9 In a later report, the Ombudsman raised the issue of Defence conducting urinalysis under the provisions of the DFDA, and then proceeding with discharge on administrative grounds. An amendment to the *Defence Act 1903* was passed the following year, to permit random urinalysis of ADF members with administrative discharge action allowed to follow when appropriate.<sup>11</sup>

3.10 Some complainants claimed to have ingested illegal drugs unknowingly. In one case cited in the Ombudsman's 1998–99 annual report, a member claimed to have unknowingly ingested an illegal drug in food. The office sought advice from Defence about the standard of proof that should apply, given the member was facing loss of employment.

3.11 Two cases reported in the 2001–02 annual report also alleged unknowing ingestion of illegal drugs as a result of action by friends or a flat-mate. In both cases, when the complainants were asked for details of the other party to assist with the investigation, they did not provide the information. The Ombudsman decided in both cases that the decision to continue with discharge was open to Defence to make, as the complainants had not provided any evidence to support their assertions.

3.12 In the 2004–05 annual report, the Ombudsman noted that the ADF's campaign to extend measures to prevent and detect the use of illegal drugs was reflected in the complaints the office received. About 13% of complaints about the ADF finalised in the DFO jurisdiction were about dissatisfaction with ADF processes that resulted in decisions to involuntarily discharge members, with most related to the use of illegal drugs. While no recommendations were made to reconsider discharge action, the Ombudsman raised with the Chief of the Defence Force the need for detailed documentation of termination decisions and for a quality control mechanism to ensure briefs prepared for decision makers are consistent with natural justice principles. The report also noted that the Defence Instructions which had been recently released reflected a number of recommendations made by the office.

## Pay and conditions of service

3.13 In an organisation as large and diverse as the ADF, the area of pay and conditions of service can generate many different types of complaint. In some cases one or a few individuals may be affected by a mistake, while in others there may be much broader implications.

3.14 The Ombudsman's 1986–87 annual report noted that one particular source of complaints was the inequitable conditions of service for members without families, particularly the more mature members. For example, complainants raised concerns about standards of living quarters, entitlements to removal at public expense, denial of living out allowance even when the member had permission to live out, the

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<sup>11</sup> The relevant provisions of the *Defence Act 1903* were amended further in 2005.

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unavailability of the allowance for expenses incurred in the purchase or sale of a home, and allowances overseas. The Ombudsman noted:

A frequent theme appears to be that the Defence Force has failed to recognise that a member of mature age, without family, has justified expectations of sharing in community living standards; and that it is unrealistic to think of him or her in terms of a small room in a mess, access to public mess rooms, and only very limited possessions.

3.15 The Ombudsman wrote to Defence and the Department of Industrial Relations (which from July 1987 had shared responsibility for conditions of employment for Service members) about the issue, and particularly about entitlements to removals and storage of personal effects of members without families. In around mid-1988 the Minister for Defence Science and Personnel announced improved removals and storage entitlements for members without families. The Ombudsman noted he was continuing to pursue other conditions of service, such as living out allowances, home purchase or sale expenses allowance and overseas living allowance.

3.16 Another problem area identified in the 1987–88 annual report was the accuracy of information about conditions of service and pay and allowances contained in instructions. The instructions were meant to be easier to read than the ministerial determinations that provided the legal basis for most of the matters. However, investigations showed that some members were misled by the instructions about their entitlements, and in some cases the instructions were not consistent with the determinations. In one case cited, a member had been wrongly denied living out allowance for some years.

3.17 In a similar vein, the report noted a number of complaints from members who had been overpaid salary or allowances, mostly due to errors in the Defence pay system. The relevant instructions implied that, in certain circumstances, a person who receives an overpayment was entitled to have the recovery waived. However this was not the case. The Ombudsman outlined the office's general approach to such complaints—that there was no prima facie reason why a person should make a windfall gain because of an administrative error, but on the other hand someone who receives an overpayment in good faith should not suffer financial hardship in repaying it. In general repayment should be by instalments, and only of the after-tax amount. Defence undertook to rewrite its relevant instruction so that members were not misled.

3.18 In some cases a single complaint can reveal a broader problem. In his 1999–2000 annual report, for example, the Ombudsman outlined a complaint from a member that he was not being paid at the correct pay group for his rank. The area responsible for preparing input into the pay system advised that their records showed he was in the correct pay group. However, a check with the pay centre showed he was being paid at a lower level. Defence enquiries showed there was a technical problem in the transmission of pay data, which affected many other members as well. Pay adjustments were processed to correct the problem for all the members affected.

3.19 Unlike most forms of employment in the Australian community, pay and conditions of service for members of the ADF also encompass a wide range of family issues such as relocation, dependents' education and reunion travel. An example of the complexities was described in the Ombudsman's 1991–92 annual report. In this case two members complained when their applications for reimbursement of private tuition fees for a subject for their children were refused. In each case, the family had

moved and the subject, which was relevant to the child's chosen future study, was not available at the new locality. In this case, responsibility rested with the then Department of Industrial Relations. The Ombudsman put the view that the legislation should be amended to allow a discretion to be exercised in such circumstances, and the families should be reimbursed the cost of the tuition fees. At the time of reporting, the matter had not been resolved.

## **Standards of medical care**

3.20 Another cause of complaint to the DFO has been the standard of medical care provided to members of the ADF. In most reported cases the problems have been specific to the individual concerned, but some earlier complaints raised the issue of some members' expectation of the level of care to which they might be entitled.

3.21 The Ombudsman's 1986–87 annual report noted that there was no officially promulgated ADF policy on the standard of medical care it should provide. This comment was prompted by two separate complaints by members who felt they were not getting the best standard of medical care to which they considered they were entitled. In one case the matter involved an optional medical procedure, while in the other case the pregnant complainant was concerned she was at a disadvantage because facilities in the area of her posting were not as good as in some other parts of Australia.

3.22 The Ombudsman noted that each Service seemed to have a policy that their responsibility was to ensure the health of their members was kept to a standard sufficient to enable the Service to perform its role at an operationally effective level. On the other hand, there seemed to be a perception amongst some members at least that they were entitled to very comprehensive medical support. The Ombudsman suggested that a joint instruction should be issued defining the extent of the ADF's responsibility for medical care of its members.

## **Changing the grounds for discharge**

3.23 On occasion former members of the ADF seek to have the grounds recorded for their discharge amended. Depending on the circumstances, this may enhance the employment prospects of the individual, or enable them to access benefits to which they otherwise would not be eligible.

3.24 In one long-running case, a member had been discharged from the RAAF some years earlier on the grounds of being incompatible with service life. It was later discovered that she had a medical condition which could have explained her apparent behavioural and work problems. After DFO investigation, Defence and the RAAF agreed that had they been aware of her condition they most likely would not have discharged her but rather arranged treatment and retained her pending recovery. The RAAF acknowledged it had made mistakes, and amended the grounds of her discharge to 'at own request'. After long delays and extensive negotiation with Defence and the Department of Finance, the former member was offered an act of grace payment of \$10,000 in recognition of the Defence Service Home loan for which she would have been qualified had she completed her initial engagement.

3.25 In another case, a former member complained that he had been discharged as incompatible with service life, although he had applied at the time for discharge at own request. He considered the recorded reason for discharge was a form of punishment for incidents that occurred close to the end of his career. The office's

investigation of the former member's file showed some issues of concern. The Service involved re-examined his case and approved an amendment to the reason for discharge to 'at own request'.

### Defence housing and removals

3.26 Over the past 25 years several schemes to provide home loans or loan subsidies to members of the ADF have been in force.

3.27 In his 1982–83 annual report, the Ombudsman outlined new procedures the Defence Service Homes Corporation had put in place to help ensure it gave correct advice about eligibility for defence service home loans, and its agreement to revise its form letters and brochures to emphasise its warning to owner/builders not to commence construction prior to loan approval. These changes arose, in part at least, as a result of some DFO investigations.

3.28 Another issue reported that year was the corporation's policy that an applicant for a housing loan must intend to take up occupation of the house within about six months, and that it was practical for them to do so. The Ombudsman received four complaints about the policy, in circumstances such as where the applicant wanted to build a house in Perth for his family, but would be unable to live in it himself for the time being because he was posted to Sydney. The office queried the legal basis for the policy. After obtaining fresh legal advice, the corporation decided a less restrictive policy was appropriate, and invited each applicant to re-apply.

3.29 The portability of loans attracted a number of complaints in the earlier years. The Ombudsman's 1988–89 annual report raised concerns about the policy under which a Defence Service Homes Scheme loan could be transferred to another house only in special circumstances, such as medical necessity. Legislative amendments were made, but these only applied to new borrowers. Existing borrowers remained unable to transfer loans. The following year, the Ombudsman made a formal report on the issue, and the policy was to be revised. The *Defence Service Homes Act 1918* was later amended to enable existing borrowers to transfer their loan from one house to another.

3.30 With thousands of members and their families being relocated each year, it is not surprising that problems with removal or storage of goods have been a continuing feature of complaints to the Ombudsman. In some cases these involve damage to goods in transit (for example, a boat damaged) or in storage (for example, extensive mould on stored furniture), while in other cases the complaint centres on the removal of goods without proper authority. In one such case, reported in 1990–91, a young soldier had been posted to a remote locality and some of his furniture and personal effects were put into storage. After the breakdown of his marriage, and the altering of some documents, the items held in storage were released to his estranged wife without his permission or approval. Regrettably there was no legal obligation to compensate him. However, procedures were strengthened to ensure that no removal documentation could be altered without the written authority of the member.

3.31 Another procedural change was reported in the Ombudsman's 1989–90 annual report. The spouse of an Army member complained about the lack of compensation for goods damaged when a cupboard fell off the wall in their married quarter. Amongst other remedies, the Ombudsman reported that Defence and the then Defence Housing Authority had agreed to procedures for handling claims from tenants, rather than tenants having to go through Defence channels to the owner of the property.

## Continuity of service

3.32 Continuous service can be an important element in determining eligibility for, or retention of, some benefits. Over the years, the Ombudsman has dealt with a range of complaints where this was the central issue.

3.33 In one case, reported in the Ombudsman's 1987–88 annual report, a serving member took 12 months leave without pay to accompany her husband, also a serving member, on an overseas posting. She was granted further leave without pay when his posting was extended. However, under the relevant determination she lost all previous credit for long service leave because her period of leave without pay exceeded 12 months. The Ombudsman and Defence agreed this was unreasonable and the determination should be amended in line with public service conditions. Subsequently the determination was changed so that serving spouses of members could, under some circumstances, take leave without pay for more than 12 months without losing the benefits of continuous service.

3.34 Two other cases were reported in 1988–89 where continuity of service was a problem. In one, a member of the Army applied for enlistment in the RAAF. Although he made it clear he needed to enlist immediately after discharge, to preserve his entitlements, there was a six-week delay due to administrative problems in the RAAF. This gap meant he lost his entitlement to a Defence Service Homes loan. An act of grace payment was approved to recompense him for his lost entitlement.

3.35 In the other case, a person had been conscripted for national service in Vietnam while he was an employee of Qantas. Under the provisions of the *Defence (Re-establishment) Act 1965*, he remained a Qantas employee. After completing his national service and a short holiday, he advised Qantas he would not be returning, and he enlisted in the Australian Regular Army. However the Defence Force Retirement and Death Benefits Authority (DFRDBA) would not recognise his national service as military service for retirement benefit purposes, as it considered his 12 days leave—during which he was technically still a Qantas employee—broke the continuity of his service. The Ombudsman suggested that the benevolent purpose of the legislation would not be served if its provisions put national servicemen at a disadvantage. The DFRDBA agreed, accepted that during the 12 days the officer had in effect been on leave, and determined he was eligible to preserve his superannuation benefits.

## Reserves

3.36 Reserves form an important part of Australia's military capability. Over the years, the Ombudsman has dealt with some systemic issues particular to Reserves.

3.37 In his 1990–91 report the Ombudsman noted that 'Given that greater emphasis is to be given to the Reserve Forces in future, it is timely that this year has seen resolution of some important issues concerning reservists.' Among the issues enumerated were improvements to Army's pay system for reservists and reinforcement of the procedures for dealing with reservists who fall ill while on exercises. In addition, Defence agreed to change its procedures so that employees compensation paid in lieu of Reserve salary was exempt from income tax (as was Reserve salary).

3.38 The 2000–01 annual report noted that the office had received four complaints from former members of the Army General Reserve who considered they had been discharged peremptorily or without regard to proper procedures. The following year

the Ombudsman reported that the investigations had highlighted a number of procedural irregularities in the discharge process and raised concerns about the legality of the process. Defence introduced revised administrative procedures as a result.

## **Young people in the military**

3.39 In 2003 the Ombudsman initiated an own motion investigation into the ADF's management of service personnel under the age of 18 years, after receiving several serious complaints from parents of young people in the ADF. The report of the investigation, *Australian Defence Force: Management of service personnel under the age of 18 years* (Commonwealth Ombudsman Report No 4/2005), was released in 2005.

3.40 The report made a number of recommendations to improve the management of minors across all three Defence Services and various training establishments.

- The ADF seek legal advice as a matter of priority on the extent of its duty of care to minors and how that should be interpreted in service and training establishments: the advice should address the interaction of Commonwealth and state/territory laws, the implications of society's expectations about care owed to minors, and the ADF's liability if adequate levels of care are not provided.
- A Defence Instruction General be developed defining the ADF's responsibility for the administration of minors, and each Service develop its own instruction, including addressing the risks specifically associated with that Service.
- Service Training Commands take a more active role in directing and supporting commanding officers, and their staff, in the delivery of care to minors.
- The ADF consider developing a tri-Service strategy for training and maintaining consistent, high quality instructional and support staff in training establishments.
- The ADF review accessibility of support arrangements for minors.
- The ADF review its accountability structures for the care of minors to ensure that commanding officers in training establishments receive adequate support in maintaining appropriate levels of care for minors.

3.41 The Chief of the Defence Force advised that the ADF would implement all the recommendations except one—that the ADF undertake an analysis of the costs and benefits of accepting minors for enlistment in the ADF, with a view to determining whether the enlistment age should be raised to 18 years. He also advised that many of the recommendations would be extended to all young members in their first year of service.

## **Investigations related to major incidents**

3.42 During the past 25 years the Ombudsman's office has carried out several investigations related to major incidents involving the loss of life. In 1990–91, following a request from the Minister for Defence, the office completed a review of a RAAF investigation into the crash of a Mirage aircraft some years earlier. The review found that the RAAF's investigation 'had in the main been thorough and professional'. However, the father of the young man killed in the crash continued to express deep reservations about the investigation and the review. The next

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Ombudsman noted 'This complaint occupied many months of work by investigation staff and entailed research of highly technical subjects. I would be reluctant to undertake another task of such magnitude with the resources presently available to me.'

3.43 The Ombudsman was subsequently asked to investigate the RAAF's handling of an inquiry into the 1990 fatal crash of a Nomad aircraft, by the Minister for Defence and the brother of the deceased pilot. The Minister asked the Ombudsman to provide an independent view of the adequacy of the RAAF's handling of the crash, particularly its judgements on matters of disciplinary action. The Ombudsman agreed to undertake this investigation on the basis that Defence provided 'relief staff and other logistic assistance'.

3.44 The crash had been the subject of three internal RAAF investigations. The Ombudsman released the investigation report in June 1994. The report examined the RAAF's handling of the matter, the design of the aircraft by the then Government Aircraft Factory (GAF), and its use for test flying by GAF and Aerospace Technologies Australia Ltd (ASTA, then a Commonwealth-owned company).

3.45 The Ombudsman concluded that there had been no cover up by the RAAF, as had been alleged. However, she was critical of the RAAF, the GAF, the Civil Aviation Authority and ASTA and made a number of recommendations in relation to each organisation. One criticism in relation to the RAAF made in a draft of the report was that the RAAF did not go far enough in attributing individual responsibility for the deficiencies that were found, and gave inadequate consideration to the question of disciplinary action. In responding to the recommendations in the draft report, the Chief of Air Staff advised that he had been informed the basis for disciplinary charges against five RAAF members existed at the time of the crash, but any such action was by then outside the statutory time limits.<sup>12</sup>

3.46 Following the release of the Ombudsman's report, the Senate Foreign Affairs, Defence and Trade References Committee conducted an inquiry into the issues arising from the report, including the extent to which the Ombudsman's recommendations had been implemented.<sup>13</sup> The government accepted the committee's recommendation that the statutory time limit on charges be extended from three to five years and the DFDA was amended in 1999. There is no such limitation on most charges regarding offences relating to operations against an enemy, mutiny or desertion.

3.47 The third investigation involved allegations in March 2007 in the press and Parliament that Defence was warned in February 1998 that HMAS *Westralia* was in grave danger from the faulty fuel lines that caused the fire on 5 May 1998. The Minister for Defence wrote to the Ombudsman, requesting that we consider an own motion investigation into the matter.

3.48 In April 2007 the Acting Ombudsman initiated an own motion investigation into the allegations of Defence's forewarning about the fire and the appropriateness of the Defence response. The Ombudsman released the report of the investigation *Department of Defence: Allegations concerning the HMAS Westralia fire* (Commonwealth Ombudsman Report No 3/2008) in April 2008.

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<sup>12</sup> Commonwealth and Defence Force Ombudsman report *Investigation into the adequacy of RAAF response to loss of Nomad A18-401*, 1994, page ix.

<sup>13</sup> Senate Foreign Affairs, Defence and Trade References Committee report *Crash of RAAF Nomad aircraft A18-401 on 12 March 1990*, April 1996.

3.49 The report concluded that the press reports of February 2007 stating Defence was warned about the safety risk to HMAS *Westralia* and failed to act were wrong. The report also found, amongst other things:

- Defence's investigation into the February 2007 allegations that it had forewarning of the safety risk to HMAS *Westralia* was timely and thorough, and its conclusions were reasonable and had a sound evidentiary basis
- Defence could have maintained better records and a clear audit trail of action it took in dealing with an anonymous allegation it received on the issue in 2000.

## **Eligibility for veterans' benefits and compensation**

3.50 Australia has had a repatriation system since 1903. Over the years the system has expanded substantially, with entitlements currently covered under the *Veterans' Entitlements Act 1986*.<sup>14</sup>

3.51 In most cases decisions about eligibility for, or the payment of, benefits under the Veterans' Entitlements Act and military compensation legislation can be reviewed through merits review by the Veterans' Review Board and/or the Administrative Appeals Tribunal (AAT). In general the Ombudsman expects people to use these review processes when they dispute a decision about eligibility for, or the payment of, benefits.

3.52 In some cases, however, there are broader issues of eligibility. For example, in annual reports from 1984–85 to 1986–87 the Ombudsman referred to complaints from veterans whose service in various support capacities in the Vietnam War had not been recognised for repatriation (veterans') benefits. In May 1986 the Minister signed instruments under the Veterans' Entitlements Act which conferred eligibility on the veterans concerned. However the question remained as to whether the veterans had been eligible at all times under the earlier *Repatriation (Special Overseas Service) Act 1962*. The Ombudsman wrote to the Attorney-General's Department which confirmed his view that the veterans had, in fact, been eligible under the earlier Act at all times. In light of this, the Ombudsman asked the Departments of Defence and Veterans' Affairs to confer in order to decide how to give the veterans their legal entitlements.

## **Payment of veterans' benefits and compensation**

3.53 The Ombudsman's 1987–88 annual report commented on an issue that affected a number of veterans, as well as people on some social security benefits. A number of complaints were raised by people who had inadvertently declared income from non-taxable pensions or benefits as income for taxation purposes. The problem was probably exacerbated by the 1986 introduction of self-assessment of income tax. Following contact by the Ombudsman's office, the DVA agreed to notify its clients in one of its regular communications, and to use press releases and information releases to ex-service organisations as another avenue of advice on the problem. The Australian Taxation Office also agreed to consider the issue in its review of the wording of income tax forms and guides.

3.54 From time to time the Ombudsman's office receives complaints about underpayments or the recovery of overpayments where the strict application of

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<sup>14</sup> Chapter 3 of the 2003 *Report of the review of veterans' entitlements* (the Clarke Report) contains a summary of the history of the repatriation system.

legislative provisions does not necessarily result in a fair outcome for a person. For example, in one long-running complaint, a veteran's widow complained that she had not had her pension backdated as far as could have been achieved because of delay in DVA. She had written to DVA saying she wanted to appeal to the AAT, but DVA filed her letter instead of forwarding it to the AAT. When the problem was eventually found, and she was successful at the Federal Court, her pension could not be backdated to the date that would have applied had there been no delay. In this case, the Minister for Finance agreed to an act of grace payment to the widow.

3.55 In another case, a Member of Parliament complained on behalf of one of his constituents that DVA should not recover an overpayment of military compensation because of the person's poor health and the circumstances of the overpayment. The office's investigation showed that DVA's guidelines for waiving overpayments of compensation were different from those applied by Comcare. The Ombudsman suggested that, given the essential common nature of compensation policy for Defence Force personnel and other Commonwealth employees, uniform policies were desirable. DVA agreed and drew up new guidelines consistent with those of Comcare.

### **Delays in DVA decision making**

3.56 Ombudsmen have periodically raised concerns about delays in particular aspects of DVA decision making. For example, the Ombudsman's 2004–05 annual report discussed delays with DVA in relation to deciding claims for compensation under the Scheme for Compensation for Detriment caused by Defective Administration, and in the resolution of matters being investigated by the Ombudsman. On the latter point, the Ombudsman pointed to legalistic approaches to complaints often contributing to delays and detracting from finding simple administrative solutions to them.

3.57 In 2005–06 the Ombudsman expressed continuing concern about delays in getting responses to enquiries made of DVA, and outlined some initiatives to improve timeliness. There were also a number of complaints of delay in DVA making decisions under the *Military Rehabilitation and Compensation Act 2004* which came into force in July 2004. Often the delays arose while DVA waited for documentation from the claimant or from the ADF, and that the ADF and DVA were working to improve liaison and communication.

3.58 The following year the Ombudsman reported that the office had initiated a project to look more broadly at possible systemic issues in the handling of military rehabilitation and compensation claims by DVA. DVA acknowledged the need for improvements in certain areas, and advised of a range of initiatives put in place to address a backlog of older claims and improve processing. One such initiative was for some DVA staff to have access to Defence's human resources system to obtain access to a former member's service record, reducing the time required to obtain records from several months to an average of 12 days.

### **Commonwealth 'double-dipping'**

3.59 A number of cases have been reported where the Commonwealth has raised a debt against a person and sought to recover the full amount paid, rather than the amount net of any tax. In one case which ran over several years, a service pensioner and his wife had been overpaid for some time. When DVA sought to recover the overpayments, they raised a debt for the total amount overpaid. Part of the period covered was outside the time when the couple could seek retrospective amendments

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to their income tax liability, with the effect that they were required to repay more than they had received. After some years, an act of grace payment was made to the couple in recognition of the tax they had paid which they could not recover.

3.60 In two other cases, former Army and RAAF pilots were asked to repay their pilot retention bonuses in full—around \$70,000 rather than \$35,000 after tax. After considerable negotiation between several Ministers and their departments, the Minister for Industrial Relations approved a retrospective determination to require repayment of the after-tax amount of the pilot retention bonus.

## PART 4—INTERNAL COMPLAINT HANDLING

### Defence

4.1 The capacity for serving members to seek to resolve complaints through their chain of command has existed for many years. Prior to 3 July 1985, each Service had separate ROG procedures. These were replaced with Part XV of the Defence Force Regulations, providing a consistent approach for each Service. At the same time, most of the provisions of the *Defence Force Discipline Act 1982* came into force.

4.2 Concern about delays in the ADF ROG process and in Defence's responding to Ombudsman enquiries have been a feature of most annual reports apart from the past few years. The Ombudsman's 1988–89 annual report noted Defence structural changes to try to improve the timeliness of handling of applications for redress and DFO enquiries. The RAAF had established a directorate to deal specifically with applications for ROG and with Ministerial and Ombudsman complaints. During its first year of operation the backlog of ROG applications was halved. The other major change was that responsibility for dealing with Ombudsman complaints was transferred to the functional area primarily concerned with the subject of each enquiry. In effect, 90–95% of the complaints related to conditions of service and were dealt with by Headquarters ADF (HQADF).

4.3 The following year the Ombudsman reported that handling of applications for ROG had improved following the two structural changes. However, he raised concern about the 'increasing incursion into the redress process of legal advice' which could be a significant cause for delayed processing. The Ombudsman noted:

... for the most part, members' complaints are of a sort on which a service officer ought to be able to reach a view without recourse to legal advice. Too much reliance on legal opinion is likely to deflect the administrative decision makers away from the main aim of the redress system which, I believe, is better looked at in terms of section 15 of the Ombudsman Act: that is to say, the reasonableness of the action whatever the circumstances.

4.4 The report outlined further work planned by the ADF, including:

- a review of the redress legislation, procedures and relationship with other administrative review systems
- promulgation of tri-Service instructions for use at unit level
- a review of departmental instructions
- the establishment of a legal education program for staff officers involved in the process
- review of legislative powers needed by redress officers to overcome situations where a ROG might be upheld but the Chief of Staff had no legislative power or authority to give effect to the decision.

4.5 Further changes were reported in the Ombudsman's 1990–91 annual report. The RAN had also created an administrative review unit and Army had completed a review of ROG procedures. The Ombudsman hoped these changes would lead to further streamlining of the process. He cited as an example of his concern cases where a member who has been advised that they are to be discharged (through

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administrative action, not disciplinary action) appeals against the decision through the ROG system and then to the DFO. The redress process could take over a year, and in many cases the DFO did not find fault with the decision to discharge the member. However, in the meantime the member 'frequently displays impeccable conduct and performance' and it can be difficult to explain to the member why they are to be discharged. The Ombudsman concluded:

There is a need, of course, to safeguard members' appeal rights and I would not want the member to feel that the case had not received the fullest consideration. Nevertheless, I believe the interval between the date of the incident giving rise to the decision to discharge and the actual date of discharge is too long. My office has brought this to the Services' attention and I hope that revised grievance procedures will hasten action in such cases.

4.6 The following year the Ombudsman continued to express concerns about delays in the redress system. HQADF had advised that it had established a tri-Service working party to review ways in which delays in processing grievances might be reduced. Another blockage in the system was the number of complaints which were not capable of being resolved within the system, with many of these relating to conditions of service for which the responsibility rested with agencies outside Defence, such as the then Department of Industrial Relations.

4.7 In her 1992–93 annual report, the new Ombudsman noted continuing unacceptable delays in handling ROG applications, citing several cases where members facing discharge on the basis of 'retention not in the interest of the service' had been retained for several years while their applications for redress were considered in Defence. She noted that HQADF was arranging changes to the Defence Force Regulations to enable speedier processing of applications for ROG.

4.8 The following year, the Ombudsman reported that there had been improvements in the ROG process. Applications for redress could be fast-tracked by avoiding referral to unnecessary levels in a Service's command structure, and the administrative review units had been established in the headquarters of each Service. However, delays in dealing with applications for redress, and to Ombudsman enquiries, were still a matter of concern.

4.9 The Ombudsman again noted the need for decision makers to give proper statements of reasons in rejecting applications for redress, for decision makers not to take account of material which had not been revealed to the member as relevant to the consideration, and, as far as possible, for executive action to be suspended pending the outcome of an application for ROG where the action would prejudice the outcome of any redress that might be granted. She also again drew the distinction between legality and reasonableness, noting that a legally correct decision need not be a reasonable or desirable decision, and that sometimes there are different views on what is legally correct.

4.10 In July 1997 the separate complaint resolution offices operating in the RAN, Army, RAAF and Defence Headquarters were replaced by the CRA. The new Ombudsman noted that the former Ombudsman had raised concerns about delays in ROG processes with the Chief of the Defence Force, and CRA had given high priority to further streamlining the ROG process. The Ombudsman noted that delays continued to be the basis of a significant number of complaints to the office, and the office and CRA were working to explore ways to improve the effectiveness and timeliness of the redress system.

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4.11 In June 1999 the Auditor-General released a report of an Australian National Audit Office (ANAO) audit of the ROG process. The Ombudsman's office provided comments on the draft report. The ANAO concluded that the ROG process was time-consuming and resource-intensive. It made 14 recommendations for improving timeliness, accessibility, independence, confidentiality, transparency and consistency. Defence agreed, or agreed with qualification, to all the recommendations.<sup>15</sup>

4.12 Towards mid-2000 it was proposed that there be a joint DFO/Defence review of the ROG system and of the DFO's interaction with that system, as a follow-up to the ANAO audit. In his 2000–01 annual report, the Ombudsman again expressed concern at the delays in the redress process, and looked forward to the review delivering a major improvement in timeliness. Apart from the issue of timeliness, he considered the relationship and operating arrangements between Defence and his office were fundamentally sound. Changes arising from the review were to be implemented by December 2002.

4.13 However the Ombudsman's 2002–03 annual report advised that it was not possible to determine if the changes had had the desired effect. The following year, the problem of delay was still a concern to members. In a submission to the second inquiry into the effectiveness of the military justice system by the Senate Standing Committee on Foreign Affairs, Defence and Trade, the Ombudsman raised this and other issues about the redress process, including the quality of some investigations, timeliness of response to serious allegations, the need to learn lessons from complaint management, and a tendency to legalistic approaches to addressing Ombudsman enquiries.

4.14 The Ombudsman and the Chief of the Defence Force subsequently agreed to conduct a joint review of the ROG system. The report of the joint review was provided to the Chief of the Defence Force and the Ombudsman in January 2005 and released publicly in April 2005. The report noted that many recommendations of previous reviews had not been implemented, or had only been partially implemented, in part due to the need for legislative changes which had not been pursued.<sup>16</sup> It also noted there had been a growth in complaint-handling mechanisms within Defence, and that:

The current ROG system now lies uncertainly within a complex and poorly understood network of inter-linked processes and mechanisms that make up the military justice system.<sup>17</sup>

4.15 The review team made 72 recommendations covering the areas of legislation, policy, improving processes, performance management and reporting, organisational and structural change, information systems/management, staffing, training, interaction between Defence and the Ombudsman's office, and implementation of the recommendations. The recommendations covered not only the formal redress of grievance system, but sought to improve complaint handling for ADF members more broadly.

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<sup>15</sup> Australian National Audit Office report number 46/1998–99, *Redress of Grievances in the Australian Defence Force*, June 1999.

<sup>16</sup> Commonwealth Ombudsman, *Review of Australian Defence Force Redress of Grievance System 2004, joint report by the Department of Defence and the office of the Commonwealth Ombudsman* (Commonwealth Ombudsman Report No 1/2005), April 2005, page iv.

<sup>17</sup> *ibid*, page iv.

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4.16 Changes made as a result of the review have included:

- amendments to the Defence Force Regulations so that, for the purposes of the ROG provisions, 'service' is defined as service in the permanent or active reserve forces; some matters (including general complaints about the merits of Defence policies, complaints about assessments in performance evaluation reports, and matters which are not capable of being redressed by anyone in Defence) cannot be the subject of applications for ROG; time limits for applying for redress, except in exceptional circumstances, were introduced; and escalation of applications to the relevant Service Chief for consideration of its future dealing where the commanding officer has not made a decision on the application within 90 days
- the Fairness and Resolution Branch was established, bringing together most of the complaint-handling areas in Defence, with the exception of the Inspector-General of the ADF (IGADF)
- complaint statistics for measuring the health of the military justice system have been developed, and a common complaint management system has been developed
- the then backlog of applications for ROG was cleared
- improved liaison and information exchange arrangements between Defence and the Ombudsman's office were put in place.

4.17 A revised Defence Instruction (General) on ROG procedures is expected to be released in early 2009.

4.18 The changes to the Defence Force Regulations have not changed the jurisdiction of the Ombudsman.

4.19 The Ombudsman's 2005–06 annual report noted a significant improvement in Defence's handling of ROG applications over the past year, with a reduction in the number of cases awaiting allocation to a case officer and the time taken to finalise applications. There was also a reduction in the number of complaints to the Ombudsman about redress processes.

4.20 This was only the second annual report in 22 years in which the Ombudsman did not raise concerns about delays in the redress process. The Ombudsman also reported that complaints about ADF matters were being finalised more quickly, due to a more effective working relationship between Defence and the office and the implementation of recommendations from the joint review of the ROG process. Similar sentiments were echoed in the Ombudsman's 2006–07 annual report.

4.21 In June 2007 the Acting Ombudsman released a report of an own motion investigation *Australian Defence Force: Handling of complaints about unacceptable behaviour* (Commonwealth Ombudsman Report No 4/2007). The investigation examined the way the ADF deals with complaints about unacceptable behaviour such as harassment and bullying. The report concluded that:

The information gathered in this investigation supports the view that Defence currently provides an effective complaint-management mechanism that ADF members can readily access. We observed that ADF members consider there have been improvements in the complaint-handling process in recent years and that members have a reasonable level of confidence in the complaints system. Defence may, however, wish to consider additional research into the reasons why a significant

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proportion of ADF members surveyed did not feel confident to make a complaint about unacceptable behaviour, and identify whether there are particular barriers to making a complaint.

4.22 The report also made a number of recommendations in relation to recordkeeping, training, data collection and reporting, the role of inquiry officers and equity advisers, and quality assurance. Defence accepted all the recommendations. It has advised that about half of the recommendations have been implemented, with the rest being largely implemented with a new Defence Instruction (General) on the management and reporting of unacceptable behaviour to be released in early 2009.

### **Veterans' affairs**

4.23 As noted earlier, in many cases people dissatisfied with a decision by the DVA and/or the Repatriation Commission can seek merits review—for example, through the Veterans' Review Board or the AAT. The office's usual practice is to suggest people pursue their concerns through those processes, if they are available, unless there are special issues we consider warrant our attention.

4.24 Nevertheless, having a good internal complaint-handling system is a mark of good governance. The Ombudsman's 2007–08 annual report noted that DVA was reviewing its internal complaint-handling mechanism, and that it appeared DVA intended to develop a centralised complaint-handling area, supported by a complaint management system to record and track all complaints received by DVA.

4.25 The Ombudsman strongly supported the development of a centralised complaint-handling system. In the absence of such a system, the office is unable to refer complainants back to DVA to attempt to resolve their complaint with DVA in the first instance. As a result, the office investigates a large proportion of the complaints made about DVA. The development of a robust, centralised complaint-handling system should enable the office to refer more complainants back to DVA. This should facilitate the resolution of many complaints at agency level, with only a smaller number requiring the involvement of the Ombudsman's office.

## PART 5—REVIEWS OF MILITARY JUSTICE

5.1 Over the past decade there has been intense public scrutiny of the military justice system.

5.2 In 1997 the Senate referred the issue of Australia's military justice system to the Joint Standing Committee on Foreign Affairs, Defence and Trade. The inquiry ceased when Parliament was dissolved in August 1998, and was re-referred to the newly appointed Committee in March 1999. The Committee reported in June 1999. It identified three distinct components of the military justice system—military inquiries, military discipline and administrative action.<sup>18</sup> The Committee noted that:

Notwithstanding that members of the ADF voluntarily accept the imposition of an additional layer of justice when they choose to serve their country, the military justice system must be demonstrably independent, impartial and fair.<sup>19</sup>

5.3 The Committee also noted that the ADF was moving to address the recommendations of the Ombudsman's 1998 report into how the ADF responds to allegations of serious incidents and offences, as well as those of Brigadier the Hon AR Abadee, who had been commissioned by the Chief of the Defence Force to conduct a study into arrangements for the conduct of military trials.

5.4 The Committee made 59 recommendations to improve the perceived and actual independence of the system. A number of the recommendations gave explicit acknowledgement to conclusions and recommendations in the Ombudsman's 1998 report into the way the ADF responds to allegations of serious incidents and offences. Some of the Committee's recommendations related to administrative action, but did not address the ROG system or the role of the DFO.

5.5 In April 2001 the Committee also released a report *Rough Justice? An investigation into allegations of brutality in the Army's Parachute Battalion*. The report made eight recommendations relating to educating Defence personnel of their rights and obligations, the appointment of equity officers, the ADF inquiry process and the ADF justice system. The report touched briefly on the ROG system, noting the ANAO report and the 2000 DFO/Defence review of the system.<sup>20</sup>

5.6 In December 2000 the Chief of the Defence Force appointed Mr JCS Burchett QC to examine the military justice system. The *Report of an inquiry into military justice in the Australian Defence Force* (the Burchett report) was completed in July 2001. One of the report's recommendations was to create a position of Inspector-General of the ADF (IGADF) to provide the Chief of the Defence Force with constant

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<sup>18</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry report, *Military Justice Procedures in the Australian Defence Force*, June 1999. Chapter 5 of the report describes how administrative action is a response to 'professional failure', with DFDA action being a response to disciplinary issues. Administrative action can follow a civil conviction or disciplinary action.

<sup>19</sup> *ibid* page x.

<sup>20</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry report, *Rough Justice? An investigation into allegations of brutality in the Army's Parachute Battalion*, April 2001, paragraphs 5.13–5.15.

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scrutiny of the military justice system, independent of the ordinary chain of command.<sup>21</sup>

5.7 The Defence (Inquiry) Regulations were amended in 2003 to allow the IGADF to investigate matters concerning the military justice system. In December 2005 the IGADF became a statutory officer under the Defence Act.

5.8 In October 2003 the Senate referred the matter of the effectiveness of the military justice system to the Senate Foreign Affairs, Defence and Trade References Committee. After the Parliament was dissolved in August 2004, the Senate re-referred the matter to the new Committee in December 2004. The Committee reported in June 2005.<sup>22</sup>

5.9 In its consideration of the administrative system, the committee noted the developing role of the IGADF and the recommendations of the joint Defence/Ombudsman review of the ROG system, which had just been released. The Committee considered that comprehensive reform of the redress system was still required, and recommended the establishment of an ADF Administrative Review Board, along the lines of the Canadian Forces Grievance Board. The board would have taken on the work of the IGADF and, apparently, duplicated to a large extent the role of the Defence Force Ombudsman.

5.10 The government did not accept this recommendation. It noted the need to improve the complaints and ROG management system, and the start of the implementation of the recommendations from the joint Defence/Ombudsman review of the redress system. The government expressed concern that the board 'would not support the relationship between command and discipline, would reduce contestability and introduce duplication'.<sup>23</sup>

5.11 Following the government response to the Committee's report, in June 2006 the Senate Foreign Affairs, Defence and Trade Legislation Committee commenced an inquiry into Defence's progress in implementing the recommendations (review of reforms to Australia's military justice system). Defence reported to the Committee on progress on a six-monthly basis.

5.12 In its first progress report, tabled in August 2006, the Committee reported:

The restructuring of the Redress of Grievance (ROG) process under the direction of the Fairness and Resolution Branch is a positive step. Its effectiveness in tackling some of the long-term problems with ROGs is yet to be tested. Early indications, however, are promising. The Branch is now in a stronger position to offer advice to Commanding Officers (COs) with regard to ROGs and to monitor their progress. This would seem to indicate that the perceived conflict of interest in the process is being addressed by Defence. The committee is unsure, however, about the effectiveness of the proposed new regulations to remove the opportunities for real or perceived conflicts of interest that undermine the integrity of the ROG system. ADF's senior

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<sup>21</sup> *Report of an inquiry into military justice in the Australian Defence Force* (the Burchett report), July 2001, recommendation 55: Mr Burchett used the terminology 'Military Inspector General'.

<sup>22</sup> Senate Foreign Affairs, Defence and Trade References Committee inquiry report *The effectiveness of Australia's military justice system*, June 2005, page 1.

<sup>23</sup> Government response to Senate Foreign Affairs, Defence and Trade References Committee inquiry report *The effectiveness of Australia's military justice system*, June 2005, response dated October 2005, page 17: it gives more details on changes underway, starting with CDF directive 2/2005.

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officers and the Parliament need to be vigilant to ensure that the changes taking place will have a lasting effect on improving the effectiveness and fairness of the system. The committee will continue to monitor this matter and requests it receive six-monthly updates on an ongoing basis.

The committee fully supports the work being undertaken by the Branch to inform ADF members about the improvements to the military justice system. The committee acknowledges the difficult task that the Branch has in restoring trust in the system. It would encourage ADF members to take full advantage of the services now offered by this Branch. The committee believes that the credibility of this Branch is critical in that it cannot afford to be compromised in its independence and thoroughness. The proof of its success will depend on not just its timeliness, but on the quality of outcomes which might not become evident for some time.<sup>24</sup>

5.13 The Committee also discussed the work of the IGADF and said '[t]he committee sees great potential for both the Defence Force Ombudsman and the IGADF to work together to improve Australia's military justice system'.<sup>25</sup>

5.14 In its fourth and final progress report, tabled in September 2008, the Committee reported:

The committee recognises the efforts of the ADF to improve its ROG process. It especially notes the success achieved in reducing the time taken to process these grievances. It draws attention, however, to the potential for delay where a grievance is referred to a service chief. The committee believes that a timeframe imposed on this stage of a ROG would be desirable.<sup>26</sup>

5.15 It also reported:

The committee recognises that the restructuring of the ROG process under the direction of the Fairness and Resolution Branch was a definite improvement. While early indications are promising, the system will require continuing surveillance and adequate staffing.<sup>27</sup>

5.16 Perhaps the most important of the Committee's statements was in the report's executive summary:

Following the findings of the committee's 2005 report into Australia's military justice system, Defence has implemented significant reforms that, without doubt, have improved the system. The committee's primary concern, however, is with ensuring that the reform program maintains its momentum and the gains made to date are not lost. Defence's history of failed reforms heightens this concern.<sup>28</sup>

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<sup>24</sup> Senate Standing Committee on Foreign Affairs, Defence and Trade. *Reforms to Australia's Military Justice System: first progress report*, August 2006, summary.

<sup>25</sup> *ibid*, summary.

<sup>26</sup> Senate Standing Committee on Foreign Affairs, Defence and Trade. *Reforms to Australia's Military Justice System: fourth progress report*, September 2008, paragraph 4.13.

<sup>27</sup> *ibid*, paragraph 4.51.

<sup>28</sup> *ibid*, executive summary.

## PART 6—CONCLUSION

6.1 Over the past 25 years the DFO role has had a strong focus on employment rights and conditions for members of the ADF and their families, and entitlements and benefits for former members. Complaint investigation by the DFO has played a role in numerous changes over the years to legislation, Defence policy, administrative systems, and decision making. Just as importantly, those investigations have provided assistance and redress to many thousands of people.

6.2 As with other Ombudsman work, it demonstrates 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.

6.3 The role of the DFO has been altered, particularly in recent times, by the establishment of the Fairness and Resolution Branch and the IGADF. Comparatively they play a larger role than the DFO in complaint handling and monitoring, auditing and analysis. They are special purpose bodies with a focus only on Defence.

6.4 The work of the Fairness and Resolution Branch and the IGADF has not altered the need for oversight from an independent Ombudsman office with a more general jurisdiction. There is a continuing need for oversight agencies that:

- look across government
- are not unduly focused on relationship management with a single client agency
- locate themselves within an overarching system of administrative law and external accountability
- draw strength from their special relationship with the public.

## APPENDIX 1—TIMELINE

1 July 1977	Prof. Jack Richardson takes office as first Commonwealth Ombudsman
5 December 1983	The Commonwealth Ombudsman also becomes the Defence Force Ombudsman, following amendments to the <i>Ombudsman Act 1976</i>
1 January 1984	AVM Jordan AO (retd) is appointed as a third Deputy Ombudsman, and designated as Deputy Ombudsman (Defence Force)
3 July 1985	The redress of grievance system is established under Part XV of the Defence Regulations, replacing separate systems for each Service
23 September 1985	Prof. Richardson retires. AVM Jordan acts as Ombudsman and Defence Force Ombudsman until 30 June 1986
1 July 1987	Mr Geoffrey Kolts OBE takes office as Commonwealth and Defence Force Ombudsman
10 July 1987	Following the departure of AVM Jordan, AVM Frost AO (retd) is appointed Deputy Ombudsman and designated as Deputy Ombudsman (Defence Force)
31 October 1987	Mr Kolts resigns as Ombudsman. Mr Kevin Sainsbury acts as Ombudsman and Defence Force Ombudsman until 31 January 1988
1 February 1988	Prof. Dennis Pearce takes office as Commonwealth and Defence Force Ombudsman
31 January 1991	Prof. Pearce completes his term as Ombudsman
1 April 1991	Mr Alan Cameron takes office as Commonwealth and Defence Force Ombudsman
December 1991	Senate Standing Committee on Finance and Public Administration reports on an inquiry into the Ombudsman's office. It recommends that the requirement under the Ombudsman Act for three deputies be changed to allow for between one and three deputies to be appointed.
8 July 1992	AVM Frost retires
20 July 1992	Mr Richard Mills, formerly a senior officer in the Department of Defence, is appointed Deputy Ombudsman and designated as Deputy Ombudsman (Defence Force)
31 December 1992	Mr Cameron resigns
17 May 1993	Ms Philippa Smith AM takes office as Commonwealth and Defence Force Ombudsman

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8 August 1996	Mr Mills resigns. This position of Deputy Ombudsman was not refilled in light of pending substantial resource cuts (19% over three years), leaving one Deputy Ombudsman position filled. This was the first time that there was no designated Deputy Ombudsman (Defence Force).
6 February 1998	Ms Smith completes her term as Ombudsman
18 February 1998	Mr Ron McLeod AO takes office as Commonwealth and Defence Force Ombudsman
18 February 2003	Mr McLeod completes his term as Ombudsman
17 March 2003	Prof. John McMillan takes office as Commonwealth and Defence Force Ombudsman
17 March 2008	Prof. John McMillan commences a second term as Commonwealth and Defence Force Ombudsman

## APPENDIX 2—OWN MOTION AND MAJOR INVESTIGATION REPORTS

June 1994	Investigation into the adequacy of RAAF response to loss of Nomad A18-401
January 1998	Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: review of practices and procedures
October 2004	Complaint by a young person (under the age of 18) of an incident involving unacceptable behaviour at a Navy training establishment in mid-1996 (abridged version of Report No 4/2004)
April 2005	Review of Australian Defence Force redress of grievance system: a joint report by the Department of Defence and the office of the Commonwealth Ombudsman (Report No 1/2005)
October 2005	Australian Defence Force: management of Service personnel under the age of 18 years (Report No 4/2005)
June 2007	Australian Defence Force: management of complaints about unacceptable behaviour (Report No 4/2007)
April 2008	Department of Defence: allegations concerning the HMAS <i>Westralia</i> fire (Report No 3/2008)

## ABBREVIATIONS AND ACRONYMS

ARC	Administrative Review Council
ADF	Australian Defence Force
ANAO	Australian National Audit Office
Army	Australian Army
ASTA	Aerospace Technologies Australia Ltd
CRA	Complaint Resolution Agency
DFDA	<i>Defence Force Discipline Act 1982</i>
DFO	Defence Force Ombudsman
DFRDBA	Defence Force Retirement and Death Benefits Authority
DVA	Department of Veterans' Affairs
GAF	Government Aircraft Factory
HMAS	Her Majesty's Australian Ship
Hon	Honourable
HQADF	Headquarters Australian Defence Force
IGADF	Inspector-General of the Australian Defence Force
MP	Member of Parliament
RAAF	Royal Australian Air Force
RAN	Royal Australian Navy
ROG	redress of grievance