



**Submission by the
Acting Commonwealth
Ombudsman**

**HMAS *SUCCESS* COMMISSION OF
INQUIRY**

**SYSTEM OF ADMINISTRATIVE INQUIRIES IN THE
AUSTRALIAN DEFENCE FORCE**

Submission by the Acting Commonwealth and Defence
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INTRODUCTION AND SUMMARY

The Australian Defence Force (ADF) is a large and complex organisation, characterised by distinctive cultural values, hierarchical structures and a diversity of systems that support its roles and missions. The Military Justice system (MJS) is one such system.

A robust MJS supports productivity, morale, retention and recruitment and these go to sustaining Defence capability.

The Commonwealth Ombudsman, who is also the Defence Force Ombudsman (DFO), is independent of the Defence Organisation and the ADF chain of command, but supports the MJS as one of a number of external organisations to which ADF members can turn if they are dissatisfied with aspects of their service. We also act independently to conduct 'own motion' investigations where we identify issues that may be serious or systemic.

As a part of our support of the MJS, we have been active in making submissions to a variety of inquiries about the MJS, including to the Senate Foreign Affairs, Defence and Trade Committee. We have also initiated two recent own motion investigations of relevance, one dealing with the delivery of pay and benefits and the other with the system of redress of grievances (ROG).

BACKGROUND

The DFO can investigate the actions and/or decisions of the ADF, the Department of Defence (Defence), Defence Housing Australia (DHA) and the Department of Veterans' Affairs (DVA) which arise from a member's service in the ADF. This includes, but is not limited to, decisions about postings, promotions, payment of salary and allowances, debt recovery, discharge, approval of leave, ROG investigations, allocation and maintenance of housing and accommodation and decisions relating to claims for compensation, service or disability pensions. We can consider approaches by serving members, former members and their dependants.

The DFO may investigate complaints about the grant, delay or refusal to grant a campaign or service medal to an individual member of the ADF, but cannot investigate complaints about decisions relating to personal honours and awards.

The DFO may not investigate action connected to proceedings under the *Defence Force Discipline Act 1982*.

All approaches received by us are assessed to determine if we will investigate. The *Ombudsman Act 1976* provides discretion to not investigate complaints under a range of circumstances.

Where a member of the ADF has the opportunity to redress a complaint within the ROG system and has not done so, we will not generally investigate their complaint. Where redress has been sought but not yet granted, there must be special reasons for the DFO to investigate. Where redress has been granted, the DFO will consider the adequacy of the remedy granted following the redress process before investigating.

When we conduct an investigation, this is in private and as we see fit. The Ombudsman has wide investigative powers and may investigate complaints using a combination of methods, including:

- oral inquiry
- written request (email or letter) for comment
- examination of files
- formal interview of relevant Defence personnel sometimes under oath.

On completion of an investigation, we notify Defence of our views. Where we form a view that is critical of Defence, we write to Defence with advice of any preliminary views and recommendations and allow Defence to comment.

DEFENCE COMPLAINTS RECEIVED BY THE OMBUDSMAN

In 2008–09, we received 609 defence–related approaches and complaints, compared to 562 in 2007–08. Some of these complaints were about DVA, DHA and other portfolio agencies. Around 250 were about the Department of Defence and the three Services.

Between 1 July 2009 and 31 March 2010, we received 264 complaints about the Department of Defence and the three Services. This represents an upward trend on 2008 but we do not consider this a significant increase.

Complaints about the Department and the Services are usually about the ROG process, complaints relating to termination, access to salaries and benefits and, more recently, re-entry to the ADF. A breakdown of the number of complaints received for the period 1 July 2009 and 31 March 2010 is in the table below:

Act of grace payments	1	Freedom of information	7
Allegations of misconduct	16	Initial recruitment	21
Career issues	22	Military Justice system	11
CDDA claims	3	Pay and conditions	54
Civilian employment	16	Re-entry	31
Contracts and tenders	7	Redress of grievance	19
Discharge	28	Other	28

Table 1: Complaints by category 1 July 2009 and 31 March 2010

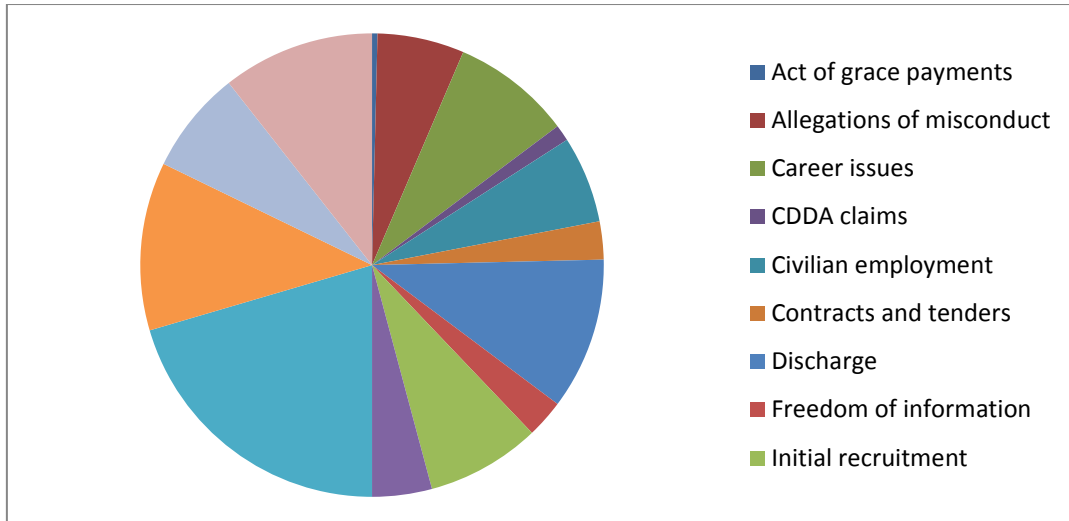


Chart 1: Complaints by category 1 July 2009 and 31 March 2010

Complaints are often about how quickly a decision has been made, whether there was adequate evidence available to a decision maker or whether there has been a misunderstanding about a case that a person has put forward. A new area of concern to us is the adequacy of reasons being given for decisions.

RELATIONSHIP WITH DEFENCE

The formal relationship between Defence, the Services and the Ombudsman is agreed as set out in Defence Instructions (General) Personnel (DI(G) PERS) 34-3, *Inquiries and investigations by the Commonwealth Ombudsman and the Defence Force Ombudsman*. That document was last amended on 10 February 2009 and we intend to obtain Defence's agreement for a joint review of the document in 2011.

DI(G)s are intended to facilitate the administration of the ADF. The processes and relations described in DI(G) PERS 34-3 as agreed by the Ombudsman assist the ADF's administration of the MJS.

Fairness and Resolution Branch

The Director General Fairness and Resolution Branch (FRB), through the Directorate of Complaint Resolution (CR), investigates and responds to Ombudsman complaints of a routine nature. The Ombudsman will communicate directly with the Chief of Defence Force and Secretary to the Department of Defence on serious matters including those relating to defective administration, fraud and probity issues.

DI(G) PERS 34-3 requires that CR attempt to provide a substantive response to the Ombudsman within 20 working days of receiving the inquiry. The required internal turn-around time within Defence is 10 working days. The 20 day target is, by and large, being met although the requirement is usually described as 28 days, inclusive of non-working days.

We may make direct contact with units, functional areas or Service headquarters or with individual Defence personnel if considered necessary.

The formality of the arrangement for channels of communication through CR has been one possible impediment to early resolution of complaints by us. We have taken recent steps to improve our complaint inquiries by adopting measures such as

more precisely defining the disputed point in a disagreement between a complainant and Defence and the outcome sought, and we have held a small number of case conferences with 'line' staff in Defence. By further developing these arrangements we hope to reduce the time taken to resolve complaints.

Inspector-General ADF

Unlike the legislated arrangements for cooperation with other oversight agencies set out in Part II of the *Ombudsman Act 1976*, there is no formal relationship between the DFO and the Inspector-General ADF (IGADF).

With IGADF, we have developed informal understandings on how approaches that may be of interest to both parties might be managed. This includes the transfer of complaints by consent of the complainant. For example, a recent complaint to us appeared to be about delay in determining a ROG. On investigation, it turned out to include issues to do with command and discipline in the ADF and was a matter for the IGADF. This complaint was referred, with the consent of the complainant, to the IGADF.

In our view, the relationship we have with the IGADF is suitable for our joint purposes and there are adequate procedures available to refer matters between the parties.

CURRENT OWN MOTION INVESTIGATIONS

Table 1 provided a breakdown of complaints received by the DFO in the period 1 July 2009 and 31 March 2010. Chart 2 covers the 35 month period from 1 July 2007 to 31 March 2010, in which we received 485 complaints about the Department of Defence (this excludes the three Services). Approximately 18% (or 75) of these complaints were about the delay in resolving 'Service Chief' ROG¹

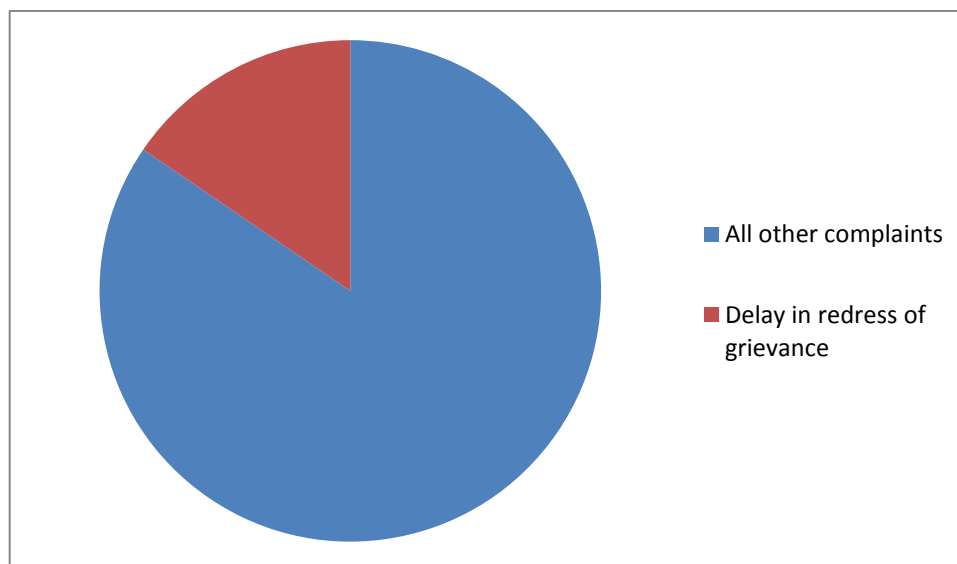


Chart 2: Complaints to the Ombudsman about delay in processing ROG compared with all Department of Defence complaints 1 July 2007 – 31 March 2010

¹ These are ROG^s referred to the Fairness and Resolution Branch for determination by one of the relevant Service Chiefs.

Because of our concerns about the delay in determining ROGs, Defence and the DFO agreed to conduct a joint review² of the handling of referred ROGs. The aim of the review was to identify opportunities for improvement in ROG timeliness. We examined the practices and policies that govern how ROGs are managed and our report will include recommendations on a number of issues arising from our investigation.

We were concerned that the delays in dealing with referred ROGs meant that a backlog of ROGs was accumulating and some ROGs had been ‘garaged’ for periods in excess of 14 months without being allocated a case officer. Defence’s view has been that the backlog occurs because of the requirement to give priority to termination cases and because of a lack of resources, including staff with adequate training and experience.

Service Chief ROGs	Number on hand	Number received	Number finalised	Carried forward	Case Officer days ³
2007-08	58	93	83	68	<i>Not available</i>
2008-09	68	105	57	116	634
1/7/2009 to 31/3/2010	116	56	52	120	854

Table 2: Service Chief ROG backlog against resources

We were also interested in understanding the underlying complaints in referred ROGs. A large proportion of the complaints seem to relate to pay and conditions which suggest that better management of applications for pay and benefits could reduce the incidence of dissatisfaction, which, in turn is what leads to ROGs being raised.

We have been conducting an own motion investigation to test the health of the system delivering pay and benefits.⁴ Our investigation included discussions with Service personnel branches and others involved in personnel and service delivery policy and we undertook considerable field work with decision makers in the chain of command and with the ‘clients’ of the system — primarily junior personnel of the three Services.

Issues identified in our own motion investigations of relevance to the Inquiry

Our own motion investigations have highlighted some issues which may be of interest to the Inquiry.

Principles-based decision making

We are aware of the forthcoming introduction of ‘principles-based decision making’ for pay and benefits decisions in Defence. In our view, this will have mixed results because there is likely to be differential treatment of Service members. While this will

² This review is still in progress.

³ Expressed as days because case officers are usually Reserve Officers with an allocation of paid reserve days as compared with full time equivalent (FTE) days.

⁴ This investigation into the *Conditions of Service* is also still in progress.

be welcome by some members, it could become a source of further complaint for those members seeking, but not receiving, a benefit similar to that given to others.

In our view, complaint management arrangements will need to respond adequately when the new scheme begins. This will include good record keeping and adequate reasons being given for decisions.

Delay

In June 2005, the Senate Foreign Affairs, Defence and Trade Committee noted that:

[T]his submission by the Ombudsman is almost completely in accord with the tenor of the various submissions received by the committee about the shortcomings of the ADF administrative system. Moreover it was made well after the implementation of 14 recommendations made in a review by the Australian National Audit Office in 1999 and four years after 24 recommendations made following another review carried out with the assistance of the Ombudsman's staff in 2000. While the recommended changes have apparently had some effect in reducing delays, it appears that major problems remain and even the reductions in delays are relative, as it still takes on average, some 280 days to resolve an 'administration-type grievance'.

It now takes 391 days to resolve a grievance after it is escalated to Service Chief level.

Resolution by the immediate chain of command

In October 2008 we advised the Senate Foreign Affairs, Defence and Trade Committee that we were satisfied that the changes brought to the ROG system at the 'primary' level (the immediate chain of command), in particular a 90 day finalisation requirement, resulted in improvements to the system.

At that time, we welcomed the early intervention of CR in providing advice, guidance and direction to the unit level commander to assist with the investigation. Our view was, and is, early management of complaints is important. We consider that CR's inter-action with the primary level of decision is essential for the health of the ROG system and that it may be possible to further exploit CR's expertise in this role.

Risk aversion

In our view, the ROG process, once escalated to the Service Chief level, lacks accountability and transparency and creates a false impression of efficiency.

The fact that the Service Chiefs and CDF are the clients of the ROG system, and not the complainants, is a feature of the system that differentiates it from conventional complaint handling systems. The degree of risk aversion and the amount of detail involved in the process of preparing reports for the Service Chiefs is such that it, in our view, exceeds reasonable requirements for administrative review and hampers the timely resolution of Service members' issues.

In 1999, the ANAO said:

[S]ome of the files associated with the cases reviewed during this audit had grown into several volumes and involved hundreds of pages of correspondence and documentation. This issue is not about achieving justice but whether such effort is required to achieve justice for the member concerned.

In 2010 we have reached the same conclusion. The degree of risk aversion evident in the process hampers the timely resolution of administrative issues.

Not a matter of resources

Previous reviews of the ROG system have recommended devoting more resources to the task once referred to the Service Chiefs. We do not see that as a solution. The recommendations from successive reviews have not worked, as is evident from the continuing backlog of cases.

A regression analysis undertaken as part of our investigation showed that, if nothing changes, the backlog of referred ROGs will rise from 120 at 31 March 2010 to approximately 150 in June 2011. We believe that while more resources may alleviate the symptom of the problem, the business processes need to change to allow the ROG system to operate effectively.

Complexity

In the focus groups and interviews we have conducted, the complexity and proliferation of rules and regulations around the conditions of services was seen as adding to the difficulty of making fair and reasonable decisions. Decision makers are expected to act according to the law but, for example, officers in the Navy personnel branch noted that even members with legal or administrative expertise in interpreting the Pay and Accounting Manual (PACMAN) can often make mistakes.

Two thirds of respondents to our Command Team questionnaires agreed that the current system of entitlements is difficult to understand. Over 70% of respondents agreed that commanders are afraid to fail or make mistakes when making administrative decisions. Members of our Command Team focus groups observed:

‘Many administrative decisions now require legal advice in order to make an informed decision that will stand redress/challenge however access to legal officers is more and more limited, especially if a timely decision is to be made’.

Commanding Officers were concerned that the embedded source of advice that was traditionally relied upon, the Chief Writer or Chief Clerk, was a thing of the past. They were also concerned that junior staff did not have the training and experience to undertake the role given the increased complexity in decision making required today.

We propose to make recommendations on how Commanding Officers might access subject matter experts in the future, so as to provide them with more confidence in their role as decision makers.

Quick Assessment and Routine Inquiry

Commanders were concerned that their formations lacked adequate resources to conduct quick assessments and routine inquiries (QA and RI). Often, it was the ‘next person to walk past the door’ who was selected. In contrast, one Commander advised us that as he was the ‘administrative’ commanding officer he had no people to direct to conduct inquiries and had to ‘beg and steal’ from other commands.

The two impediments to Commanders conducting QA and RI were what they saw as overly-legalistic requirements and the lack of qualification and experience of personnel to conduct QA and RI.

Our review of the Administrative Inquiries Manual (ADFP 06.1.4) to some extent supports the Commanders’ views. Neither QA nor RI is a statutory inquiry, and they

proceed on the basis that a Commander has inherent authority to inquire in matters within his or her command. An opportunity for improvement may exist if Defence were to examine whether the rules for these inquiries can be simplified.

In terms of the availability of personnel to conduct inquiries and their qualifications and experience, we see no reason why experienced members of the Reserve could not be used and a pool of skills developed within a population that has relatively high levels of location stability. It would be open to Defence to explore the practicality of that type of arrangement.

There is no protection for QA and RI officers except at common law. The *Ombudsman Act 1976* protects officers acting under direction or authority of the Ombudsman from liability for an action, suit or proceeding in exercise or purported exercise of any power or authority conferred by the Ombudsman Act. This is for administrative inquiries. Defence could consider legislating that QA and RI officers be protected from criminal and civil suit. This may instil greater confidence in those officers.

Defence could also review the current position that Australian Public Service (APS) members cannot be required to give evidence before a number of Defence inquiries. The current arrangement is outdated given that APS members now deliver outcomes as part of MJS.

In our view, it would be open to the Secretary to issue a lawful and reasonable direction for the purposes of s 13(5) of the *Public Service Act 1999* that members of the APS cooperate with Defence inquiries.

Views of junior ADF members on fairness and abuse of MJS

Members should feel free to use the MJS. That message needs constant reinforcement because rank and the chain of command can make people disinclined to complain. In our focus group discussions there was mention of the subtle pressures that can work against people making complaints.

Some junior members informed us that they had experienced retaliation after using the 'fair go' hotline. Others expressed concern about reprisals if they did not meet their Corp's expectations, for example electing to transfer to another trade or mustering.

The major message, constantly and from the top, must be that the complaints system exists as of right.