

Submission by the  
Commonwealth Ombudsman and  
Defence Force Ombudsman

**Reforming Defence legislation to meet  
Australia's strategic needs**

Submission by the Commonwealth Ombudsman and  
Defence Force Ombudsman, Iain Anderson

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## Introduction and summary

1. The Office of the Commonwealth Ombudsman and Defence Force Ombudsman (the Office) welcomes the opportunity to make a submission to the Department of Defence (Defence) in relation to the proposed reform of Defence legislation.
2. Our submission explains our role and functions as an active independent accountability institution in relation to Defence. We respond specifically to consultation question 2:

*What safeguards do you consider should be included to ensure the law supports Defence accountability?*

## Our role

3. The purpose of the Office is to:
  - provide assurance that the agencies and entities we oversee act with integrity and treat people fairly, and
  - influence systemic improvement in government administration.
4. We aim to achieve our purpose by:
  - independently and impartially reviewing of complaints and disclosures about government administrative action
  - influencing government agencies to be accountable, lawful, fair, transparent, and responsive
  - assisting people to resolve complaints about government administrative action; and
  - providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

## Considerations for the reform

### Scope of the reform

5. The paper states that Defence must be accountable to the Government and Australian people and that legislation developed in this initiative must incorporate appropriate safeguards to support accountability. We suggest that there is merit in Defence legislation reform preserving the Office's role as an independent accountability institution in relation to Defence.
6. Details of the Office's functions and powers are included as background to this submission.

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**INITIATIVE 1: SUPPORT THE FULL RANGE OF MILITARY ACTIVITIES AND CAPABILITIES  
REQUIRED TO DEFEND AUSTRALIA AND ITS NATIONAL INTERESTS**

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## **Safeguards and accountability**

7. The Office is a part of Australia’s administrative law system, which ensures that administrative decision making is legal, fair, consistent, transparent, and impartial. The primary function of the Office is to investigate complaints received from members of the public about the administrative decisions and actions of government agencies, including departments like the Department of Defence. The Office is an important safeguard and a means of ensuring that the actions of government agencies are consistent with the law.
8. In the Defence context, the Office can receive and investigate complaints from current and former members of the Australian Defence Force (ADF) about administrative action taken by Defence agencies. Defence agencies include the 3 services (Navy, Army and Air Force), the Department of Defence and Defence Housing Australia (DHA). The Office also receive and investigate complaints about the Department of Veterans’ Affairs (DVA) as matters of administration include the payment of allowances or pensions and provision of benefits to a member of the Defence Force or a dependant of such a member.<sup>1</sup>
9. Since 2016<sup>2</sup>, the DFO has also had an ongoing function<sup>2</sup> with respect to complaints of abuse from serving and former ADF members, and civilians deployed on ADF operations. The DFO provides an independent and confidential mechanism to report incidents involving serious forms of abuse, including sexual abuse, serious physical abuse, and serious bullying and harassment within Defence.
10. Some elements of the DFO’s functions have been configured specifically to give ADF members an external mechanism for raising grievances outside the Defence chain of command. For example, s 14(2) of the *Ombudsman Regulations 2017* expressly provides that members do not have to approach Defence before making a complaint of abuse with the DFO. The explanatory materials to the amending regulations recognise “that an independent complaints mechanism remains desirable for those victims who remain uncomfortable reporting abuse within Defence”. The Office considers it is appropriate for Defence to retain external mechanisms for raising such grievances outside the chain of command.
11. The Office is also empowered to investigate administrative matters on its own motion. In 2019 the Office inquired into Defence’s policies for receiving and responding to reports of abuse and made recommendations to assist Defence in maintaining a prevention-focused culture with respect to abuse.<sup>3</sup> The Office built on that inquiry in 2020 by considering the

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<sup>1</sup> Paragraph 19C(4) of the *Ombudsman Act 1976* sets out this scope as a non-limiting example of the matters of administration over which the DFO has oversight.

<sup>2</sup> *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2016*.

<sup>3</sup> Office of the Commonwealth Ombudsman. 2019 Defence’s policies for receiving and responding to reports of abuse. Available online.

training the ADF provides to its recruits about required behaviours for members of Defence including behaviour that is considered unacceptable in the workplace.<sup>4</sup>

12. From a rule of law perspective, the Office's handling of complaints concerning Defence agencies affirms they are bound by rules, and that there can be an independent evaluation of whether there has been compliance with the rules. Defence accountability and complaints go hand in hand.

### **Clear statutory authorisation**

13. The focus of rule of law is upon controlling the exercise of power by the executive government. The foundational principle is that the agencies and officers of government require legal authority for any action they undertake and must comply with the law in discharging their functions.<sup>5</sup>
14. Defence states that one of the guiding principle of Defence legislation reform is that legislative changes must support flexibility and avoid prescription as far as possible.<sup>6</sup> In our view, this reform principle must be balanced against the need for defence legislation to provide statutory authority – expressed in unmistakable and unambiguous language – for Defence activities, including “grey-zone” activities.

### **Interactions with the *Ombudsman Act 1976***

15. In undertaking this reform, Defence will need to preserve the existing interactions between the Ombudsman Act and Defence legislation which enable the Office's oversight.
16. The DFO has much the same powers as the Office has in its general jurisdiction. The DFO also has the discretion to investigate complaints as the Office or the DFO.<sup>7</sup> Powers available to the Office include:
  - extensive investigation and information gathering powers including the power to investigate any matter of administration on his or her own motion (s 5(1)(b)) and to compel the provision of information and documents (s 9)
  - the ability to report directly to the Prime Minister (s 16) and to the Parliament (ss 17, 19)
  - the ability to issue reports (s 15) and publish investigation findings or make a statement 'in the public interest' (s 35A).

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<sup>4</sup> Office of the Commonwealth Ombudsman. 2020. Inquiry into behaviour training for Defence recruits. Available online.

<sup>5</sup> McMillan, J. 2004. *The Ombudsman and the Rule of Law – Revised version of a paper presented at ANU Public Law Weekend, Canberra, 6 November 2004.*

<sup>6</sup> Department of Defence. 2023. *Reforming Defence legislation to meet Australia's strategic needs – consultation paper*, p 7.

<sup>7</sup> Section 19F of the Ombudsman Act provides for the application of the majority, but not all, of the Office's powers to the DFO position.

17. Where the Ombudsman Act has not provided for the DFO to adopt provisions applicable to the Office, the Act has provided for them separately or provided similar powers with modification:

- The power to investigate any matter of administration on his or her own motion is not provided by adopting s5(1)(b) of the Act (as it applies to the Office) and instead provided separately in paragraph 19C(2)(b) of the Act.
- The DFO is empowered to provide the Minister with a report to table before parliament (ss19FA(2), however, the Minister is not compelled to table the report within 15 sitting days – in contrast to the Office’s powers under s19 of the Ombudsman Act.

## Background

### The Defence Force Ombudsman

18. The Commonwealth Ombudsman’s role as the Defence Force Ombudsman (DFO) is established under Part IIA of the *Ombudsman Act 1976* (the Ombudsman Act) and commenced in 1983.

19. The DFO has 2 main functions:

- dealing with matters of administration related to the service of members of the Defence Force, including in response to complaints or at the DFO’s own motion, and
- dealing with matters related specifically to complaints of abuse involving members of the Defence Force.

20. The range of appropriate responses open to the DFO in response to complaints of abuse is not exhaustive, but includes:

- facilitating a referral to counselling through Open Arms – Veterans and Families Counselling (formerly known as the Veterans and Veterans Families Counselling Service)
- participation in the Ombudsman’s Restorative Engagement Program – the program is designed to support those who report to tell their personal story of abuse to a senior representative from Defence in a private, facilitated meeting – a Restorative Engagement Conference. The conference also provides the opportunity for Defence to acknowledge and respond to a personal story of abuse.

21. Since 2017<sup>8</sup>, the DFO has also had the option, in certain circumstances, of recommending that Defence make a reparation payment in acknowledgement of abuse via what is known as the Defence abuse reparation scheme (DARS). However, this option effectively ceases from 30 June 2023, as complaints of abuse made after that date cannot be assessed for a reparation payment.<sup>9</sup>

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<sup>8</sup> *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017*.

<sup>9</sup> *Ombudsman Regulations 2017*, reg 14(1)(a)(iiia).

22. The Office's general jurisdiction has some overlap with the DFO's jurisdiction. There are several key distinctions between the Office and DFO's jurisdictions:

- The Office can receive and investigate complaints from members of the public about the administrative actions of Australian Government agencies including Defence agencies<sup>10</sup> whereas the DFO is limited to complaints by current and former members of the ADF about administrative actions taken by Defence agencies.<sup>11</sup>
- Employment-related matters are carved out of the Office's jurisdiction<sup>12</sup> whereas the DFO may investigate complaints by current and former members of the Defence Force related to their service (e.g. service conditions, employment decisions, recruitment, termination)<sup>13</sup>.
- Typically, the Office exercises its discretion not to investigate an administrative complaint until the complainant has first complained to the relevant agency.<sup>14</sup> The operation of the DFO's discretion operates differently<sup>15</sup>, especially with respect to complaints of abuse, which do not have to be raised with Defence prior to the DFO.<sup>16</sup>

## Statistics

23. The statistics presented below are a snapshot but nevertheless indicate the frequency with which people turn to the Office for assistance and the number of queries and grievances against Defence agencies that we addressed in these periods.

24. More generally, these statistics demonstrate that through the Office, the notion is now embedded in Australia that people have a right to complain against government, to an independent agency, without hindrance or reprisal, and to have their complaint resolved on its merits according to the applicable rules and the evidence.

## Complaints

25. In 2021–22 we received 295 complaints about Defence agencies<sup>17</sup> and finalised 220, a decrease of 13.9 per cent compared with complaints received in 2020–21. Complaints about Defence agencies raised issues such as discharge, unacceptable behaviour, termination, and allegations of abuse or improper conduct by ADF members.

26. During 2021–22 we received 157 complaints about DVA and finalised 103. This was an increase of 1.3 per cent compared with complaints received in 2020–21. Complaints about DVA included issues such as disability pension/compensation, service delivery, health care and medical services, and financial remedies.

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<sup>10</sup> Section 5 of the Ombudsman Act.

<sup>11</sup> Section 19C of the Ombudsman Act.

<sup>12</sup> Section 5 of the Ombudsman Act.

<sup>13</sup> Section 19C of the Ombudsman Act.

<sup>14</sup> Section 6(1A) of the Ombudsman Act.

<sup>15</sup> Paragraph 19F(2) carves out the application of ss 6(1A) and s19E sets out the framework for which the DFO's discretion may be exercised in relation to handling certain complaints.

<sup>16</sup> *Ombudsman Regulations 2017*, reg 14(2).

<sup>17</sup> Includes Air Force Cadets, Air Force, Army, Australian Signals Directorate, Department of Defence, DHA, Defence Honours and Awards Tribunal, Inspector-General Australian Defence Force, and Navy.

### ***Reports of abuse***

27. From 1 December 2016 to 31 March 2023, our Office received 4,263 reports of abuse. At 31 March 2023, 2,944 of those reports had been assessed, with 2,574 found to be within DFO jurisdiction and 370 outside DFO jurisdiction. At 31 March 2023, we had received 2,231 'intent to report' notifications, of which 770 had already reported, leaving 1,461 eligible to submit a report of abuse to the DFO on or before 30 June 2023 and still be eligible for assessment for a potential reparation payment.
28. In 2021–22, we received 1,222 reports of abuse compared with 953 in 2020–21. The increase is largely attributable to the fact that eligibility to be assessed for a potential reparation payment closed on 30 June 2022.
29. As of 31 March 2023, Defence had considered and accepted 1,709 recommendations, totalling approximately \$71,035,000.