

EXPLANATORY STATEMENT

Issued by the Authority of the
Assistant Minister to the Prime Minister
Parliamentary Secretary to the Prime Minister

Ombudsman Act 1976

Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulation 2016

The *Ombudsman Act 1976* (the Act) establishes the office of the Commonwealth Ombudsman (the Ombudsman) and provides certain powers and functions that can be exercised by the Ombudsman.

Section 38 of the Act provides in part that the Governor-General may make Regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Ombudsman Regulations 1977* (the Principal Regulations) made under the Act prescribe such matters as prescribed authorities for the purposes of the Act, the terms and conditions of the Office of Ombudsman and other matters.

Section 19B of the Act establishes the office of the Defence Force Ombudsman (DFO). Subsection 19C(1)(a) of the Act provides that the functions of the DFO include any functions that are conferred on him or her by the Act or the Principal Regulations.

The *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulation 2016* (the Regulation) amends the Principal Regulations to confer additional functions on the DFO, including to:

- take appropriate action to respond to complaints about abuse in Defence, and
- inquire into Defence's practices and procedures relating to making and responding to complaints of abuse, and the effectiveness and appropriateness of those procedures.

The purpose of the new functions is to complement reforms undertaken in Defence to prevent and respond to abuse, recognising that an independent complaints mechanism remains desirable for those victims who remain uncomfortable reporting abuse within Defence.

Under the Regulation, the DFO will be authorised to take appropriate action to respond to complaints of abuse, including where the complainant has not approached Defence in relation to the complaint. This will provide an additional independent avenue for individuals to make a complaint about abuse in Defence, including those whose complaint was not dealt with by the Defence Abuse Response Taskforce (DART) (because, for example, their matter did not meet the registration date under the DART), as well as those with more recent allegations of abuse (ie the abuse occurred after 11 April 2011).

Under the Regulation, the DFO will not be authorised to take appropriate action to respond to a complaint if it is the same in substance as a complaint that was previously made to, and dealt with by, the Defence Abuse Response Taskforce.

The Regulation will authorise the DFO to respond to complaints about abuse in Defence by offering outcomes similar to, but not the same as, those which were provided by the DART,

including referral to counselling and facilitating an alternative dispute resolution process or a restorative engagement conference.

These outcomes will be in addition to existing powers under the Act, such as under section 35A, enabling the DFO to disclose information to any person, such as a police officer or appropriate Defence representative, if it is in the public interest to disclose the information (eg for investigation and possible prosecution).

Under the Regulation, reparation payments of the kind available under the DART will not be an available outcome. The DART served as an important avenue for people to receive redress for past abuse and provided appropriate outcomes, including a financial payment in recognition that the abuse that had occurred was wrong and should not have occurred. As a time-limited entity primarily established to deal with complaints of historical abuse, the outcomes available under it, coupled with the processes it adopted, were tailored to take account of cultural factors that were revealed to be prevalent at the time the abuse occurred. In particular, the reparation payments were a one-off acknowledgement for historic incidents of abuse in the context of the time-limited taskforce.

The Government now recognises that Defence has invested significant time and effort to reform Defence culture, to improve the timeliness and effectiveness of complaints reporting mechanisms and to deliver a pro-reporting message. These were the actions sought by Government to address the issue of abuse within Defence going forward.

As a result of these steps, internal Defence reporting mechanisms should retain primacy for reporting abuse. The primary purposes for the new DFO functions are to provide an alternative complaints mechanism for those who cannot, or do not feel comfortable, accessing Defence's new internal mechanisms and to strengthen the role of the DFO in relation to overseeing and supporting Defence's culture change strategy. The Government considers that any financial redress should be obtained through existing compensation mechanisms.

Going forward, while Defence continues to focus on eliminating all forms of abuse, in the event that an abuse event does occur, the victim can receive prompt support by reporting to enhanced mechanisms in Defence or through the DFO under the new function. A complainant will continue to have the right to take legal action against Defence or anyone else in relation to that abuse. If the complainant suffers an injury, the complainant may also have entitlement to compensation in accordance with the suite of military compensation legislation.

In addition, the DFO will be able make any recommendations to Defence in respect of a complaint including that Defence make a payment of money if there is a proper basis to do so.

The DFO complaints function will cover complaints of sexual abuse, serious physical abuse and serious bullying or harassment of a complainant. This is narrower than the definition of 'abuse' used for the purposes of the DART, which also received lower-level bullying and harassment complaints. It would apply to complainants who were abused in the course of their employment and are, or were, members of the Defence Force and a limited class of Defence APS employees or contractors to Defence engaged in activities connected to the overseas operations of the Defence Force. The DFO will provide outcomes if satisfied that there is a 'reasonable likelihood' that the abuse occurred in connection with their employment with Defence.

The proposed DFO monitoring function will also strengthen the DFO's existing oversight functions and ensure it can contribute to Defence's ongoing efforts to prevent abuse from occurring and to respond to complaints about abuse in Defence.

Consistent with the role of an Ombudsman, in exercising the proposed new functions, the DFO will not make findings of guilt or innocence and would not have determinative powers.

The Regulation will specifically allow the DFO to disclose information, as appropriate and having regard to the safety of the complainant, to Defence, including to inform Defence of areas where cultural change has been less effective and where there are systemic issues of abuse or poor management of complaints.

Details of the Regulation are set out in Attachment A.

The authorising Act does not specify any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation was developed in close consultation between the DART, the Ombudsman, the Department of the Prime Minister and Cabinet and the Department of Defence.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*.

The substantive new functions of the DFO will commence on 1 December 2016.

The other provisions of the Regulation, including transitional arrangements, would commence on the day after the Regulation is registered, to facilitate the transition to new arrangements.

Authority: Section 38 of the *Ombudsman Act 1976*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Ombudsman Amendment (Defence Force Ombudsman functions) Regulation 2016

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the Regulation is to confer additional functions on the Defence Force Ombudsman (DFO) to take appropriate action to respond to complaints of abuse in Defence. The Regulation also confers on the DFO an oversight function to monitor the reporting and management of allegations of abuse in the Defence Force.

Human rights implications

The Regulation will provide for programs and functions, similar to those of the DART, to continue beyond its current term of operation, which expires on 31 August 2016.

This Regulation engages the following rights:

- the Right to Privacy and unlawful attacks on reputation in Article 17 of the *International Covenant on Civil and Political Rights*

The Regulation allows the Defence Force Ombudsman to collect, use and disclose personal information and documents for the purpose of appropriately responding to complaints of abuse in Defence. In some cases, complaints of abuse will identify an alleged abuser and the DFO will request information about the alleged abuser from Defence. In some limited circumstances, information about the alleged abuse may be disclosed to third parties such as the police. The Defence Force Ombudsman will have no determinative powers in relation to an alleged abuser and will have no powers to compel information from individuals in relation to a complaint of abuse.

This is a permissible limitation:

- a) *Legitimate objective*: The collection, use and disclosure of personal information will support the Regulation's objective of providing an independent complaints mechanism and appropriate responses in relation to allegations of abuse in Defence. This mechanism is not currently available.
 - b) *Rational connection*: The collection, use and disclosure of personal information of alleged abusers named to the Defence Force Ombudsman is the only way to achieve the objectives of the Regulation. It will allow the Defence Force Ombudsman to gather information about complaints of abuse in order to appropriately respond to a complaint.
 - c) *Reasonable, necessary and proportionate*: The collection, use and disclosure of personal information and documents is reasonable and necessary to determine the appropriate response to complaints of abuse in Defence. Information and documents will be handled in a manner consistent with the *Privacy Act 1988*.
- The right to just and favourable conditions of work, contained in article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The right to just and favourable conditions of work in article 7 of ICESCR encompasses a number of elements, including safe and healthy working conditions. By providing new functions to the DFO, both to receive complaints of abuse and strengthen the DFO's oversight

functions to align with Defence's cultural change program, the Regulation supports members of Defence having a workplace that is safe, healthy and free of abuse.

The Regulation positively engages this right.

Conclusion

The Regulation is compatible with human rights because it promotes the right to have a safe and healthy working environment for members of Defence and the limitations imposed on the right to privacy and unlawful attacks on reputation are reasonable, necessary and proportionate to achieve this.

Senator the Hon James McGrath
Assistant Minister to the Prime Minister
Parliamentary Secretary to the Prime Minister

Details of the proposed *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulation 2016* (No.)

Section 1 – Name of Regulation

This section provides that the name of the Regulation is the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulation 2016*.

Section 2 – Commencement

This section provides that each provision of the Regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

Section 3 – Authority

This section provides that the Regulation is made under the *Ombudsman Act 1976*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Ombudsman Regulations 1977

Item 1 After regulation 6A

Item 1 inserts a new regulation 6B, conferring additional functions on the Defence Force Ombudsman.

New Subregulation 6B(1)

Subregulation 6B(1) provides that the Defence Force Ombudsman has the function of taking appropriate action to respond to a complainant about abuse in Defence. Paragraph (a) sets out a non-exhaustive list of actions the DFO is empowered to take in response to a complaint.

The available actions listed in paragraph (a) may be taken in relation to any complaint of abuse, regardless of when the abuse occurred (that is, whether it occurred before, on or after 1 December 2016, the date of commencement of the new function). These actions include facilitating counselling (subparagraph (i)) or a restorative engagement conference (subparagraph (ii)), or making any recommendation to Defence in respect of the complaint as the DFO sees fit (subparagraph (iii)). The DFO may also choose not to take any action, or cease taking any further action, in relation to a complaint (subparagraph (iv)).

The new regulation also provides the DFO with functions that are ancillary or incidental to the complaints function (paragraph (b)), the function of inquiring into matters relating to complaints of abuse (paragraph (c)), and the function of dealing with any matter relating to complaints previously made to, and dealt with by, the Defence Abuse Response Taskforce (DART) (paragraph (d)).

New subregulation 6B(2)

Subregulation 6B(2) clarifies that an individual may make a complaint about abuse in Defence to the DFO even if they have not approached Defence in relation to the complaint. This ensures the new DFO mechanism complements existing Defence internal mechanisms by providing an avenue through which victims of abuse can obtain timely support and advice if they do not feel, for whatever reason, capable of reporting the abuse directly to Defence. The new DFO mechanism will also be available to former Defence personnel who may no longer be able to access internal Defence mechanisms.

New subregulation 6B(3)

Subregulation 6B(3) clarifies that the DFO may not deal with complaints that were previously dealt with by the DART.

New subregulation 6B(4)

Subregulation 6B(4) requires the Chief of the Defence Force and the Secretary of the Defence Department to provide assistance to the DFO in carrying out these new functions.

New subregulation 6B(5)

Subregulation 6B(5) provides definitions of key terms used in new regulation 6B.

‘Abuse’ is defined as sexual abuse, serious physical abuse or serious bullying or harassment of a complainant. Only bullying and harassment of such seriousness that it amounts to abuse, as well as sexual abuse and serious physical abuse, is included for the purposes of the DFO complaints function.

‘Member of Defence’ is defined to include a person who was, at the time the abuse occurred, a member of the Defence Force or another person deployed overseas with the Defence Force (whether as an employee or contractor). The complaints regime only relates to abuse by people who were serving defence personnel at the time the abuse occurred.

‘Complainant’ is similarly defined to include a person who is, or was, a member of the Defence Force or another person deployed overseas with the Defence Force (whether as an employee or contractor). Both serving and former defence personnel may make complaints under this regime.

Item 2 After regulation 10

Item 2 inserts new regulation 11 to provide transitional arrangements for the new function. This will ensure that information held by the DART (or the Attorney-General’s Department, recognising that the DART was administratively part of that Department) is disclosed to the DFO.

Subregulations (4) and (5) also ensure the DFO may use, collect and disclose information, and other agencies and authorities may provide information to the DFO, relating to performing his or her functions under the Act or these Regulations.

This new regulation commences on the day after this instrument is registered, prior to the formal commencement of the new functions in new regulation 6B. This will support the transition of records and staff from the DART to the DFO to assist the DFO to establish its new functions ready for commencement.