

# **ADDENDUM TO THE SUBMISSIONS ON THE MILITARY OMBUDSMAN BILL**

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## **MILITARY OMBUDSMAN BILL OF 2011**

### **INTRODUCTION**

An ombudsman is an institution that exercises oversight over the public administration and helps to ensure that the latter observes the principles and practices of good governance by dealing with complaints from the public regarding decisions, actions, or omissions of the public administration. This article deals with military ombudsmen. It explores the importance of this institution in protecting matters affecting military personnel in the performance of their duties and its contribution to a more efficient and accountable structure of the armed forces. The role of the Military Ombudsman 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 Defence Force members and their families. To this end, this article presents different approaches to the ombudsman's function, highlighting the advantages and shortcomings of each of them.

### **WHAT IS A MILITARY OMBUDSMAN?**

For the purpose of this paper, a military *ombudsman* (MO) is a mechanism independent of the military command structure that exercises oversight of the defence sector and helps to ensure that it observes the principles and practice of good governance. The MO addresses complaints about improper and abusive behaviour in the military as well as shortcomings in military procedures, and formulates recommendations for corrective action. The MO does not make defence policy or decisions on operational issues (Snider, Adler & Castro, and 2005:78). While the immediate purpose of the MO is to redress grievances and to encourage proper conduct of and within the defence sector, the broader role of the office is to enhance its efficiency and effectiveness by making it accountable and responsive to its constituencies.

### **THE RATIONALE FOR ESTABLISHING A MILITARY OMBUDSMAN**

Why have an ombudsman? In spite of existing complaints procedures within the military, various countries around the world have an ombudsman for addressing complaints about improper and abusive behaviour in the military, shortcomings in military policy, as well as systemic problems in the military (Schlueter, 2004:14). After investigating these complaints and shortcomings, the ombudsman formulates recommendations for corrective action. In this context, the value of an ombudsman can be seen in several areas:

- ✓ Its independent oversight increases trust in the military sector by creating greater transparency in the administrative process, without undermining the authority of the military chain of command;
- ✓ As an independent watchdog, it contributes to the democratic and civilian control of the armed forces. It reinforces the principles of good governance, civilian control, the rule of law, and human rights within the barracks;

- ✓ The ombudsman provides essential protection to individual armed forces personnel against violations of their rights, abuses of power or unfair decisions;
- ✓ The ombudsman can help military commanders to achieve internal changes and to improve the internal functioning of the armed forces;
- ✓ As a result, the ombudsman can have a positive impact on the quality of life of servicemen, on their morale, on the *esprit de corps*, which can also help retain soldiers at a time of critical staff shortages.

## INTERNATIONAL COMPARISON

- |                          |                            |
|--------------------------|----------------------------|
| ✓ Austria                | ✓ Montenegro               |
| ✓ Belgium                | ✓ Netherlands              |
| ✓ Bosnia and Herzegovina | ✓ Norway                   |
| ✓ Canada                 | ✓ Poland                   |
| ✓ Estonia                | ✓ Romania                  |
| ✓ Finland                | ✓ Slovenia                 |
| ✓ France                 | ✓ United States of America |
| ✓ Germany                | ✓ United Kingdom           |
| ✓ Ireland                | ✓ Namibia                  |
| ✓ Japan                  |                            |

### *General Ombudsman*

Estonia, Finland, Poland, Romania, Serbia, Slovenia, Namibia and Sweden

### *Specific Ombudsman*

Austria, Belgium, Canada, Germany, Ireland, the Netherlands, Norway, and the United Kingdom.

(Sassoli & McChesney, 2002:12).

## NEED FOR MILITARY OVERSIGHT

Every institution has its share of problems and challenges, but there are special ones endemic in a military organisation like the South African National Defence Force (SANDF). Necessarily, military organisations have daunting power over their members. Those members are called upon to undertake work that is both physically and mentally taxing—at times even physically and mentally debilitating (Careiras, 2006:98). This generates inordinate levels of stress that not only take a human toll but also can impede the effectiveness of military institutions that are dependent on positive morale. Retention, recruitment, focus and effort all suffer. Problems and challenges can also be acute in a military institution because of the “military culture” with its traditions of blind unquestioning obedience, of closed access to information, and of a highly regimented command structure that relies on layers of fixed orders and directives. This creates a bureaucratisation unparalleled in civilian life.

It is within this kind of organisation that the chain of command is taxed with work that is so crucial that it engages national security and international peace and justice. Officers given this kind of responsibility acquire an understandable zeal to do their job well. Unfortunately, some of those who take on commitments of this magnitude can become single-minded, even blinkered, in extreme cases

treating human beings as mere troops or military tools—abstracting them and forgetting their humanity (Detter, 2000:45). Administration can become wooden, rule bound and order-obsessed, even when those rules and orders reveal themselves as problematic and there are means of remedy available. In a misguided effort to maintain the authority they need to do their job, military institutions can become closed and resistant to change.

It is also notorious that military organizations tend to be conservative. In Canada (2009) its report on *Achieving Administrative Efficiency*, a Minister's Advisory Committee spoke of a "cultural aversion to programmatic risk" that feeds "resistance to all but the most incremental change." When change is advocated in a conservative institution, an entrenched "no can do" attitude can too easily undermine initiative and progress (Rowe, 2006:60). This can put a premium on keeping problems from the public eye so that meddling political interference or public criticism does not undermine the mission. In the faith that they are internal matters best handled within the command structure, military organisations are often apt, in the face of criticism, to circle the wagons.

So, when soldiers have real problems and are treated unfairly they can run into unreasonably rigid administrators working within a closed, highly bureaucratic, conservative, and at times, even insensitive institution (Quaker Council for European Affairs, 2005:29). They can run into bias and stereotype. What makes the problems so intransigent is that those who give short shrift to these problems do so with the authority of their own consciences. The contributions that an impartial, outside agency can make are obvious given that problems often emerge from a widespread culture of defensiveness within a largely closed society.

### **THE FUNCTIONING OF THE OMBUDSMAN**

Regardless of the approach chosen, three conditions should be met in order to ensure the proper functioning of the ombudsman's institution:

- ✓ Effectiveness (i.e., that the ombudsman's recommendations are followed by the relevant organs);
- ✓ Fairness (i.e., transparency of procedures); and
- ✓ Independence.

The independence of the ombudsman office is crucial for ensuring robust and credible accountability of the military. In order to be independent, the ombudsman should be granted statutory authority, operational independence, and an adequate staff. This means, first of all, that an appropriate legal status should be granted to the ombudsman office, either by the constitution (e.g., Azerbaijan) or by a legislative act (e.g., Finland) or by both instruments (e.g., Denmark) (Moskos, Williams & Segal, 2000:20).

Second, the ombudsman should be provided with its own autonomous investigative capacity. Third, the ombudsman should be provided with sufficient and qualified expert staff. The military ombudsman's independence also depends on its institutional embedding in the political system, which varies from country to country. In some countries, defence ombudsmen are appointed by, and accountable to, the Parliament (e.g., Poland, Norway, the Czech Republic); in others, ombudsmen are appointed by the Ministry of Defence and accountable to the Ministry of Defence and to the Parliament (e.g., Canada) (Detter, 2000:12). Ombudsmen may also be appointed by, and report to, the commander of the armed forces (e.g., Estonia). The independence of the ombudsman is one of its main strengths and a source of trust; therefore, the ombudsman should never serve as an adviser to ministers or to the Parliament.

### **WHO CAN COMPLAIN?**

Members of the armed forces, former members, reserve members, applicants, or their partners/families who allege that they have been subjected to wrong or unfair treatment can ask the ombudsman in most countries to start an inquiry (Careiras, 2006:44).

In addition, the ombudsman often has the power to conduct an investigation upon instruction of the Parliament. In general, members of the general public cannot bring a complaint to the ombudsman. In certain countries, ombudsmen may also start an investigation on their own initiative in matters that suggest that there has been a violation of the basic rights of a member of the armed forces (e.g., Germany, Canada, Finland, Georgia, and Ireland). Such investigations are an important tool if an ombudsman wishes to look at broader systemic issues affecting all servicemen.

### **TYPES OF COMPLAINTS**

Complaints may refer to a broad spectrum of official, personal, and social problems that service personnel may encounter in their everyday military routine, ranging from cases of maladministration to violations of fundamental rights (Callaghan & Kernic, 2003:38). Complaints may relate to working conditions in general; exemption from, and postponement of, obligatory military service; and entitlement to benefits in case of disability suffered during operations or of death. Complaints may also deal with discrimination in the working environment and harassment. Ombudsmen may deal with individual wrongs, as well as with systemic issues concerning broader policy questions. Sometimes an investigation into an individual complaint may shed light on systemic problems.

### **OMBUDSMAN'S POWERS OF INVESTIGATION**

In some countries, an ombudsman can deal with a case only after appeals through internal military complaint mechanisms (the chain of command and the military justice system) have been exhausted. In Ireland, the chain of command and the military justice system are given 28 days to deal with a case. Following this period, a complaint may be filed with the ombudsman (Caforio, 2003:70). This rule has greatly speeded up internal complaints mechanisms. In Germany, on the contrary, servicemen may bring complaints directly to the attention of the parliamentary commissioner without going through official channels and without having to observe specific time limits. In order to protect the rights of servicemen, the ombudsman has the power to conduct investigations. As part of his or her investigative duties, the Ombudsmen may deal with individual wrongs, as well as with systemic issues concerning broader policy questions (Fleck, 1995:59).

### **THE OUTCOME OF AN OMBUDSMAN'S INVESTIGATION**

Once an investigation has been completed, the ombudsman has the power to make recommendations to eliminate improper conduct; including demanding a change in policy or the adoption of certain measures to ensure that there is no recurrence (Fleck, 1995:57). He or she may also refer a matter to the authority responsible for initiating criminal or disciplinary proceedings. In most states, ombudsman institutions do not have binding adjudicative powers; instead, they rely on persuasion. Their recommendations are not binding and may not overturn decisions of the military or civil justice systems; however, ombudsmen's recommendations carry significant political weight and moral authority.

### **DIFFERENT APPROACHES TO THE OMBUDSMAN FUNCTION**

As far as the structure and the competences of ombudsmen are concerned, there are four main models:

- ✓ Countries without a military ombudsman (e.g., Slovakia and Spain);
- ✓ Countries where the ombudsman is integrated in the military itself, under the name of inspector-general (e.g., the Netherlands and Belgium);
- ✓ Countries where the civilian ombudsman's responsibility also includes the military (e.g., Sweden, Denmark, Poland);
- ✓ Countries that have an independent military ombudsman (e.g., Germany, Canada, Ireland).

The majority of countries do not have a military ombudsman. This approach has the advantage of relying principally on the command structure for the administration of discipline within the military ranks (Fleck, 1995:32). However, there is a risk that abuses and mistreatment of military personnel will go unpunished due to the lack of confidence in internal disciplinary procedures and due to the fear of retaliation by military commanders; therefore, the protection of human rights of servicemen may be at risk. The absence of a military ombudsman is often due to strong resistance to the introduction of such independent complaints mechanisms on the part of the chain of command.

In the United Kingdom, for example, especially after the death of the four recruits at the Deepcut army barracks, there was an intense debate on the merits of establishing an alternative means of exercising external and independent oversight over the armed forces. The introduction of a military ombudsman with full investigative powers with respect to complaints and authority to make binding adjudications on them was recommended both by the House of Commons Defence Committee and also by the recent Deepcut Review Report (1995 – 2002).

However, the Ministry of Defence did not accept this recommendation, “mainly on the grounds that the Services already [had] procedures for dealing with the redress”. Also, the proposal of extending the terms of reference of the parliamentary commissioner for administration to permit him to deal with complaints from service personnel about administrative matters has been refused so far (Caforio, 2003:82).

Instead, legislation in 2006 introduced the Service Complaints Commissioner. Appointed by the defence minister, the role of the service complaints commissioner is to supervise the investigation of complaints by the military and to report to the defence minister annually on the operation of these redress procedures. The military chain of command tends to favour an oversight mechanism integrated into the military, as it appears to be more receptive to command and control issues and attentive to the need to protect the operational effectiveness of the military (Schlueter, 2004:93). Furthermore, it has the advantage of specialist knowledge of military life and issues. However, integrated mechanisms may lack independence, as they are under the control of the military hierarchy. This may in turn reduce the legitimacy of the complaints mechanism in the eyes of the complainants.

An inspector-general, as this mechanism is most often called, is usually involved in operational issues, and the incumbent is invariably a serving member of the military. This is the case in the Netherlands, where the inspector-general of the armed forces has both an advisory and a mediation function; he also exercises the function of inspector for veterans. The main drawback of this approach is that the military performs the oversight function on itself (Rowe, 2006:19). This can create a potential conflict of interest and undermine confidence in the recommendations of the oversight body.

### **Countries where the civilian ombudsman's responsibility includes the military**

In some countries, the military oversight function is part of a civilian oversight mechanism, as, for example, in Sweden and in Poland. A civilian ombudsman has the advantage of having a strong appearance of independence and of ensuring equal treatment of military personnel and civilians alike. On the other hand, a civilian ombudsman may lack specific knowledge and credibility within the military (Fleck, 1995:15). Furthermore, an excessive workload may cause significant delays in the resolution of cases. A solution to these problems could be to introduce specialisations within the ombudsman's office, e.g., appointing a deputy ombudsman dealing specifically with military affairs.

This is the case, for example, in Sweden, where the ombudsman's work is subdivided into several areas of responsibility, including the armed forces, non-combatant national service, and other cases relating to the Ministry of Defence. Sweden was the first country to establish the office of ombudsman for military affairs, in 1915 (Detter, 2000:62). Later, however, in the 1980s, in the framework of general reform of the Swedish military, the responsibilities of the military ombudsman were incorporated into the responsibilities of the parliamentary ombudsman. In Denmark, an advisory system has been established to provide assistance and advice to soldiers and officers who feel that they have been subjected to discrimination or have been accused of discrimination. The system consists of advisers outside the military chain of command who perform this advisory function alongside their normal assignments. When exercising their advisory function, they report to a chief adviser in the Army's Personnel Command.

The advisers provide guidance or, if necessary, assistance in formulating a complaint through the chain of command. The system does not constitute an external/independent complaint process in itself. This system has the advantage of ensuring that soldiers' rights are not unduly differentiated from those of the population as a whole (Detter, 2000:29). The concentration of the ombudsman function in one office can also be less costly than having several specialized offices. At the same time, a civilian oversight mechanism may lack the necessary expertise for dealing with the defence sector and may fail, due to the wide range of its mandate, to focus attention on the particular problems facing military personnel.

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### **Countries that have an independent military ombudsman**

As a separate institution, the laws of several countries provide for an independent ombudsman for the military, such as the parliamentary ombudsman for the Norwegian armed forces, the parliamentary commissioner for the armed forces in Germany, the ombudsman for national defence and Canadian Forces, or the ombudsman for the defence forces of Ireland. In addition to having specialist knowledge of military matters, the main advantage of an independent military ombudsman is its credibility in the eyes of complainants, parliament, and the public (Detter, 2000:30).

The main disadvantage is that its establishment may be costly. This is the case, for example, in Sweden, where the ombudsman’s work is subdivided into several areas of responsibility, including the armed forces, non-combatant national service, and other cases relating to the Ministry of Defence. Sweden was the first country to establish the office of ombudsman for military affairs, in 1915. Later, however, in the 1980s, in the framework of general reform of the Swedish military, the responsibilities of the military ombudsman were incorporated into the responsibilities of the parliamentary ombudsman (Careiras, 2006:39).

The **parliamentary ombudsman for the Norwegian armed forces** was established in 1952, making it the world’s first parliamentary military ombudsman. The ombudsman is head of the Ombudsman’s Committee, which comprises seven members. The ombudsman and the Ombudsman’s Committee are organs of the Norwegian Parliament. They are elected and report to the Parliament (Caforio, 2003:65).

The ombudsman is impartial and independent of the Ministry of Defence and the military authorities. The ombudsman safeguards the rights of all members and former members of the armed forces. The Office of the National Defence and Canadian Forces Ombudsman was set up in 1998 following a public inquiry into the involvement of a Canadian airborne regiment in beating up, torturing, and killing Somali youngsters during a peacekeeping mission in Somalia in 1992 (Careiras, 2006:18). One of the recommendations of the public inquiry was to strengthen accountability of the Canadian Forces by setting up an independent review body. The Canadian military ombudsman is a fully independent institution that is appointed by the cabinet and reports to the Ministry of Defence.

It deals with individual complaints initiated by military members, their families, the Ministry of Defence, or upon its own initiative. Unlike in Germany, a complainant must, except in compelling circumstances, have attempted to resolve the complaint by referring it to the chain of command or the military grievance system before having recourse to the military ombudsman (Callaghan & Kernic, 2003:39). The ombudsman may also conduct investigations into systemic issues, as, for example, in the framework of the Post Traumatic Stress Disorder Initiative (PTSD). The ombudsman publishes an annual report that is tabled in Parliament by the defence minister and debated by the relevant parliamentary committees,

as well as special reports on specific investigations, when this is judged to be in the public interest.

An independent military oversight mechanism has the advantage of being able to devote its attention exclusively to military matters, thus developing a specialized knowledge in the field. Its ability to issue public reports strengthens Parliament's oversight capacity and ensures greater transparency and accountability of the military. These are among the most significant examples of independent mechanisms for military oversight and have often been used as models by other countries, such as, for example, Ireland (Caforio, 2003:23). The **Irish ombudsman for the defence forces** is appointed by the president of Ireland on the recommendation of the government and reports to the minister of defence.

The ombudsman investigates complaints by members and former members of the defence forces. The ombudsman's task is to ensure that members and former members of the permanent defence forces and reserve defence forces have a rigorous, independent, and fair appeal for complaints they believe have not been adequately addressed by the internal military complaints process.

The ombudsman is impartial and is independent of the minister of defence, the Department of Defence, and the military authorities (Born, Fluri, & Johnsson, 2003:45). Like in Canada, members of the armed forces must make a complaint through internal structures before submitting a case to the ombudsman. Upon conclusion of an investigation, the ombudsman may make recommendations to the minister of defence, setting out measures that should be taken to rectify the situation. If the minister's response to the ombudsman's recommendations is unsatisfactory, then the ombudsman may issue a special report on the case.

## **BEST PRACTICES AND RECOMMENDATIONS**

For a Military Ombudsman (MO) office to realise its full potential, there are three key requirements: operational independence, political authority, and an adequate material/intellectual infrastructure.

Ideally, the office of the MO should:

- ✓ be legally defined in the constitution or an act of the legislature
- ✓ have its own investigative capacity, and be authorized to freely initiate investigations on questions affecting individuals or, as appropriate, of a systemic nature
- ✓ have access to the information necessary to conduct any investigation
- ✓ be able to operate in the utmost confidentiality
- ✓ be able to publish reports for the attention of parliament and the general public
- ✓ be empowered to formulate recommendations for consideration by the civil and military leadership, which require official and public responses
- ✓ be housed in its own premises, independently of the General Staff.

Of crucial importance is the staff of the office of the MO. Ideally this should be made up of civilians whose expertise should allow for the MO office to carry out research, formulate legal opinions and develop media policy independently of other departments of government. To avoid problems in accessing classified information, the staff should also be cleared to the highest security level.

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