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ATTENTION:

SOUTH AFRICAN PARLIAMENT

Portfolio Committee on Defence and Military Veterans

AMENDED SUBMISSIONS: MILITARY OMBUDSMAN B9-BILL

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This document should be read in conjunction with the Addendum to the Submissions on the Military Ombudsman Bill as hereto annexed.

MILITARY OMBUDSMAN BILL, 2011

1. Definitions (Complaints)

We believe that the current definition of “Complaint is not broad enough to cover all matters related to the administration, operation of the Defence Force and treatment of its military personnel. We therefore propose:

1.1 that the definition of complaint should be broadened to incorporate the following terms:

- (a)“Complaints should refer to a broad spectrum of administration of the Department of Defence and official, personal, and social problems that military service personnel are likely to encounter in the performance of their everyday military routine,
- (b)This complaint ranges, amongst others, in addition to violations of fundamental rights, to cases of maladministration within the affairs of the Department of Defence.
- (c)Abuse or unjustifiable exercise of power by anyone in a commanding position that has or is likely to have a direct or indirect negative impact on a member of the Military service,
- (d)Undue delay which is likely to have a direct or indirect negative impact on a member of the Military service
- (e)Complaints relating 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.
- (f) Discrimination in the working environment and harassment

2. Who must submit complaint?

2.1 The Bill seems to limit categories of persons who can submit complaints to the Ombudsman.

- (a) We therefore proposes that an interested third party member¹ is included since not always the aggrieved personnel/his or her immediate family

¹ Internally it must be restricted to colleagues; while externally it should not be limited to anyone provided it is proven that the third party concerned is acting in the interest of immediate family members (who could be illiterate or legally incapacitated in various ways).

member, for number of reasons, could be able to lodge the complaint himself/herself.

(b) Therefore anyone acting in the interest of the personnel or immediate family member must be allowed to lodge the complaint with the Ombudsman.

2.2 Although we take note that the Bill of Rights is applicable here, we are of the view that the Bill should categorically stipulate that any of the following persons may bring a complaint to the Ombudsman, directly and free of charge, where the matter complained about relates directly to the SANDF, in addition to the Third [interested] party:

- a) a member or former member;
- b) a member or former member of the Cadets;
- c) an employee or former employee;
- d) a person who applies to become a member;
- e) a member of the immediate family of a person referred to in paragraphs (a) to (d);
- f) a person who, pursuant to law or pursuant to an agreement between South Africa and the state in whose armed forces the person is serving, attached or seconded as an officer or non-commissioned member to the SANDF.
- g) Third party acting in the interest of the member as contemplated above in (a-f)

2.3 The above submissions are mainly based on the fact that it cannot be ignored that our Department of Defence [Military] is also facing daunting challenges in the manner it administers its affairs or operates and treat its military personnel who regards the existing complaints mechanisms as inadequate to provide any redress particularly to matters that are not related to their respective services benefits.

3. From the Memorandum on the Objects of the Bill:

3.1 It is evident that this Bill intends to dispose the Public Protector of its powers to investigate all complaints relating to the Military, due to the uniqueness of the Military environment, since the system seems insufficient and ineffective.

3.2 Unless it can be stated on the said Bill that the Office of the Public Protector shall continue to carry its investigations on all other matters not related to Military service benefits.

- 3.3 We hereby submit that the definition of complaints therefore needs to encompass broadly in addition to service benefits investigation the above terms on the definition so as to enable and empower the Military Ombudsman to have a wider scope of investigation similar to that the Public Protector had over the Department of Defence.
- 3.4 By so doing the Bill would be lawfully dispossessing the Public Protector of the said investigative powers but ensuring a transfer and continuation of the said powers to the Military Ombudsman exclusively designated for military complaints.

4. Object of Office

- 4.1 The objective of the Office is to investigate and ensure that complaints are resolved in a fair, economical, and expeditious manner.
- 4.1 (a) We are of the opinion that this is insufficient and therefore we propose that the following should be included: The Office of the Military Ombudsman should help to:
- i. Independently and impartially investigate and ensure a fair, economical and expeditious resolution of complaints,
 - ii. exercise democratic control over the defence sector,
 - iii. ensure respect for the rule of law in the defence sector,
 - iv. promote transparency and accountability within the defence structures,
 - v. focus attention on systematic problems in military practice requiring corrective action,
 - vi. enhance the efficiency, effectiveness and proper administration of the defence sector,
 - vii. Strengthen the confidence of both the public and the defence sector personnel in the administration of the Department of Defence.

5. Appointment of Military Ombudsman and Deputy Military Ombudsman

5.1 In terms of Clause 5 (3), the Ombudsman holds office for a non-renewable period of five years. We are of the view that a non-renewable term of 5 years is not in line with current international trends.

5.1 (a) We propose that if the Bill continues with the 5 years term it should be a renewable term.

OR

5.1(b) We propose the Ombudsman's terms of appointment be extended to 7 years which will be sufficient for it to be non-renewable.

5.2 Qualification and Experience of the Ombudsman and his/her Deputy

5.2 (a) The Bill does not adequately and expressly address whether or not the required qualification background of the said persons is essential. Therefore this leaves a lot to be asked whether persons from any [education/skills] background who proves to have had the said knowledge of or experience in military and public administration of 10 and 8 years also qualifies to be appointed.

5.2 (b) an implied reference to people with legal background has been made by making Ombudsman salaries comparable with that of salary to Military Judges who are persons trained in a specialised field [law], in addition to their experience of or knowledge of the military and public administration.

5.2 (c) Therefore we propose the Bill to clearly specify either

- (i) that it complies with the current Ombudsman trends by stating/narrowing the required people to be eligible as Military Ombudsman to those with legal background in addition to the required knowledge of and experience within the military industry and public administration.
- (ii) Examples of related ombudsman, established in South Africa, appointed persons with legal backgrounds are that of the Ombudsman for Short-Term Insurance, Pension Fund Adjudicator, Public Protector, The Banking Adjudicator and the University of South Africa Ombudsman

OR

5.2 (d) if the Bill decide to continue with the current format it must expressly state and broaden people that could be appointed as Military Ombudsman to make its wording clear who can be eligible for appointment in addition to their experience of or knowledge of the military and public administration service.

5.3 The Bill must state that this term shall be served in a full time capacity to the exclusion of any other duty or obligations arising out of any other employment or occupation or the holding of any other office.

6. Powers and functions of Ombudsman and Deputy Ombudsman

6.1 Proactive Investigations on a *mero motu* basis

- (a) Section 6 seems to deny the Military Ombudsman an important power of the necessity of conducting proactive investigations *mero motu* (on his own).
- (b) Any organisation/institution intending to establish a watch dog institution (ombudsman) needs to be mindful of the need not to make the impending Agency a toothless paper tiger.
- (c) Therefore in order for an Ombudsman to be independent, impartial and to perform its investigation powers fully, without any fear, favour or prejudice the Bill should enable him/her if on his/her opinion there seems to be systematic problems, within the Defence Sector, that may surface as a result of his/or her investigation or by other means on his/her own to initiate such investigation.

6.2 In addition to functions already suggested, we are of the opinion that the following should be considered:

“Subject to this Act, the Ombudsman may investigate any action that is the subject of a complaint made by a person affected by the action if, having carried out a preliminary examination of the matter, it appears to the Ombudsman that—

- (a) the action or the omission has or may have adversely affected the complainant,
- (b) the action or the omission was or may have been—
 - (i) taken or exercised without proper authority,
 - (ii) taken or exercised on irrelevant grounds,
 - (iii) the result of negligence or carelessness,
 - (iv) based on erroneous or incomplete information,
 - (v) unreasonable, notwithstanding consideration of the context of the military environment,
 - (vi) based on undesirable administrative practice, or
 - (vii) otherwise contrary to fair or sound administrative action,
 - (viii) the action or omission was not an order issued in the course of a military operation.”

7. Unreasonable/undue delay in exercising power

As far as unreasonableness is concerned, we are of the opinion that the Bill does not address this aspect.

7.1 We believe that the following should be included in the Act: Where:

- (a) under an enactment, a person has a power to do an act or function in the exercise of a discretion or otherwise;
 - (b) there is no enactment that prescribes a period within which the person is required to do or refuse to do the act or function;
 - (c) an enactment provides that application may be made to a prescribed tribunal for the review of decisions made in the exercise of that power; and
 - (d) a complaint has been made to the Ombudsman concerning a failure to do the act or function in the exercise of that power; the Ombudsman, after having investigated the complaint, may, if he or she is of the opinion that there has been unreasonable delay in deciding whether to do such an act or function, order the said person or unit in the Military to perform its duties timeously and within a specified time as determined by the Ombudsman.
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- (e) In instances whereby the Ombudsman grant to the complainant a certification or confirmation that, in his/her opinion, there has been unreasonable delay in deciding whether to do the act or function and, if the Ombudsman does so, the person required or permitted to exercise the power, shall, for the purpose of enabling application to be made under the enactment referred to in paragraph (c) to the prescribed tribunal/agency concerned, be deemed to have made, on the date on which the certificate is granted, a decision, in the exercise of that power, not to do the act or thing.

8. Units Deployed on International Operations

We are of the view that this aspect is not covered in the Bill.

8.1 We therefore propose the following: If the investigation of a matter by the Ombudsman involves a unit that has been deployed in international operations, the Ombudsman shall

- a) inform the contingent commander of the investigation prior to its commencement;
- b) keep the contingent commander or the commander's designate informed about the progress of the investigation;
- c) request from the contingent commander or the commander's designate that a liaison person be assigned to represent the contingent commander and provide advice to the Ombudsman on any impact the investigation may have on the operational mission;
- d) carry out the investigation while being sensitive to the need to minimize the impact on the operational effectiveness of the contingent; and

- e) where appropriate, seek the advice of the contingent commander or the commander's designate concerning the matter referred to in paragraph (d).
- 8.2 Visits by the Ombudsman to an operational theatre shall occur only where there is a serious and urgent need having regard to the necessity to protect the safety and security of the personnel deployed.
- 8.3 The determination of the serious and urgent need under subsection (2) shall be made by the SANDF by weighing the competing priorities, including the need to support the Ombudsman's investigation activities, the need to avoid impacting on operational priorities and the need to protect the safety of all personnel.
- 8.4 Investigations by the Ombudsman must not impede the operational mission of contingent commanders, but notwithstanding that aim, must be completed in a credible, responsive, independent, and professional manner.
- 8.5 If the matter of the Ombudsman being effectively able to carry out an investigation without impeding the operational mission of a contingent commander cannot be resolved to the satisfaction of the Ombudsman and the contingent commander, the contingent commander shall refer the matter to the SANDF for direction.
- 8.6 If the investigation of a matter by the Ombudsman involves a unit that has been deployed in domestic operations, subsections (1) to (5) also apply in respect of the investigation but a reference to a commander in any of those provisions shall be read as a reference to the joint force commander.

9. Limitations on Ombudsman's Jurisdiction

- 9.1 Ombudsman's investigation Limitations not clear enough to specify if labour and employment related complaints are also to be dealt with by the Ombudsman.
- 9.2 The Bill must clarify this aspect though caution should be exercised not to make the Ombudsman a labour and employment investigator
- 9.3 Also Section 7-must expressly include limitation of Ombudsman's jurisdiction on any decision/judgement of the military or civil court and any other decision/judgement of an applicable Alternative Dispute Resolution body where a matter has been dealt with by such a body.

10 Accountability of the Ombudsman

- 10.1 Who must the Ombudsman for Military Service be accountable to?

The President or the Minister or the National Assembly or there has to be an established Committee that the Office must be accountable to?

(a) In the Bill section 5 states it is the President who must appoint the Military Ombudsman if so why will then the Ombudsman be required to report to the Minister?

(b) We view this as already compromising the independence of the Office of the Ombudsman.

(c) The Bill need to state that the Ombudsman should be allowed to serve his/her report simultaneously and directly to the Minister and the Public Protector.

10.2 We hereby submit that the Ombudsman's reporting directly to the Minister is likely to have serious repercussions in particular to matters that are likely directly and indirectly relate to the Minister in the course of his/her duties.

10.3 Therefore we rather propose that:

- (a) Since appointed by the President then the President must establish/direct an Independent Committee which can be established by the President to serve that purpose as an entity that the Office of the Ombudsman must be accountable to
- (b) Or the President direct that the existing Parliamentary Portfolio Committee on Defence and Military Veterans that this office must directly report to.
- (c) In turn the Ombudsman must directly and personally present his/her report to the Parliament committee concerned.

11. Security Clearance

11.1 We view the uniqueness of the Department of Defence as a serious matter which necessitate anyone employed within it to be subjected to the security clearance and therefore we hereby propose that not only staff must be subjected, in terms of section 9, to the said security clearance.

11.2 The Ombudsman and his/her deputy must also be subjected to the same security or higher security clearance.