

**SUBMISSION BY MS M. MPOFU: SECRETARY FOR DEFENCE: DIRECTOR-GENERAL: DEPARTMENT OF DEFENCE**

**August 2011**

**Att.: Ms M. Bailey**

**DEPARTMENTAL RESPONSES TO THE PCD & MV PUBLIC HEARINGS ON MILITARY OMBUDSMAN BILL HELD ON 17 AUGUST 2011**

1. The above matter has reference.

2. The public hearings on the Military Ombudsman Bill took place on 17 August 2011 and the following persons/Institutions were shortlisted to testify before the Portfolio Committee on Defence and Military Veterans:

- a. Prof M. Montesh & Adv B.M. Mmusinyane: University of South Africa;
- b. South African Security Forces Union (SASFU): Cdr B. Mvovo (President); and
- c. Lebogang Monyatsi: Individual Presentation.

3. Generally, it is not without significance to note that all the persons/Institutions that testified before the PCD & MV, in principle, support the Bill and the establishment of the envisaged Office of the Military Ombudsman within the South African National Defence Force (SANDF). Each submission merely sought to strengthen the Bill in respect of independence, jurisdiction, powers etc.

The DOD has considered the submissions made during the public hearings and provides its responses thereto hereunder. In the interest of readability, the layout of the responses has been designed in such a way that the issue/proposal raised by each member of the public during the hearings is firstly summarised and then followed by a departmental response thereto. It is, of course, the understanding that the DOD will fully explain its responses during the 24 August 2011 when it appears before the PCD & MV. We now propose to deal with the issues under separate headings:

**a. PROF M. MONTESH & ADV B.M. MMUSINYANE: UNIVERSITY OF SOUTH AFRICA**

**Definition:**

Complaint must include "a person acting on behalf of the member or former member of the SANDF." Also consider including the "beneficiary (ies) of the member or former member of the SANDF.

**Departmental response:**

The proposal is reasonable and worthy of a consideration. It is common cause that some members, for a variety of reasons (resources or knowledge), may not be able to effectively pursue their grievances through the prescribed procedures. Third parties e.g. civil society may have a significant role to play in order to ensure that members are able to pursue and enforce their rights. This, however, comes with its difficulties as it introduces third parties in matters that may be considered to be purely military in nature. This may present new challenges and may potentially blur the distinction between the SANDF and ordinary public administration.

**Term of service:**

The term must be renewable or if non-renewable is to be retained, the term must be extended to seven (7) years.

**Departmental response:**

The proposed term of five years is based on the term of government. The DOD is amenable to consider increasing it to seven years if the PCD & MV feels strongly about the matter.

**Qualifications of Ombudsman:**

In addition to knowledge of public administration and military, the qualification must include qualifications along the lines of Public Protector, Financial Ombud etc (e.g. legal qualification).

**Departmental response:**

The DOD is of the opinion that, given the uniqueness of the SANDF, an incumbent of this office should be well versed in the ways of the military in order to effectively discharge his/her functions. The qualification as currently phrased was intended to accord with this understanding. The need for legal expertise may be catered for by the appointment of legally qualified personnel within the office of the Ombudsman. It is our view that to prescribe legal qualifications as a requirement will be too restrictive. In any event the current formulation, in our view does not preclude legally qualified persons from being appointed into the position.

**Mero motu/discretionary investigation:**

The Ombudsman should be able to initiate investigations at its own instance even in circumstances where there is no complaint by member or member of the public.

**Departmental response:**

The DOD has no objection to this submission. We have compared this proposal with other laws regulating similar offices and can confirm that they provide for discretionary investigations of the nature proposed.

**Operational Deployments:**

Procedure must be prescribed in case of an investigation in or during an operational deployment.

**Departmental response:**

Although the proposal has a merit, it is our respectful submission that a matter of this nature should be left to the relevant organisations to regulate by means of service level agreements or other similar instruments. Given the ever changing organisational protocols, this matter is ill-suited for legislating.

**Independence of Ombudsman (reporting):**

Reporting must be to the President, not to the Minister. This matter relates to the issue of independence and impartiality. Reports of the Ombudsman must be submitted to the Minister and directly to the PP, not through the Minister.

**Departmental response:**

The Military Ombudsman is intended to strengthen the hand of the Minister in exercising political oversight over the SANDF hence the current formulation. It therefore makes sense that the Ombudsman reports directly to the Minister so as to enable her to take remedial or corrective measures where appropriate..

**Security Clearance:**

The requirement for security clearance in the Bill seems to relate to only members of staff but not the Ombudsman and his/her Deputy Ombudsman. It is proposed that it should also apply to the Ombudsman and his/her Deputy.

**Departmental response:**

We agree with the submission.

## **b. SOUTH AFRICAN SECURITY FORCES UNION (SASFU): CDR B. MVOVO (PRESIDENT)**

### **Public Interest Groups:**

It is proposed that the Bill should allow "Unions and Associations" to lodge grievances/complaints on behalf of their members for investigation.

### **Departmental response:**

Although the proposal on the face of it is innocuous it has the potential to create space for Unions and related associations to crowd the office of the Military Ombudsman with labour related complaints. This has the potential to undermine the original intent and divert the resources of the Ombudsman. Care should be taken not to create space for organisations that do not have the necessary credentials to sit in the relevant structures of the DOD that deal with labour issues to sneak those issues in the agenda of the Ombudsman.

### **Name of the Bill:**

A view was expressed that the name "Ombudsman" may be inappropriate at this stage in our democracy as it reflects gender insensitivities that are not consistent with the new ethos.

### **Departmental response:**

The essence of this proposal is understandable in as far as the name creates an impression that women are excluded. However, it is common cause that "ombudsman" is a Swedish word which means "an official appointed by government to investigate individual's complaints against public authorities" (Concise Oxford Dictionary). As such the name has no gender connotations. Notwithstanding this, it is our view that this proposal can be accommodated by amending the name to either Military Ombud or Ombudsperson which are gender neutral terms. This is in line with current trends domestically e.g. Financial Ombud, Community Schemes Ombud etc.

## **c. MS LEBOGANG MONYATSI: INDIVIDUAL PRESENTATION**

### **Territorial jurisdiction of the Ombudsman:**

The Bill is silent on the matter. Can the MO entertain a complaint relating to a deployment are external to the Republic?

### **Departmental response:**

The jurisdictional fact for the exercise of powers by the MO is the SANDF. Simply put the exercise of powers by the MO is not limited by territory, but follows the SANDF.

### **Complaint:**

"by a member of the public regarding the conduct of a member": This is too wide as it may include complaints by a wife against the husband who works in the SANDF.

### **Departmental response:**

The Department agrees with the submission and proposes an insertion of the word "official" immediately before the word "conduct".

### **Discretionary investigation:**

No provision for these in the Bill.

### **Departmental response:**

This matter has already been dealt with above.

**Limitation of Jurisdiction:**

MO may not entertain a complaint that has been referred to another dispute resolution mechanism. The MO should have an option to take the complaint where it is of the view that delays in resolving the dispute are prejudicial to the member.

**Departmental response:**

The provision relating to limitation of jurisdiction is intended firstly to protect internal procedures for the resolution of grievances and secondly to afford the command of the SANDF an opportunity to resolve the grievances on its own. This is necessary in order to maintain confidence of the subordinates in the ability of the superiors to resolve the grievance.

The DOD will be available to fully engage in further deliberations with the PCD & MV on the content of its responses.

We trust that you will find this to be in order.

**(MS M. MPOFU)**

**SECRETARY FOR DEFENCE: DIRECTOR-GENERAL**