

REPUBLIC OF SOUTH AFRICA

MILITARY OMBUDSMAN BILL

*(As introduced in the National Assembly as a section 75 Bill. Explanatory summary
of Bill published in Government Gazette No. of)
(The English text is the official text of the Bill)*

(Minister of Defence and Military Veterans)

[B—2010]

Draft No. 1

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DA Proposals for Amendments to the Military Ombudsman Bill [B-2010]

BILL

To provide for the establishment of an independent Military Ombudsman; [to provide for the establishment of the Office of the Military Ombudsman]; and to provide for the appointment and functions of a Military Ombudsman; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

DEFINITIONS

1. In this Act, unless the context indicates otherwise—

“auxillary service” has the same meaning ascribed to it in section 1 of the Defence Act (Act No. 42 of 2002);

["complaint” means a grievance lodged in writing by-

- (a) a member regarding his or her service benefits;**
- (b) a former member regarding his or her service benefits;**
- (c) a member of the public regarding the conduct of a member of the Defence Force.]**

“complaint” means a grievance lodged in writing by—

- (a) a member regarding his or her conditions of service;
- (b) a former member regarding his or her conditions of service;
- (c) an employee regarding his or her employment practice;
- (d) a former employee regarding his or her employment practice;
- (e) a member of an auxillary service regarding his or her conditions of service;
- (f) a former member of an auxillary service regarding his or her conditions of service;
- (g) an immediate family member of persons referred to in (a), (b), (c), (d), (e) above; or
- (h) a member of the public regarding the conduct of a member or the Defence Force;

"conditions of service" bears the same meaning ascribed to it in section 1 of the Defence Act (Act No 42 of 2002);

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"Defence Force" means the South African National Defence Force contemplated in section 11 of the Defence Act, 2002 (Act No. 42 of 2002);

"Department" means the Department of Defence;

"employee" bears the same meaning ascribed to it in section 1 of the Defence Act (Act No 42 of 2002);

"employment practice" bears the meaning ascribed to it in section 1 of the Public Service Act (Act No. 42 of 1994);

"member" bears the same meaning ascribed to it in section 1 of the Defence Act;

"Ombudsman" means—

- (a) the Military Ombudsman appointed in terms of section 5; and

(b) may for the purposes of sections 5(2), 6, 7, 8 and 14, include a Deputy Military Ombudsman, also known as the Deputy Ombudsman;

"Minister" means the Minister responsible for Defence;

"Office of the Military Ombudsman" means the Office of the Military Ombudsman established in terms of section 2;

"prescribed" means prescribed by regulation under section 15.

Objects of the Act

2. The objects of this Act are to –

(a) provide for the establishment of an independent Military Ombudsman; and

(b) ensure that all matters are investigated in an impartial, procedurally fair and expeditious manner.

Office of Military Ombudsman

[2] **3.** (1) The Office of the Military Ombudsman is hereby established.

(2) The seat of the Office of the Military Ombudsman must be determined by the Ombudsman in consultation with the Minister.

[Object of the Office

3. The objective of the Office is to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner.]

Mandate of the Office of the Military Ombudsman

4. (1) The Military Ombudsman is competent to investigate, on his or her own initiative, or on receipt of a complaint, any alleged:

(a) maladministration in the Defence Force;

(b) abuse of power by the member of the Defence Force;

(c) unfair, improper or dishonest conduct, act or omission, which results in unlawful or improper prejudice to any member of the Defence Force;

(d) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage by a member of the Defence Force.

(2) The Military Ombudsman must investigate: -

(a) complaints lodged by a member or a former member regarding his or her service benefits;

(b) complaints lodged by an employee or former employee regarding his or her employment practice;

(c) complaints lodged by an auxiliary service member or a former auxiliary service member regarding his or her conditions of service;

(d) complaints lodged by immediate family members of persons referred in (a), (b), (c) above;

(e) complaints lodged by a member of the public regarding the conduct of a member of the Defence Force;

(f) any matter referred to the Ombudsman by the President, the Minister or a Member of Parliament.

(3) The Military Ombudsman may, after advising the President, the Minister and the Joint Standing Committee on Defence in writing, investigate any other matter relating to the Defence Force.

(4) (1) The Military Ombudsman may not investigate a complaint relating to—

(a) the manner in which a military judge performs his or her functions in his or her capacity as a judge; or

(b) a matter that is pending before a military or civil court;

(c) a matter on which a decision has been taken by a military or civil court; or

(d) a matter that has been referred for resolution through any other dispute resolution mechanisms available or where the matter has already been determined by such alternative dispute resolution mechanism.

(2) The Office of the Military Ombudsman may refuse to investigate a complaint if—

(a) the investigation may undermine channels of command, or constitute insubordination in the Defence Force;

(b) the complaint is frivolous or vexatious;

(c) the complainant has failed to lodge a complaint within a reasonable time; or

(d) a member has not first used the mechanisms available under the Individual Grievance Regulations, 2010, unless the complaint relates to problems inherent in the system which bring about an adverse result to the complainant.

[Complaints

4. (1) A complaint must be lodged in writing with the Office, in the prescribed manner.

(2) On receipt of a complaint the Ombud must register the complaint as may be prescribed.]

Appointment of Military Ombudsman and Deputy Military Ombudsman

5. (1) Due regard having been given to—

(a) participation by the public in the nomination process;

(b) transparency and openness; and

(c) the publication of a shortlist of candidates for appointment.

(2) The Joint Standing Committee on Defence must table a list of five persons for approval by the National Assembly.

(3) The National Assembly must by a resolution with a support of a majority vote of its members upon approval submit the list of five persons to the President for appointment.

(4) The Ombudsman must:

(a) possess adequate knowledge of the Constitution; and

(b) have a legal qualification and practical legal experience of at least 10 years.

(4) The President must, in consultation with the Ombudsman, appoint a Deputy Military Ombudsman who—

- (a) possesses adequate knowledge of the Constitution; and
- (b) has knowledge or experience in military and public administration, that was gained over a period of eight years.

(5) A person may not be appointed as the Military Ombudsman or Deputy Military Ombudsman if he or she -

- (a) is not a citizen of the Republic;
- (b) is appointed by, or is in the service of, the state and receives remuneration for that appointment or service;
- (c) is a member or a former member of the Defence Force;
- (d) is a member of Parliament, any provincial legislature or any municipal council;
- (e) is an office-bearer or employee of any party, movement or organisation of a party-political nature;
- (f) is an unrehabilitated insolvent;
- (g) has been declared to be of unsound mind by a court of the Republic;
- (h) has been convicted of an offence in the Republic, other than an offence committed prior to 10 May 1994 associated with political objectives, and was sentenced to imprisonment without an option of a fine.
- (i) has been removed from an office of trust on account of misconduct involving theft or fraud.

(6) (3) The Ombudsman holds office for a non-renewable period of five years.

(7) (4) The remuneration and other terms and conditions of service of the Ombudsman and Deputy Ombudsman must be determined by the President with the concurrence of the Minister of Finance: Provided that—

(a) the salary of the Ombudsman must not be less than the salary of a judge of a High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989); **[and]**

(b) the salary of a Deputy Ombudsman must not be less than 85 per cent of the salary of the Ombudsman; and

(c) such remuneration may not be reduced and such terms and conditions may not be adversely altered during the term of office of the Ombudsman and Deputy Ombudsman;

(5) The Ombudsman and Deputy Ombudsman may at any time resign by submitting a written notice to the President at least two months prior to the intended date of vacation of office.

[(6) The President may remove the Ombudsman or a Deputy Ombudsman from office, on the grounds of misconduct, incapacity or incompetence, after affording the person concerned a reasonable opportunity to be heard, and subject to applicable legislation.]

(6) The Ombudsman or a Deputy Ombudsman may be removed from office on -

(a) the grounds of misconduct, incapacity or incompetence;

(b) a finding to that effect by the Joint Standing Committee on Defence ; and

(c) the adoption by the Assembly of a resolution calling for the removal of the Ombudsman or Deputy Ombudsman.

(2) A resolution of the National Assembly concerning the removal of the Ombudsman or a Deputy Ombudsman must be adopted with a supporting vote of a majority of the members of the Assembly.

Powers and functions of Ombudsman and Deputy Ombudsman

6. (1) The Ombudsman must investigate complaints lodged with the Office in terms of section 4 in the following manner:

(a) the complaint must be lodged in writing with the Office in the prescribed manner;

(b) on receipt of the complaint the Ombud must register the complaint as may be prescribed.

(2) The Ombudsman must investigate a complaint fairly and expeditiously without fear, favour or prejudice.

(3) The Ombudsman may not investigate a complaint unless the Ombudsman—

(a) has in writing informed every other interested party to the complaint after the receipt thereof;

(b) is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto; and

(c) has provided all interested parties the opportunity to submit a response to the complaint.

(4) For the purpose of subsection (1), the Ombudsman—

- (a) may summon any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or produce any document that has bearing on the matter before him or her;
- (b) may resolve any dispute by means of mediation, conciliation or negotiations or in any other expedient way; and
- (c) must promote the observance of the fundamental rights of the members of the Defence Force.

(5) After investigating a complaint, the Ombudsman must—

- (a) confirm or dismiss the complaint, or issue an alternative resolution;
- (b) recommend an alternative resolution to the Minister; or
- (c) refer the complainant to the appropriate public institution for finalisation, if the matter falls outside his or her jurisdiction.

(6) If the Ombudsman confirms the complaint, the Ombudsman must order the Department to comply with the determination or his or her alternative resolution within the period determined by the Ombudsman.

(7) The Ombudsman must immediately after finalisation of the investigation and in writing, advise the complainant and any other affected person of the outcome of the investigation.

(8) The Ombudsman may if he or she believes the facts disclose the commission of an offence by any person, bring the matter to the notice to the South African Police or National Prosecuting Authority.

(9) The Ombudsman must perform any other function allocated to him or her under this Act.

[(9) The Minister may assign to the Ombudsman any other additional functions, which are not inconsistent with this Act, as the Minister may determine.]

(10) The Deputy Ombudsman must perform any functions assigned to him or her by the Ombudsman.

(11) The Deputy Ombudsman must perform the functions of the Ombudsman if the Ombudsman is for any reason unable to perform his or her functions.

[Limitation on jurisdiction

7. (1) The Ombudsman may not investigate a complaint relating to—

- (a) the manner in which a military judge performs his or her functions in his or her capacity as a judge; or**
- (b) a matter that is pending before a military or civil court;**
- (c) a matter on which a decision has been taken by a military or civil court;**

or

- (d) a matter that has been referred for resolution through any other dispute resolution mechanisms available or where the matter has already been determined by such alternative dispute resolution mechanism.**

(2) The Ombudsman may refuse to investigate a complaint if—

- (a) the investigation may undermine channels of command, or constitute insubordination in the Defence Force;**
- (b) the complaint is frivolous or vexatious;**

- (c) the complainant has failed to lodge a complaint within a reasonable time; or
- (d) a member has not first used the mechanisms available under the Individual Grievance Regulations, 2010, unless the complaint relates to problems inherent in the system which bring about an adverse result to the complainant.]

Independence and impartiality

8. (1) The Ombudsman and staff members must serve independently and impartially and must perform his or her functions in good faith and without fear, favour, bias or prejudice, subject to the Constitution and the law.

(2) The Minister, Secretary for Defence and Chief of the Defence Force must afford the Ombudsman such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Ombudsman.

(3) No person may interfere with the functioning of the Ombudsman.

(4) Members and employees of the Department must co-operate with the Ombudsman and Deputy Ombudsman in the performance of their functions, which includes providing him or her [reasonable] access to facilities, information or documents.

(5) No information may be withheld from the Ombudsman on any grounds;

[(5)] The Office must preserve confidentiality in respect of any information acquired in terms of subsection (4).]

(6) The Office must operate in an open and transparent manner but may not make public information which:

(a) would cause demonstrable harm to a person or persons; or

(b) cause demonstrable harm to the national security of the Republic.

Staff

9. (1) The Ombudsman must **[after consultation with the Minister]**, appoint staff to assist him or her in the performance of his or her functions in terms of this Act.

(2) The remuneration and other terms and conditions of service of the staff must be determined by the Ombudsman, with the concurrence of **[the Minister and]** the Minister of Finance.

(3) The appointment of the Ombudsman or the staff contemplated in subsection (1) may not be confirmed unless they have been issued with the appropriate **[or provisional grade of]** security clearance by the **[Intelligence Division of the Defence Force contemplated in section 33 of the Defence Act]** State Security Agency contemplated in Schedule 1 to the Public Service Act, 1994 (Act No. 103 of 1994).

Finances

10. (1) Expenditure in connection with the administration of the Office must be funded from monies appropriated by Parliament for that purpose, as part of the budget vote of the Department.

(2) The Ombudsman must, subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999)—

- (a) account for all monies received or paid by the Office; and
- (b) cause the required accounting and other records to be kept.

Reporting

11. (1) The Ombudsman must, within 30 days after the end of each financial year, table [submit to the Minister] an annual report on the activities of the Office during the previous financial year in Parliament.

(2) The Ombudsman must report to the President, the Minister or the Joint Standing Committee on Defence on the activities of the Office as and when requested to do so [by the Minister].

[(3) The Minister must provide the Public Protector with the report contemplated in subsection (1) and must also table such report in Parliament.]

(2) The Ombudsman may publish reports concerning any investigation or any other matter, within the mandate of the Office, if he or she considers it in the public interest to do so.

Disestablishment, judicial management and liquidation

12. The Office may not be disestablished, placed under judicial management or liquidation except by an Act of Parliament.

Review

13. Any person aggrieved by a decision of the Ombudsman may apply to the High Court for review against that decision [**within 180 days of the decision of the Ombud**].

Offences and penalties

14. (1) Any person who intentionally hinders, [**or**] obstructs, or interferes with the Ombudsman or a member of his or her staff in the performance of his or her functions commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding 12 months, or to both such fine and such imprisonment.

(2) Any person who intentionally contravenes section 8(5) is guilty of an offence and liable on conviction to a fine or imprisonment to a period not exceeding 12 months or to both such fine and imprisonment.

(3) Any person who wilfully or in a grossly negligent manner fails to comply with section 6 (6) commits an offence and is liable to a fine, or to imprisonment for a period not exceeding two years.

Regulations

15. The Minister may, after consultation with the Ombudsman, make regulations regarding—

- (a) the procedure for lodging a complaint;
- (b) the method and conduct of investigation;
- (c) the format of a written complaint;
- (d) the registration of a complaint; and
- (e) generally, any matter that may or must be prescribed in terms of this Act.

Short title

16. This Act is called the Military Ombudsman Bill, 2011, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.