



25 July 2011

ANALYSIS OF THE MILITARY OMBUDSMAN BILL [B9 – 2011]

1. INTRODUCTION

The Military Ombudsman Bill [B9 – 2011] was tabled in Parliament on 10 June 2011.¹ The Memorandum states that the Bill ‘*seeks to establish the Office of the Military Ombudsman which must attend to complaints emanating from members of the Defence Force and members of the public and which must ensure speedy resolution of complaints within and against the Defence Force*’.

The purpose of this brief is to highlight selected issues that the Portfolio Committee on Defence and Military Veterans may want to engage with further.²

2. ANALYSIS OF THE BILL

2.1 DEFINITIONS

“Complaint”³

Comment

- Is there a specific reason why the term “service benefits” is used as opposed to “service conditions?” If yes, this needs to be explained to avoid confusion.
- The definition does not make provision for the lodging of a complaint by the families of members as it only refers to “a member” and “a member of the public.”
- The Military Ombudsman should have the power to make recommendations arising from systemic investigations. This would allow for reform of poorly functioning systems. For instance the Military Ombudsman should have the power to investigate the adequacy of internal procedures on complaint handling, administrative investigation and administrative decision making.⁴

“Department”

Comment

- This should rather be defined as the Department of Defence and Military Veterans.

“Ombudsman”

Comment

- There is a difference in the functions of an Ombudsman and a Military Ombudsman and therefore the latter should be used to avoid confusion.



2.2 OBJECT OF OFFICE

Clause 3 refers to the objective of the Office being to investigate and ensure that complaints are resolved in a fair, economical and expeditious manner.

Comment

- It is important to emphasise that the objective of the Office is to function in an independent and impartial manner and this should manifest clearly in the object of the office clause. Clause 8 is dedicated to independence and impartiality, indicating its centrality.

The Office of the Public Protector also states that independence and impartiality are two of its important values.⁵

2.3 COMPLAINTS

Clause 4 (1) refers to complaints and states that a complaint should be lodged in writing with the Office in the prescribed manner.

Clause 4 (2) provides that on receipt of a complaint the **Ombud** (for the sake of consistency this should be Military Ombudsman) must register the complaint as may be prescribed.

Comment

- It should be made clear that the detail that needs to be in a complaint will be captured in Regulations, (these Regulations should be submitted to Parliament). The following may act as a guideline for the Military Ombudsman regarding complaints:

“The Military 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 Military Ombudsman that—

(a) the action has or may have adversely affected the complainant,

(b) the action was or may have been—

(i) taken without proper authority,

(ii) taken on irrelevant grounds,

(iii) the result of negligence or carelessness,

(iv) based on erroneous or incomplete information,

(v) improperly discriminatory,

(vi) unreasonable, notwithstanding consideration of the context of the military environment,

(vii) based on undesirable administrative practice, or

(viii) otherwise contrary to fair or sound administration, and

(c) the action was not an order issued in the course of a military operation.”⁶



2.4 APPOINTMENT OF MILITARY OMBUDSMAN AND DEPUTY MILITARY OMBUDSMAN

Clause 5 refers to the fact that the President must appoint a Military Ombudsman. It also refers to the term of office and removal/resignation from office of the ombudsman/deputy ombudsman.

Comment

- Since the clause also refers to the removal of the MO, the title should be adjusted to read: *Appointment [and Removal from office] of Military Ombudsman and Deputy Military Ombudsman*
- One of the Best Practices regarding the appointment of an Ombudsman, is that the holder is elected by Parliament or appointed by the head of state or government, whether in or after consultation with Parliament. Parliament's role should thus be made explicit in the appointment of the Military Ombudsman.
- It is thus suggested that the MO should be appointed by the President on recommendation of the National Assembly.

How does one measure 'adequate knowledge' of the Constitution? To address this inadequacy, the following is proposed regarding the candidate:

"He/she must be an appropriately qualified, fit and proper person who has specialised knowledge and experience of the military and administration of justice and who is:

- *a judge of the High Court: or*
- *is admitted as an advocate or attorney and has for ten years practiced as such: or*
- *is qualified to be an attorney or advocate and for ten years has lectured in law."*

The following criteria may also be considered regarding the candidate:

"A person may not be appointed as Military Ombudsman if he or she –

- (i) *is not a citizen of the Republic;*
- (ii) *is a member of Parliament, any provincial legislature or any municipal council;*
- (iii) *is an unrehabilitated insolvent;*
- (iv) *has been declared by a court to be mentally ill or unfit; or*
- (v) *has at any time been convicted, whether in the Republic or elsewhere, of any offence involving dishonesty."*

- It is also important to stress that neither the Military Ombudsman nor the deputy should 'perform or undertake to perform any other remunerative work during the period in which he or she holds office.'⁷
- It is not clear why the Military Ombudsman will not be eligible for re-appointment for another five year period.



2.5 POWERS AND FUNCTIONS OF OMBUDSMAN

Clause 6 (4)(a) states that the Military Ombudsman 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 a bearing on the matter before him or her.

Comment

- It may be necessary to include the term, in the prescribed manner as there needs to be some guidance, at least in the Regulations on how this should be done.

Clause 6 (5) states that 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.

Comment

- Some consideration should be given to including the following: “*The Military Ombudsman may want to confirm the complaint and refer the matter to another public institution such as the National Prosecuting Authority (NPA) or the SAPS for prosecution.*”

Clause 6 (9) reads that “The Minister may assign to the Ombudsman any other additional functions which are not inconsistent with this Act, as the Minister may determine.”

Comment

- The function of the Military Ombudsman should be clear from the legislation and this sub clause raise the following questions:
 - Will the Military Ombudsman have the capacity to deal with ‘*additional functions*’?
 - Who determines inconsistency?
 - Does this ‘assignment’ of additional functions not risk compromising the independence of the office?

To address these and related concerns, the following provision may be added: “...*the Minister may, in consultation with the Military Ombudsman, assign...*”

2.6 LIMITATION ON JURISDICTION

Clause 7 states that 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.

Comment

- If the Military Ombudsman does refuse to investigate for any of the above reasons then he/she must inform the complainant in writing of this refusal and of the reasons thereof.
- Consideration should be given to making it clearer in the legislation that as a first resort the complainant must exhaust the internal mechanisms available under the Individual Grievance Regulations, 2010 before resorting to the Military Ombudsman's office. The Office of the Military Ombudsman should be utilised as an office of last instance.⁸

2.7 INDEPENDENCE AND IMPARTIALITY

Clause 8 states that: (1) The Ombudsman and staff members must serve independently and impartially and must perform their functions in good faith and without fear, favour, bias or prejudice, subject to the Constitution and the law. (3) No person may interfere with the functioning of the Ombudsman. (4) Members and employees of the Department must cooperate 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) The Office must preserve confidentiality in respect of any information acquired.

Comment

- Independence is key to the effective functioning of the Military Ombudsman therefore this sub-clause is an important section and it should be separated from the rest of the clause and should come earlier in the Bill. The suggestion is to place it after/or within Clause 3 (Objects).
- Sub-clauses 8(3) and (4) should be taken out of this clause and placed under a separate heading.
- Sub-clause 8(3) could be extended to include the following: “*no person may interfere, hinder or obstruct the functioning of the Military Ombudsman office.*”
- Additionally some consideration should be given to including some form of disciplinary measures against persons who not only hinder and obstruct but **interfere or fail to co-operate** with the Military Ombudsman and/or his or her staff in respect of investigations and determinations.
- Sub-clause 8(5) has nothing to do with independence and/or impartiality and should be a separate stand-alone clause for instance:



“Duty of Confidentiality⁹

Any member of the Office of the Military Ombudsman must treat as confidential the personal information which comes to his or her knowledge, except if the communication of such information is required by law.”

2.8 STAFF

Clause 9 deals with staff and states that (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.

Comment

- This is quite an onerous obligation and consideration should be given to some provision such as the following:

“The Military Ombudsman must establish its own administration to assist it in the performance of its functions and to this end must appoint—

- (a) a suitably qualified and experienced person, as chief executive officer of the Military Ombudsman’s office for the purpose of assisting the Military Ombudsman, subject to the Ombudsman’s direction and supervision, in the performance of all financial and administrative functions in terms of this Act.*
- (b) such other members of staff to assist with all such work as may arise through the performance of its functions.”*

2.9 REPORTING

Clause 11 provides that: (1) The Ombudsman must, within 30 days after the end of each financial year submit to the Minister an Annual Report on the activities of the Office during the previous financial year.(2) The Ombudsman must report to the Minister 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 table the report in Parliament.

Comment

- The Military Ombudsman should be reporting to Parliament.
- If sub clause 11(2) is retained there is a danger that the Minister may end up trying to micro-manage this office.



- It is not clear why a report should also be provided to the Public Protector as the Office of the Military Ombudsman is to report to the Minister and Parliament.

2.10 REGULATIONS

Clause 15 refers to regulations which are to be drafted by the Minister after consultation with the ombudsman.

Comment

- Regulations constitute delegated legislation and it is suggested that these regulations **must** be tabled/submitted to Parliament.

3. GENERAL COMMENTS

3.1 MEMORANDUM

3.1.1 Consultation

It is important to list the various stakeholders that have been consulted especially since reference is only made to internal stakeholders. The same applies for the Communication Implications listed in paragraph 5.

3.1.2 Financial Implications

The PFMA states that costing should accompany the Bill. Stating that costs will be borne by the Department, is therefore insufficient.

Comment

For instance, has the Military Ombudsman office been costed and how many staff are envisaged in the office structure? The same comment applies to the paragraph titled **Organisation and Personnel implications**.

3.1.3 Vulnerable Groups

The Bill will enhance the working relations and morale of the members by attending to their complaints speedily. The Bill further seeks to allow members of the public to come forward with complaints against members.

Comment

This is a superfluous comment as it does not deal with Vulnerable groups (usually defined as women, children and people with disabilities).



3.2 CONFLICT OF INTEREST AND PROTECTION CLAUSES

Some consideration should be given to the inclusion of a “*conflict of interest*” and a “*protection clause*.” The following can possibly serve as a guideline:

“Conflict of interest

If any member of the Military Ombudsman office, has a direct or indirect pecuniary or other material interest in any matter which could conflict with the proper performance of his or her duties in terms of this Act, he or she must disclose that interest, as prescribed, as soon as practicable after the relevant facts came to his or her knowledge.”

“Protection clause

Any person acting on behalf or under the direction of the Military Ombudsman is not liable for anything done in good faith in the exercise or performance of any power, duty or function in terms of this Act.”

3.3 THE MILITARY INVESTIGATOR IN THE OFFICE OF THE PUBLIC PROTECTOR

The Military investigator in the Office of the Public Protector (OPP) was first instituted in 1995, and was erroneously referred to as the Military Ombudsman, while in fact he was a senior investigator who was seconded from the Department of Justice due to his military experience.¹⁰ After he returned to the Department, the task was handed to another senior investigator with other responsibilities. The current “military investigator” is Advocate Erika Cilliers who is also a senior investigator with military experience.

Except for the first appointment, the military investigator was/is a senior investigator with other responsibilities, who could not do justice to this task due to other responsibilities.¹¹ In fact, the current “military investigator” stated that there is currently no person in the position and she handles these cases on an *ad hoc* basis.

The majority of complaints currently handled by Advocate Cilliers are labour relations which tend to deal with complaints of pensions, unfair dismissals, promotions and allowances. Many of these were referred back to the Department’s Labour Relations Section, while some were older than two years, and others did not follow the rule that the Office of the Public Protector is an office of last instance.

Comment

It should be considered whether the Office of the Military Ombudsman (OMO) will have two elements that the military investigator in the Office of the Public Protector had namely that:

- The OMO will be an office of last instance, and as indicated earlier, internal avenues should be exploited before a complaint is made to the OMO.



- The two-year rule applies.¹² In practice it means that any complaint should be addressed to the OMO within and up to two years of its occurrence.

¹ As tabled in Parliament on Friday, 10 June [ATC No 72 of 2011].

² The Military Ombudsman Bill [B9-2011] Clause 3.

³ The assistance and support of Gulian Nesbit in analysing the Bill is herewith acknowledged and duly appreciated.

⁴ As the Irish Ombudsman for the Defence Forces, points out: An Ombudsman often identifies administrative procedures and practices that are out-of-date, badly administered or in need of reform. Systemic issues which require attention also come to light. One of the far-reaching benefits of this administrative oversight is that a decision in one case, not only vindicates the Complainant's case, but ensures that the underlying causes are addressed. <http://icoaf.org/pubs/Comparative%20Perspective%20of%20OIAF.pdf>

⁵ See for instance the Values of the Office of the Public Protector at http://www.pprotect.org/about_us/Vision_mission.asp

⁶ See for instance the Irish Ombudsman Act 1980 at <http://www.irishstatutebook.ie/1980/en/act/pub/0026/sec0004.html>

⁷ See for instance the PSC report at <http://www.info.gov.za/view/DownloadFileAction?id=72540>

⁸ Telephonic interview with Adv. Erika Cilliers from the Office of Public Protector on 26 July 2011.

⁹ Rationale for the duty: The maintenance of full and frank disclosure between lawyers and their clients is the main justification for the duty of confidentiality. It allows clients to freely discuss intimate details without fear that such information could be subsequently disclosed to the general public. In turn, public confidence in lawyers and the legal system is maintained and promoted. See http://en.wikipedia.org/wiki/Duty_of_confidentiality

¹⁰ According to Adv. Cilliers he was Mr David Scroobie. Also see Military Ombudsman : Briefing by PMG dated 9 December 2004, Joint Standing Committee on Defence.

¹¹ Telephonic interview with Adv. Erika Cilliers from the Office of Public Protector on 26 July 2011 around 1500 at 012 366 7000.

¹² See the Complaints process at http://www.pprotect.org/lodge_complaint/process_overview.asp