

# Military Ombudsman Bill [B9-2011]

## SUBMISSIONS:

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### *Introduction*

The Minister of Defence, Honourable Mrs Lindiwe Sisulu is lauded for being instrumental in the formulation of this Bill. Her stance is indicative of government's recognition of broader societal trends toward openness and transparency in the military.

I am confident that the tone of the Bill sets the platform for:

- Transparency and accountability within the SANDF;
- Respect for the rule of law in the SANDF;
- Focussing attention on problems in military practice requiring corrective action;
- Strengthening public confidence and the reputation of the SANDF.

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### *SUBMISSIONS:*

#### *1. Jurisdiction of the Military Ombudsman:*

1.1 The Bill does not specify whether the jurisdiction of the Ombudsman pertain to complaints emanating out of the borders of SA only or whether it also relates to complaints emanating outside the borders of the country.

Increasingly, the SANDF finds itself engaged in theatres well beyond the country's national borders and traditional areas of deployment. Currently, the SANDF deploys about 2240 military personnel in operations across the African Continent: In the DRC, Darfur, Central African Republic. This development has important implications for the ombudsman's office.

Therefore, it is imperative that the Bill should explicitly extend the ombudsman's jurisdiction beyond the borders of SA.

*Accordingly, Section 4 of the Bill should contain a provision that stipulate the filing of complaints by members of the SANDF deployed outside the country.*

In different countries and circumstances, those mechanisms have included locked post boxes where written complaints can be made, periodic and announced or unannounced visits and inspections, and where appropriate access to telephone lines that are not monitored by SANDF personnel.

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1.2 The interpretation of the definition of complaint under Sec 1 (c) is open to wide interpretation and subsequent abuse. "A complaint by a member of the public regarding the conduct of a member of the Defence Force" can even include a spouse or partner or relative of a member of the SANDF who has a complaint that may fall within the ambit of a "domestic issues".

It is suggested that this definition should be restricted to mean a complaint from a member of the public which pertains to any perceived injustice caused either by maladministration, or by administrative action taken on behalf of the Department of Defence.

## 2. *Powers and functions of the Ombudsman and Deputy Ombudsman*

2.1 In terms of Sec 6 of the Bill, the Ombudsman and his/her deputy have authority to investigate complaints lodged with its office and carry out additional functions as assigned by the Minister.

A fundamental shortcoming is that nowhere in the Bill is the Ombudsman given the discretion to launch investigations *suo motu* (own-motion investigations), referring to instances where the Ombudsman investigates a case, where no request or complaint was received by his/her office and does it out of his/her own instance. A classic example is an investigation by the Ombudsman relating to a case that is repeatedly criticised or is under the media spotlight.

2.2 Furthermore,

Sec 6 (5) provides that, after investigating the complaint, the Ombudsman must:

- (a) Confirm or dismiss the complaint or issue an alternative resolution
- (b) Recommend an alternative resolution to the Minister
- (c) Refer the complaint to the appropriate public institution.

A study of the various Military Ombudsman in different countries, recognise the making of policy recommendation as a fundamental entrenched right of this institution: That is, to create an independent quality control mechanism to oversee the procedures, practices, and policies within the armed forces.

The practice of providing policy recommendations serves a preventative function, as recommendations are designed to encourage reforms to practices which have given rise to malfeasance, and to, thus, prevent the reoccurrence of these wrongdoings.

To this end, it is noteworthy to observe the remarks of the t Irish Ombudsman for the Defence Forces,

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*“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 comes 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”.*

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### *3. Limitation on jurisdiction*

Sec 7 (1) of the Bill states that the Ombudsman may not investigate a complaint relating to *(d) a matter that has been referred for resolution through another dispute resolution mechanism available or, ----*“.

Based on my previous experience as a military law officer in the SANDF, the resolution of disputes, on many occasions takes a very long time,(some cases may take up to 6 months or so) , thereby causing much harm to the party.

It is within this context that military personnel often have legitimate perceptions that they are unlikely to achieve a fair hearing and often feel victimised by bureaucratic delays and perceived administrative unfairness.

Therefore, at face value, Sec 7 (d) seems unfair and contrary to the spirit of the bill. This provision should exclude cases where the complainant’s case has not been resolved within a reasonable time by an existing dispute resolution mechanism. There must be a provision which stipulates that if the complainant’s case has not been progressed in accordance with the time frames set out and the Ombudsman believe the delays to be without good reason, he/she shall have a right to refer such case to the Ombudsman.

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