

SASFU PRESENTATION TO THE PORTFOLIO COMMITTEE ON DEFENCE ON THE MILITARY OMBUDSMAN BILL, 17 AUGUST 2011

INTRODUCTION

It is true that the global strategic environment on Defence and Security has changed substantially since the white paper on Defence in 1996 and Defence Review in 1998. It is also true that the South African strategic military environment changed even more drastically when the Constitutional Court declared in May 1999 that Soldiers have rights as citizen in uniform. Taking into consideration the ethos of a Defence in Democracy, the highest Court in the land confirmed the rights of men and women in the armed forces to form and join Trade Unions. Our submission as SASFU is focused on the context and need for an environment that allows the National Defence Structure to discharge their constitutional mandate of managing a disciplined military force, while at the same time upholding the legally and constitutionally guaranteed rights of Soldiers and members of the public at large.

It is our assumption that the level of discontent amongst military men and women as well as the public in the manner that the Defence force manages and conducts its affairs, has therefore prompted a need for the establishment of an office to rehabilitate that situation, hence this Bill.

However, our experience is that complaints arising from the members are of labour dispute. It is indeed only true that labour matters in the defence force are criminalized and only one structure is available to deal with those matters and it is the military courts.

MATTERS TO BE CONSIDERED IN THE ESTABLISHMENT OF THE OFFICE (Our View)

1. Military Justice System

This is one of the areas that most affect middle and lower ranking members of the Military. As a Military Trade Union we are particularly exposed to the rigid, inflexible and often unfair provisions and processes of the Military Justice System. This system while necessary and important, currently lacks credibility in the eyes

of most soldiers. It is particularly so as the bulk of soldiers who appear before Military Courts are African and largely from non-statutory forces.

Unless and until an open, transparent and representative system of military justice is put in place the negative perceptions will persist. Currently it is not always clear which matters are labour related and which are disciplinary. The processes in place are open to abuse and tendencies to victimize lower ranking soldiers. Charges are easy to trump and fabricate as evidenced by the widely held belief that Military Courts are largely used not to maintain discipline and justice but to flash out "trouble makers" out of the system.

Regarding the significance of the Military justice systems in promoting discipline, fairness, professionalism and justice in the lives of ordinary soldiers, we are particularly concerned that there is no integration and clear oversight by the Civilian justice system to ensure constitutional compliance by the Military justice system.

But this does not seem to be of any possibility with the establishment of the office of the ombudsman. The very limitation to the ombudsman to deal with matters before and after the military courts does not assist in this determination.

2. Military Labour Relations Regime

Given the hierarchical nature of the Military, the chain of command that is necessary to maintain the very fabric of military life, it is critical that a clear and unambiguous Military Labour Relations Regime akin to the Labour Relation Act is put in place to address the specific conditions of military personnel. This regime should spell out clearly the Rights and Obligations of Soldiers. Currently a substantial area of military labour law and regulation is either grey or stacked heavily in favour of the Employer.

It is never clear, in the current regulatory environment, what specific rights and procedures a Military Trade Union can access and pursue to assist their members in their daily service life regarding labour matters.

There are no clear-cut and/or adequate processes to resolve and deal with the following areas in an open and transparent way:

Promotion / Proper Staffing

Service Transfers

Administrative Discharge

Redress of Wrongs/ Grievance Procedure

3. Discrimination and Victimization

We find this area particularly complicated due to the thin line between a legitimate grievance and what could easily be construed as ill discipline/insubordination within the military context. In fact the biggest grey area in military regulation currently relates to which areas are DISCIPLINARY ISSUES and which are LEGITIMATE LABOUR RELATION MATTERS. SASFU believes that lack of clarity and certainty in these matters has led to substantial abuse and victimization of Soldiers as almost everything could be referred to Military Courts and dealt with as a Disciplinary matter.

We submit that, whilst there is an acknowledgement in this Bill, on the inadequacy of the redress of wrongs procedure (Individual Grievance) and Military Investigator in the Office of Public Protector, **the Bill needs to clarify the various processes that are ineffective including the above by either streamlining them or repealing them.**

A sound labour- relation framework might allow special labour forum/process to be constructed and put in place to deal with Labour relations and grievances effectively. The success of this procedure would be in how well it manages to make Officials and management of the Department of Defence and Military Structures responsive and accountable. It is really pointless to have a grievance procedure that looks good in paper but is in reality not enforceable

We believe that the fact that Soldiers can form and join Military Trade Unions but cannot exercise the right to Strike like their civilian counterparts, places a greater responsibility on the Department of Defence not only to negotiate in good faith but also to put in place effective mechanisms to resolve disputes.

4. Administrative Justice and Access to Information

We regard access to information as vital and even critical if Soldiers and Military Trade Union are to effectively exercise their rights and obligation as accorded by the law. Indeed the entire exercise of good Civil Military relations would be pointless if attention is not given to this important aspect of administrative regime. The following administrative issues are relevant and important:

The administrative freezing of Salaries due to AWOL

The administrative discharge of Soldiers

Service Transfers

Nomination and selection for Military and non military courses

Equal opportunities in foreign appointments, courses and training

HISTORICAL ORIGINS v/s CURRENT PROPOSALS

In May 1996, the White Paper on Defence was released to the Republic of South Africa, and in the words of the then Minister of Defence, *“For the first time in our history, a White Paper on Defence reflects the interests of our people and represents a national consensus on this critical function of government.”*

Since then there has been 2 successive ministers including the one that has placed this bill before us. It remains our view that the commendation of the process as well as its reflective mandate by the people of our country, remains a view shared by this parliament and the incumbent Minister of Defence & Military Veterans (MOD&MV).

In the said white paper,

Chapter 3 deals with Civil-Military Relations and paragraph 9 of that chapter reads as follows:

“The DOD supports the creation of the post of Military Ombudsperson whose main duties are to monitor adherence to democratic civil-military relations, undertake investigations at the request of Parliament, and investigate complaints against the SANDF by military personnel and members of the public. The ombudsperson would be an independent official who is appointed by, and reports to, Parliament. The powers and functions of the ombudsperson would be spelt out in legislation.”

Our submission is in overall informed by our persuasion in support of the formation of the office of the ombudsperson as informed by the spirit of the white paper on defence of 1996.

We however note a departure from the spirit of the said white paper in both the ideological conception as well as in its related function. The first is the reference to the office as Ombudsperson instead of the Ombudsman. It is our view that the initial reference is the most correct as a reflection of the triumph of our country against male chauvinism in our quest for a non racial and non sexist society. We are strongly of the view that it cannot be more correct, in this women's month, to do away with ombudsman and revert back to the earlier definition. This will allow an equal opportunity for a woman to be also appointed to this position without being referred to as a man (OmbudsMAN).

The second departure is related to both the independence as well as the function of the office. The white paper stresses the independence of the office by making an assertion that the *Ombudsperson is appointed by, and reports to, Parliament.*

In this bill, it has been made known that the Military Ombudsman will be appointed by the President and placed on the remuneration structure of a Judge. However reporting and accounting to the Minister instead of Parliament compromises independence.

Again, the white paper envisaged an office that would receive and investigate complaints lodged by the members of the SANDF and the public against the SANDF. But the current proposal stresses complaints against the members more than the SANDF.

The Bill may need to take into account the substantive issues raised by the Commission that investigated the situation post Union-Building.

POWERS AND JURISDICTION

We feel that the powers of the Ombudsperson are too narrow and may need to be expanded to broader individual labour issues.

They should allow Public Interest groups (Unions, Associations) to lodge complaints/allegations for investigation.

They should have powers to direct punitive measures against implicated/defaulting Officers/Individuals in the Military.

They should compel compliance by the DoD on findings of wrong doing.

History has also told us that it was the Minister who instructed that soldiers who were involved in the protest march to the Union Buildings be dismissed without a hearing. If those soldiers sought some relief on that action, the office of the ombudsperson might be a possibility. Therefore this office, if established, should also have jurisdiction over the department.

In order to support the effectiveness of the office of the ombudsperson, we bring comparison to the chapter 9 institutions. Section 181 (2) – (5) of the SA Constitution reads as follows:

(2) These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions

without fear, favour or prejudice.

(3) Other organs of state, through legislative and other measures, must assist and protect

these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

(3) No person or organ of state may interfere with the functioning of these institutions.

(5) These institutions are accountable to the National Assembly, and must report on

their activities and the performance of their functions to the Assembly at least once a year.

We hope that the above is enough to show that independence will not prevail under the circumstances as determined in the current Bill.

CONCLUSION

Our conclusion is that this is another feel good structure that has no real powers. It is not clear how an Ombudsman can force the department to comply with the findings. It is also not clear why the Minister is excluded from the requirement to comply with the determination. We are also not sure on why the Ombudsman will

be required to report to the Minister and not parliament just like chapter 9 institutions or even to the Chief Justice so as to ensure his/her independence from the department.

Our view is that there is no guarantee that the Minister and the department will comply with the decisions of the ombudsman as both have been selective in complying with the high court rulings. As of now, the high court has made many rulings instructing the department to allow the soldiers that were suspended after the march to union buildings but every tactic is employed not to honour that court instruction.

Bill should take into account the substantive issues raised by the Commission that investigated the situation post Union-Building march of 26 August 2009. We are of the view that a proper mediation and arbitration system that has powers to make decisions and not recommendations, should be established. It is our view that such a system should be done to strengthen the participation of soldiers through the military bargaining council as represented by their unions in order to limit unnecessary flow of grievances to the office of the Ombudsperson.

Whist we support the formation of the office of the Ombudsperson that is independent, the location of the office in order to be accessible to all the soldiers, has still not been clarified.