

REPUBLIC OF SOUTH AFRICA

MILITARY OMBUDSMAN BILL

*(As introduced in the National Assembly (proposed section 75) (explanatory summary of
Bill published in Government Gazette No. 33969 of 28 January 2011)
(The English text is the official text of the Bill)*

(MINISTER OF DEFENCE AND MILITARY VETERANS)

[B 9—2011]

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BILL

To provide for the establishment of the Office of a Military Ombudsman; and to provide for the appointment and functions of the 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—
 - “**complaint**” means a grievance lodged in writing by— 5
 - (a) a member regarding his or her service benefits;
 - (b) a former member regarding his or her service benefits; or
 - (c) a member of the public regarding the conduct of a member of the Defence Force;
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996; 10
 - “**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;
 - “**Deputy Ombudsman**” means the Deputy Military Ombudsman appointed in terms of section 5; 15
 - “**member**” bears the same meaning ascribed to it in section 1 of the Defence Act;
 - “**Minister**” means the Minister responsible for defence;
 - “**Office**” means the Office of the Military Ombudsman established in terms of section 2;
 - “**Ombudsman**” means the Military Ombudsman appointed in terms of section 5; 20
 - “**prescribed**” means prescribed by regulation under section 15.

Office of Military Ombudsman

2. (1) The Office of the Military Ombudsman is hereby established.
 - (2) The seat of the Office must be determined by the Ombudsman in consultation with the Minister. 25

Object of Office

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

Complaints

4. (1) A complaint must be lodged in writing with the Office in the prescribed manner. 30
 - (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) The President must appoint as a Military Ombudsman a person who—
- (a) possesses adequate knowledge of the Constitution; and
 - (b) has knowledge of or experience in military and public administration that was gained over a period of 10 years. 5
- (2) 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 of or experience in military and public administration that was gained over a period of eight years. 10
- (3) The Ombudsman holds office for a non-renewable period of five years.
- (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, 2001 (Act No. 47 of 2001); and 15
 - (b) the salary of a Deputy Ombudsman must not be less than 85 per cent of the salary of the Ombudsman; 20
- (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 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. 25

Powers and functions of Ombudsman and Deputy Ombudsman

6. (1) The Ombudsman must investigate complaints lodged with the Office in terms of section 4.
- (2) The Ombudsman must investigate a complaint fairly and expeditiously without fear, favour or prejudice. 30
- (3) The Ombudsman may not investigate a complaint unless the Ombudsman—
- (a) has in writing informed every other interested party to the complaint of the receipt thereof;
 - (b) is satisfied that all interested parties have been provided with such particulars that will enable the parties to respond to the complaint; and 35
 - (c) has afforded 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 a bearing on the matter before him or her; 40
 - (b) may resolve any dispute by means of mediation, conciliation or negotiations or in any other expedient manner; and
 - (c) must promote the observance of the fundamental rights of the members of the Defence Force. 45
- (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. 50
- (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. 55
- (8) 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. 5

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 10
 - (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. 15
- (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 20
 - (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 their functions in good faith and without fear, favour, bias or prejudice, subject to the Constitution and the law. 25

(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. 30

(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 in terms of subsection (4). 35

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. 40

(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. 45

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. 50

(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, 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. 5

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

Disestablishment, judicial management and liquidation

12. The Office may not be disestablished or placed under judicial management or liquidation except by an Act of Parliament. 10

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 Ombudsman. 15

Offences and penalties

14. (1) Any person who hinders or obstructs 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 a fine and such imprisonment. 20

(2) Any person who 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 a fine and such imprisonment.

Regulations

15. The Minister may, after consultation with the Ombudsman, make regulations regarding— 25

- (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. 30

Short title

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

MEMORANDUM ON THE OBJECTS OF THE MILITARY OMBUDSMAN BILL, 2011

1. OBJECTS OF THE BILL

The Bill seeks to establish the Office of the Military Ombudsman (the Office), 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.

2. DISCUSSIONS

2.1 Currently complaints arising from the Defence Force are dealt with in terms of the Individual Grievance Regulations and by a military investigator located in the office of the Public Protector. Due to the uniqueness of the defence environment, the Department contends that this arrangement is insufficient and inefficient as a complaints resolution mechanism.

2.2 An impartial Office serves a meaningful contribution in attending to these complaints as they often emerge from a widespread culture of uncertainty in dispute resolutions within a largely closed organisation. Although the grievance procedures have been improved, the establishment of the Office and appointment of the Military Ombudsman will go a long way in addressing these issues.

4. CONSULTATION

Various consultations have been conducted between the Department of Defence and internal stakeholders.

5. COMMUNICATION IMPLICATIONS

The proposals contained in the Bill were sufficiently canvassed with affected internal stakeholders, and it is envisaged that further communication will be dealt with in accordance with the departmental chain of command.

6. FINANCIAL IMPLICATIONS

Costs resulting from the implementation of this Bill will be borne by the Department and will be budgeted for.

7. ORGANISATION AND PERSONNEL IMPLICATIONS

The Bill provides for the establishment of a new entity. It is envisaged that new human and logistical resources will be required for the execution of the new functions.

8. 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.

9. PARLIAMENT PROCESS

9.1 The State Law Advisers and the Department of Defence are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

- 9.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18 (1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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