

EXPLANATORY STATEMENT

Issued by the Authority of the
Assistant Minister to the Prime Minister
Parliamentary Secretary to the Prime Minister

Ombudsman Act 1976

Ombudsman Regulations 2017

The *Ombudsman Act 1976* (the Act) establishes the offices of the Commonwealth Ombudsman and Deputy Commonwealth Ombudsman to investigate complaints made under the Act and to perform other specialised functions.

Section 38 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act and, in particular, prescribing matters in connection with fees and expenses of witnesses appearing before the Ombudsman.

In accordance with section 50 of the *Legislation Act 2003*, the *Ombudsman Regulations 1977* (the former Regulations), which were previously in effect under section 38 of the Act, were due to sunset on 1 October 2017.

The *Ombudsman Regulations 2017* (the Regulations) repeal and remake the former Regulations, with minor amendments to:

- remove references to agencies or positions that no longer exist or are no longer Commonwealth bodies, as well as to reflect changes in names and titles;
- remove Law Courts Limited from the Ombudsman's jurisdiction for consistency with its status under the *Public Governance, Performance and Accountability Act 2013*, noting that it is not controlled by the Commonwealth;
- provide for relocation assistance for the Ombudsman and Deputy Ombudsmen; and
- allow the Ombudsman the discretion to pay reasonable fees and expenses to witnesses.

Consultation was undertaken with the Office of the Commonwealth Ombudsman and relevant Commonwealth agencies, who supported the Regulations.

The Office of Best Practice Regulation has been consulted and has advised that a regulatory impact statement is not required.

Details of the Regulations are set out in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced the day after registration.

Authority: Section 38 of the *Ombudsman Act 1976*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Ombudsman Regulations 2017

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Ombudsman Act 1976* (the Act) establishes the offices of the Commonwealth Ombudsman and Deputy Commonwealth Ombudsman to investigate complaints made under the Act and to perform other specialised functions.

Section 38 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act. In particular, the Act provides that the following matters may be prescribed by regulation:

- declaration of an office as the of chief executive officer of a court or tribunal,
- exclusion from the Ombudsman’s jurisdiction of bodies or offices that would otherwise fall within jurisdiction,
- inclusion in the Ombudsman’s jurisdiction of bodies or offices that would otherwise fall outside jurisdiction,
- declaration of an office as the principal officer of a prescribed authority,
- providing that actions taken by a person are not deemed to have been taken by the Department responsible for dealing with the matter in connection with which the action is taken,
- providing that actions taken by an officer of a Department are not deemed to have been taken by the Department when the action was taken in the furtherance of the duties of an office which the Regulations declare to not be a prescribed authority,
- declaration of persons as members of the staff of a court or tribunal for the purposes of the Act,
- conferral of additional functions on the Defence Force Ombudsman, and
- prescription of matters in connection with fees and expenses of witnesses appearing before the Ombudsman.

The *Ombudsman Regulations 2017* have been made accordingly.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- the right to an effective remedy – Article 2 of the International Covenant on Civil and Political Rights (ICCPR),
- the right to just and favourable conditions of work – Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and
- the right to privacy – Article 17 of the ICCPR.

The right to an effective remedy (ICCPR Article 2)

Article 2 of the ICCPR provides that persons whose rights or freedoms are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. It also provides that a person claiming such a remedy shall have their rights determined by competent judicial, administrative or legislative authorities.

The *Ombudsman Regulations 2017* engages this right by supporting the effective operation of the Commonwealth Ombudsman, who has broad jurisdiction to investigate complaints by members of the public about matters of administration in the Commonwealth Government public sector.

In particular, the following regulations support the right to an effective remedy:

- Regulation 10 ensures that the actions of all court security officers, whether court employees or contractors, exercising their powers under the *Court Security Act 2013* are subject to Ombudsman review.
- Regulation 11 extends the Ombudsman's ability to investigate complaints to certain Commonwealth-controlled companies that would otherwise be outside the Ombudsman's jurisdiction.
- Regulation 14 confers additional function on the Defence Force Ombudsman. It provides for the Defence Force Ombudsman to take appropriate action to respond to complaints of abuse in Defence. It also confers on the Defence Force Ombudsman an oversight function to monitor the reporting and management of allegations of abuse in the Defence Force.

The right to just and favourable conditions of work

Article 7 of the ICESCR provides that all people have the right to just and favourable conditions of work, including safe and healthy working conditions.

By providing additional functions to the Defence Force Ombudsman to receive complaints of abuse and to monitor the reporting and management of allegations of abuse in Defence, regulation 14 supports members of Defence having a workplace that is safe, healthy and free of abuse. The regulation thus supports the right to just and favourable conditions of work.

The right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy or unlawful attacks on their honour and reputation. It also provides that everyone has the right to the protection of the law against such interference or attacks.

Regulations 14 and 15 allow the Defence Force Ombudsman to collect, use and disclose personal information and documents for the purpose of appropriately responding to complaints of abuse in Defence. In some cases, complaints of abuse will identify an alleged abuser and the Defence Force Ombudsman will request information about the alleged abuser from Defence. In some limited circumstances, information about the alleged abuse may be disclosed to third parties such as the police. The Defence Force Ombudsman will have no determinative powers in relation to an alleged abuser and will have no powers to compel information from individuals in relation to a complaint of abuse.

This is a permissible limitation:

- a) *Legitimate objective*: The collection, use and disclosure of personal information will support the objective of providing an independent complaints mechanism and appropriate responses in relation to allegations of abuse in Defence.
- b) *Rational connection*: The collection, use and disclosure of personal information of alleged abusers named to the Defence Force Ombudsman is the only way to achieve the objectives of the Regulation. It will allow the Defence Force Ombudsman to gather information about complaints of abuse in order to appropriately respond to a complaint.
- c) *Reasonable, necessary and proportionate*: The collection, use and disclosure of personal information and documents is reasonable and necessary to determine the appropriate response to complaints of abuse in Defence. Information and documents will be handled in a manner consistent with the *Privacy Act 1988*.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable and proportionate.

Details of the *Ombudsman Regulations 2017*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Ombudsman Regulations 2017*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence the day after registration.

Regulation 3 – Authority

This regulation provides that the *Ombudsman Regulations 2017* are made under the *Ombudsman Act 1976*.

Regulation 4 – Schedules

This regulation provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Regulation 5 – Definitions

This regulation provides for definitions for various terms used in the Regulations.

Regulation 6 – Bodies not to be taken to be prescribed authorities for the purposes of the Act

This regulation provides that certain bodies are not prescribed authorities for the purposes of the *Ombudsman Act 1976* and so do not fall within the jurisdiction of the Commonwealth Ombudsman. These bodies are:

Australian Security Intelligence Organisation	The Inspector-General of Intelligence and Security is able to investigate complaints about this agency.
Cocos (Keeling) Islands Council	The Council is subject to the jurisdiction of Ombudsman Western Australia, who is able to investigate complaints about the Council.
Commonwealth Grants Commission	The Commission is an advisory body and does not make decisions which could be the subject of complaints by members of the public.
Defence Force Remuneration Tribunal	The Tribunal is an independent statutory authority established to determine salary and relevant allowances for members of the Australian Defence Force. It is not intended that the Ombudsman should investigate these determinations.
Pharmaceutical Benefits Remuneration Tribunal	The Tribunal is an independent statutory authority established to determine remuneration to be paid to

pharmacists for dispensing pharmaceutical benefits. It is not intended that the Ombudsman should investigate these determinations.

Remuneration Tribunal	The Tribunal is an independent statutory authority established to determination remuneration of key Commonwealth officers. It is not intended that the Ombudsman should investigate these determinations.
-----------------------	---

These bodies were also excluded from jurisdiction under the *Ombudsman Regulations 1977*.

Regulation 7 – Persons not to be taken to be prescribed authorities for the purposes of the Act

This regulation excludes from Ombudsman jurisdiction offices established under Northern Territory legislation in fields where the Northern Territory has exclusive authority. These offices were also excluded from jurisdiction under the *Ombudsman Regulations 1977*.

It also provides that certain offices are not prescribed authorities for the purposes of the *Ombudsman Act 1976* and so do not fall within the jurisdiction of the Commonwealth Ombudsman. These offices are:

Auditor-General	The Auditor-General is an independent officer of the Parliament whose functions include undertaking financial statement audits and performance audits of Australian government entities. It is not intended that the Ombudsman should investigate these independent functions.
Australian Government Solicitor	Excluding the Australian Government Solicitor from jurisdiction ensures that the Australian Government Solicitor can compete on an even footing with private legal service providers.
President of the Defence Force Remuneration Tribunal	It is not intended that the Ombudsman should investigate the determinations of the Defence Force Remuneration Tribunal.
President of the Remuneration Tribunal	It is not intended that the Ombudsman should investigate the determinations of the Remuneration Tribunal.
Director-General of Security	The Inspector-General of Intelligence and Security is able to investigate complaints about the Director-General of Security.
Inspector-General of Intelligence and Security	The Inspector-General of Intelligence and Security performs an analogous role to the Ombudsman in respect of intelligence agencies. It is not intended that the Ombudsman should investigate the actions of the Inspector-General.

These offices were also excluded from jurisdiction under the *Ombudsman Regulations 1977*.

Regulation 8 – Principal offices

This regulation declares particular offices in various prescribed authorities to be the authority's 'principal officer' with responsibilities under the Act. This ensures these responsibilities fall on the appropriate officer in these authorities.

Regulation 9 – Actions deemed not to be taken by Attorney-General's Department

This regulation is supplementary to sub-regulation 7(b)(ii) in so far as that sub-regulation provides that the Australian Government Solicitor is not taken to be a prescribed authority for the purposes of the Act. Regulation 9 provides that action taken by the Australian Government Solicitor or any other officer of the Attorney-General's Department in furtherance of the duties of the Australian Government Solicitor is deemed not to be action taken by the Attorney-General's Department for the purposes of the Act, except in relation to the Ombudsman's public interest disclosure functions. It substantively remakes regulation 6A of the *Ombudsman Regulations 1977*.

Regulation 10 – Members of court staff

This regulation provides that court security officers are subject to the Ombudsman's jurisdiction, regardless of whether they are a member of staff of the court or employed by a private security firm contracted to the court. It substantively remakes regulation 3A of the *Ombudsman Regulations 1977*.

Regulation 11 – Commonwealth-controlled companies to be taken to be prescribed authorities

This regulation provides that Aboriginal Hostels Limited and ANU Enterprise Pty Ltd are prescribed authorities for the purposes of the Act and so within the Ombudsman's jurisdiction. If the Regulations did not so provide, these bodies would be excluded from jurisdiction due to the operation of section 3A(2) of the Act.

These bodies were also declared to fall within Ombudsman jurisdiction under the *Ombudsman Regulations 1977*.

Regulation 12 – Prescribed terms and conditions

This regulation provides that the Ombudsman and Deputy Ombudsman will be provided with relocation assistance as provided to secretaries of departments. This assistance is set out in Part 7 of Remuneration Tribunal Determination 2017/06. The Determination is published in the *Gazette* and on the Remuneration Tribunal's website.

Regulation 13 – Witness expenses

This regulation allows the Ombudsman to pay the reasonable expenses, including lost income or fees, of witnesses appearing before the Ombudsman in accordance with a notice served under the Act.

Regulation 14 – Conferral of functions on Defence Force Ombudsman

This regulation remakes regulation 6B of the *Ombudsman Regulations 1977*. That regulation initially commenced on 1 December 2016.

Sub-regulation 14(1)

Sub-regulation 14(1) provides that the Defence Force Ombudsman has the function of taking appropriate action to respond to a complainant about abuse in Defence. Paragraph (a) sets out a non-exhaustive list of actions the Defence Force Ombudsman is empowered to take in response to a complaint.

The available actions listed in paragraph (a) may be taken in relation to any complaint of abuse, regardless of when the abuse occurred (that is, whether it occurred before, on or after 1 December 2016, the date of commencement of the function). These actions include facilitating counselling (sub-paragraph (i)) or a restorative engagement conference (sub-paragraph (ii)), or making any recommendation to Defence in respect of the complaint as the Defence Force Ombudsman sees fit (sub-paragraph (iii)). The Defence Force Ombudsman may also choose not to take any action, or cease taking any further action, in relation to a complaint (sub-paragraph (iv)).

The sub-regulation also provides the Defence Force Ombudsman with functions that are ancillary or incidental to the complaints function (paragraph (b)), the function of inquiring into matters relating to complaints of abuse (paragraph (c)), and the function of dealing with any matter relating to complaints previously made to, and dealt with by, the Defence Abuse Response Taskforce (paragraph (d)).

Sub-regulation 14(2)

Sub-regulation 14(2) clarifies that an individual may make a complaint about abuse in Defence to the Defence Force Ombudsman even if they have not approached Defence in relation to the complaint. This ensures the Defence Force Ombudsman complements existing Defence internal mechanisms by providing an avenue through which victims of abuse can obtain timely support and advice if they do not feel, for whatever reason, capable of reporting the abuse directly to Defence. The Defence Force Ombudsman is will also available to former Defence personnel who may no longer be able to access internal Defence mechanisms.

Sub-regulation 14(3)

Sub-regulation 14(3) clarifies that the Defence Force Ombudsman may not deal with complaints that were previously dealt with by the Defence Abuse Response Taskforce.

Sub-regulation 14(4)

Sub-regulation 14(4) requires the Chief of the Defence Force and the Secretary of the Defence Department to provide assistance to the Defence Force Ombudsman in carrying out these functions.

Regulation 15 – Transitional—conferral of functions on Defence Force Ombudsman

Regulation 15 provides transitional arrangements for the function of the Defence Force Ombudsman provided for by regulation 14. This ensures that information held by the Defence Abuse Response Taskforce (or the Attorney-General's Department, recognising that the Taskforce was administratively part of that Department) is disclosed to the Defence Force Ombudsman.

Sub-regulations (4) and (5) also ensures the Defence Force Ombudsman may use, collect and disclose information, and other agencies and authorities may provide information to the Defence Force Ombudsman, relating to performing his or her functions under the Act or the Regulations.

This regulation remakes regulation 11 of the *Ombudsman Regulations 1977*.

Schedule 1 – Repeals

This schedule repeals the *Ombudsman Regulations 1977*.