

EXPLANATORY STATEMENT

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

Ombudsman Act 1976

Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017

The *Ombudsman Act 1976* (the Act) establishes the office of the 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.

The *Ombudsman Regulations 2017* (the Principal Regulations) made under the Act prescribe such matters as prescribed authorities for the purposes of the Act, the terms and conditions of the Office of Ombudsman and other matters.

Section 19B of the Act establishes the office of the Defence Force Ombudsman (DFO). Paragraph 19C(1)(a) of the Act provides that the functions of the DFO include any functions that are conferred on him or her by the Act or the Principal Regulations.

Paragraph 14(1)(a) of the Principal Regulations provides that “For the purpose of paragraph 19C(1)(a) of the Act, the DFO has the function of taking appropriate action to respond to a complaint of abuse made by a complainant about abuse engaged in by a member of Defence”.

Appropriate action may include facilitating counselling or a restorative engagement conference for the complainant, or making recommendations to the Department of Defence (Defence) in respect of the complaint.

These functions were inserted into the Principal Regulations by the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2016* (the 2016 Regulations). In accordance with the Explanatory Statement accompanying the 2016 Regulations, the DFO may take action to respond to abuse he or she is satisfied is reasonably likely to have occurred.

The *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017* (the Regulations) amends the Principal Regulations to provide an additional response for the DFO, namely the discretion to recommend that Defence make a reparation payment to the complainant in certain circumstances. The Regulations also provide, to avoid doubt, that the DFO may take action to respond to abuse he or she is satisfied is reasonably likely to have occurred.

A reparation payment represents an acknowledgement by Defence that the abuse suffered by the complainant was wrong, that it can have a lasting and serious impact and also that, in the past, Defence was not positioned appropriately to respond to abuse in many cases. The payments are not intended to be compensation and complainants will not be required to release the Commonwealth from liability.

Criteria which must be met before the DFO may recommend a reparation payment

The Regulations provide the DFO may recommend that Defence make a reparation payment in relation to a complaint, where the abuse alleged in the complaint occurred on or before 30 June 2014 and the complaint was made to the DFO before 1 July 2021.

The 30 June 2014 represents a key date from which time people could have confidence in the advances being made by Defence in reforming culture and in Defence's ability to appropriately address complaints of abuse where it occurred.

Positive changes to Defence culture and internal complaint mechanisms began during 2011, but reforms of this magnitude take time to implement. By 30 June 2014, key milestones had been achieved, including the adoption of *Pathway to Change* in March 2012, the introduction in July 2013 and maturing of the Sexual Misconduct Prevention and Response Office and progression of the Re-thinking Systems of Review and Investigation initiatives since early 2014.

Accordingly, these *ex gratia*-style payments will not be available in relation to complaints of abuse suffered after 30 June 2014 (although other outcomes from the DFO, including counselling and restorative engagement conferences, will continue to be available).

To bring finality to administration of the reparation payment, constrain the overall costs of the new function and provide a degree of financial certainty to the Commonwealth, a reparation payment would only be an available outcome in relation to those complaints which, in addition to meeting other eligibility criteria (including the date of abuse), are made to the DFO before 1 July 2021.

Circumstances in which the DFO may recommend a reparation payment

'Abuse', for the purposes of DFO's jurisdiction, is defined in section 5 of the Principal Regulations to mean sexual abuse, serious physical abuse or serious bullying or harassment. The DFO assesses each complaint of abuse it receives to determine whether the abuse meets this definition and is reasonably likely to have occurred.

Where complaints are assessed as within jurisdiction, the DFO may take appropriate actions, including facilitating counselling for the complainant, conducting a restorative engagement conference or making recommendations to Defence.

The Government recognises that that it can take time for survivors of abuse to come forward and report serious incidents of abuse. The Government further recognises that this is most likely to impact upon those individuals who suffered the most serious forms of abuse and that those individuals should not be disadvantaged.

The Regulations provide the DFO may recommend Defence make a reparation payment of up to \$45,000 where he or she is satisfied that a complainant was subject to the most serious forms of abuse.

The Regulations also provide the DFO may recommend Defence make a reparation payment of up to \$20,000 where he or she is satisfied that a complainant was subject to abuse, which although not amounting to the most serious forms of abuse, involved unlawful interference with the complainant accompanied by some element of indecency.

These thresholds mean that there will be complaints of abuse which have been accepted as being within the DFO's jurisdiction but in relation to which the DFO will not be able to

recommend that Defence make a reparation payment. In these matters, the DFO will still be able to facilitate referrals to counselling, conduct restorative engagement conferences and make other recommendations to Defence in relation to the abuse.

If the DFO has recommended a reparation payment in recognition of abuse, and is also satisfied that Defence mismanaged the situation, the DFO may recommend an additional payment of up to \$5,000.

The maximum amount the DFO may recommend be paid to a complainant is \$50,000.

Offsetting of payments from other relevant schemes

The Regulations refer to payments 'up to' \$45,000, \$20,000 and \$5,000. The primary intention is the DFO will recommend payments at those amounts if satisfied of the matters outlined above. The inclusion of 'up to' is to provide the DFO the discretion to take into account previous reparation or equivalent payments made to the same complainant by or on behalf of Defence.

A particular example of this is payments made under the Defence Abuse Response Taskforce (DART).

The DFO is unable to consider complaints that were previously made to, and dealt with by, the DART. However, a complainant who previously received a payment from the DART in relation to an incident of abuse may complain to the DFO about a different incident of abuse. In these circumstances, any payment for abuse or Defence mismanagement that might otherwise be recommended by the DFO will be reduced by the amount the complainant previously received from Defence through the DART for abuse or Defence mismanagement respectively.

The result of this will be that the maximum reparation payment an individual can receive from the DART and under this scheme combined is \$50,000. This reflects that the maximum payment a person can receive under either scheme is \$50,000, and a person should not benefit from the intersection of the two schemes.

In addition, where a complainant has received a previous payment from the Commonwealth or another source in relation to abuse experienced in Defence (for example, under the Commonwealth Redress Scheme for survivors of institutional child sexual abuse), the DFO may reduce the reparation payment it recommends by the amount of the previous payment. It will do so to the extent that the previous payment was reparatory rather than compensatory in nature.

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

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 Amendment (Functions of the Defence Force 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 office of the 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.

The *Ombudsman Regulations 2017* (the Principal Regulations) made under the Act prescribe such matters as prescribed authorities for the purposes of the Act, the terms and conditions of the office of Ombudsman and other matters.

Section 19B of the Act establishes the office of the Defence Force Ombudsman (DFO). Subsection 19C(1)(a) of the Act provides that the functions of the DFO include any functions that are conferred on him or her by the Act or the Principal Regulations.

Paragraph 14(1)(a) of the Principal Regulations provides that “For the purpose of paragraph 19C(1)(a) of the Act, the DFO has the function of taking appropriate action to respond to a complaint of abuse made by a complainant about abuse engaged in by a member of Defence”.

The *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017* (the Regulation) amends the Principal Regulations to provide an additional action the DFO may take in response to a complaint of abuse, namely by recommending that the Department of Defence make a reparation payment to the complainant in certain circumstances.

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)

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 Regulations engage this right by providing that the DFO can recommend the Department of Defence make a reparation payment in response to a complaint of abuse in the Australian 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 an additional action by which the DFO may respond to a complaint of abuse in Defence (recommendation of the making a of reparation payment), the Regulations support members of Defence having a workplace that is safe, healthy and free of abuse. The Regulations thus support the right to just and favourable conditions of work.

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 Amendment (Functions of the Defence Force Ombudsman) Regulations 2017

Section 1 – Name of Regulations

This section provides that the title of the Regulations is the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017*.

Section 2 – Commencement

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

The DFO is able to recommend reparation payments in relation to complaints made to the DFO at any time after its abuse reporting jurisdiction commenced on 1 December 2016 (the commencement date of the 2016 Regulations). This is to ensure no person who has already reported abuse to the DFO is disadvantaged by having done so prior to the commencement of these Regulations.

Section 3 – Authority

This section provides that the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017* is made under the *Ombudsman Act 1976*.

Section 4 – Schedules

This section 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.

Schedule 1 – Amendments

Ombudsman Regulations 2017

Item 1 – Section 5

This item inserts a definition of ‘amendment day’ as the day on which the Regulations commence.

It also inserts a definition of ‘excluded complaint’ as a complaint that has been previously made to, and dealt with, by the DART, or a complaint the same in substance as one that has previously been made to, and dealt with by, the DART. This reflects the policy that DFO will not consider complaints that were previously made to, and dealt with by, the DART.

The item also inserts definitions of ‘new complaint’ and ‘old complaint’. New complaints’ are complaints that are not excluded complaints and are those made on or after the commencement of the Regulations, or before the commencement of the Regulations where the DFO had not yet finally dealt with the complaint. ‘Old complaints’ are complaints that are not excluded complaints and are those made before the commencement of the Regulations where the DFO had, prior to the commencement, finally dealt with the complaint.

A complaint has been finally dealt with when the DFO has taken all appropriate action to respond to the complaint and the complainant has been informed of this.

The DFO can make recommendations for reparation payments in response to both ‘new complaints’ and ‘old complaints’. In relation to either a ‘new complaint’ or an ‘old complaint’, the DFO will only make a recommendation for a reparation payment where the abuse complained about meets the threshold in either paragraph 14A(1)(b) (‘the most serious forms of abuse’) or 14A(2)(b) (‘unlawful interference with the complainant accompanied by some element of indecency’).

Item 1 also inserts a definition of ‘Defence Secretary’.

Item 3 – Paragraph 14(1)(a)

This item provides the DFO with the function of responding to a ‘new complaint’ of abuse if the Defence Force Ombudsman is satisfied that the abuse is reasonably likely to have occurred and the complaint has been made by a person who is or was:

- a member of the Defence Force
- an Australian Public Service employee deployed outside Australia in connection with an operation of the Defence Force or for the purpose of capacity building or peacekeeping functions by the Defence Force
- contracted to provide services outside Australia in connection with an operation of the Defence Force or for the purpose of capacity building or peacekeeping functions by the Defence Force.

Item 4 – After subparagraph 14(1)(a)(iii)

This item provides that where a ‘new complaint’ is made before 1 July 2021 and relates to abuse that allegedly occurred on or before 30 June 2014, the DFO has an additional appropriate action to respond to the complaint, by recommending the Defence Secretary make a reparation payment to the complainant.

Item 5 – After subsection 14(1)

This item inserts a new subsection 14(1A) which defines ‘new complaint’. To fall within the definition, the complaint must:

- relate to abuse engaged in by an individual who was a ‘member of Defence’ at the time of the alleged abuse
- have been made on or after the commencement of the Regulations, or before the commencement of the Regulations where the DFO had not yet finally dealt with the complaint, and
- not be an ‘excluded complaint’ (ie have already been dealt with by the DART).

‘Member of Defence’, in relation a complaint of abuse, is defined in section 5 of the Principal Regulations to include a person who, at the time of the abuse is alleged to have occurred:

- was a member of the Defence Force
- was an Australian Public Service employee deployed outside Australia in connection with an operation of the Defence Force or for the purpose of capacity building or peacekeeping functions by the Defence Force, or

- was contracted to provide services outside Australia in connection with an operation of the Defence Force or for the purpose of capacity building or peacekeeping functions by the Defence Force.

Item 6 – Subsection 14(3)

This item repeals the subsection, as the subject matter is now dealt with through the definition of ‘excluded complaint’.

Item 7 – Subsection 14(4)

This item replaces the term ‘Secretary of the Defence Department’ with the term ‘Defence Secretary’, reflecting the new definition in section 5.

Item 8 – After section 14

Item 8 inserts new sections 14A and 14B, which provide for the DFO’s function of recommending reparation payments in response to ‘new complaints’ and ‘old complaints’ respectively and the types of abuse in relation to which the DFO may make recommendations for reparation payments.

New subsection 14A(1) - Abuse involving the most serious forms of abuse

Where the DFO is satisfied that the abuse complained about in a ‘new complaint’ is reasonably likely to have occurred, that it occurred on or before 30 June 2014 and that it involved the most serious forms of abuse, the DFO may recommend a reparation payment of up to \$45,000.

The most serious forms of abuse will ordinarily involve abuse amounting to a campaign of targeted behaviour, by either an individual or multiple perpetrators or by higher ranking members, and/or resulting in serious physical injury.

The most serious forms of abuse may also include a single incident of very serious abuse or sexual assault, or multiple incidents of abuse that, while individually may not meet the threshold, may collectively be assessed as constituting the most serious forms of abuse.

Factors that may influence the assessment of the seriousness of the abuse include the age of the complainant at the time of the abuse, the position held by the alleged abuser, the duration of the alleged abuse and the gravity of the alleged conduct.

In relation to this type of abuse the DFO will only recommend a payment of less than \$45,000 where the recommended payment is reduced in accordance with the payment cap.

New subsection 14A(2) - Abuse involving unlawful interference with the complainant accompanied by some element of indecency

Where the DFO is satisfied that the abuse complained about in a ‘new complaint’ is reasonably likely to have occurred, that it occurred on or before 30 June 2014, that it does not meet the threshold to recommend a payment of \$45,000, but did involve unlawful interference with the complainant accompanied by some element of indecency, the DFO may recommend a reparation payment of up to \$20,000.

While not meeting the threshold for a \$45,000 payment, the reported abuse may still involve a campaign of targeted behaviour, or may comprise a single incident of serious abuse with an element of indecency. Again, factors that may influence the assessment of the seriousness of the abuse include the age of the complainant at the time of the abuse, the position held by the alleged abuser, the duration of the alleged abuse and the gravity of the alleged conduct.

In relation to this type of abuse the DFO will only recommend a payment of less than \$20,000 where the recommended payment is reduced in accordance with the payment cap.

New subsection 14A(3) - Additional payment for mismanagement

Where the DFO recommends a reparation payment be made to a complainant who has made a 'new complaint', the DFO may also recommend an additional payment of up to \$5,000 where the DFO considers it is reasonably likely that Defence mismanaged the situation surrounding the abuse complained about.

Circumstances in which the DFO may recommend an additional payment could include:

- where Defence failed to take reasonable management action to prevent abuse occurring where it knew or ought reasonably to have known that abuse would occur
- where Defence failed to take reasonable management action to stop abuse at the time it was occurring where it knew or ought reasonably to have known abuse was occurring, or
- where Defence failed to respond appropriately where Defence knew abuse had occurred as a result of a report or complaint made about the abuse, or Defence ought otherwise to have known the abuse had occurred (for example by observation of unexplained injuries or irregular behaviour).

The DFO will only recommend a payment of less than \$5,000 where the recommended payment is reduced in accordance with the payment cap. In particular, a person may not receive more than one payment in recognition of Defence mismanagement. If a person received such a payment from the DART in recognition of mismanagement of another incident of abuse, that person may not receive another payment under this scheme.

New subsection 14B(1)

This subsection provides that the DFO may make a recommendation for a reparation payment in relation to an 'old complaint' where the DFO is satisfied that the abuse to which the 'old complaint' relates is reasonably likely to have occurred.

This provision ensures that, even where the DFO has already dealt with a complaint prior to the commencement of the Regulations, the DFO can still recommend a reparation payment in relation to the complaint where appropriate.

New subsection 14B(2)

This subsection defines 'old complaint'. A complaint is an 'old complaint' where it was made to the DFO on or after 1 December 2016 but before the commencement date of the Regulations, and the DFO had, before the commencement date, finally dealt with the complaint. In addition, the abuse complained about must be alleged to have been engaged in by an individual who was a member of Defence at the time of the alleged abuse, it must have

occurred on or before 30 June 2014 and the complaint must not be an ‘excluded complaint’ (ie have already been dealt with by the DART).

An ‘old complaint’ may have been made and/or dealt with under the Principal Regulations or under the former *Ombudsman Regulations 1977*.

New subsection 14B(3)

Where the DFO is satisfied that the abuse complained about in an ‘old complaint’ involved the most serious forms of abuse, the DFO may recommend a reparation payment of up to \$45,000.

The abuse which the DFO will consider to fall within this category, and the circumstances in which the DFO will recommend a payment of less than \$45,000, will be the same as for a ‘new complaint’.

New subsection 14B(4)

Where the DFO is satisfied that the abuse complained about in an ‘old complaint’ does not meet the threshold to recommend a payment of \$45,000 but involved unlawful interference with the complainant accompanied by some element of indecency, the DFO may recommend a reparation payment of up to \$20,000.

The abuse which the DFO will consider to fall within this category, and the circumstances in which the DFO will recommend a payment of less than \$20,000, will be the same as for a ‘new complaint’.

New subsection 14B(5)

Where the DFO recommends a reparation payment be made to a complainant who has made an ‘old complaint’, the DFO may also recommend an additional payment of up to \$5,000 where the DFO considers it is reasonably likely that Defence mismanaged the situation surrounding the abuse complained about.

The circumstances in which the DFO will recommend this additional payment and in which the DFO will recommend a payment of less than \$5,000, will be the same as for a ‘new complaint’.

Items 9, 10 and 11 – Subsection 15(4)

These items ensure the information-sharing power in subsection 15(4) relates to both ‘new complaints’ and ‘old complaints’.