

**OMBUDSMAN AMENDMENT (DEFENCE REPARATION SCHEME)
REGULATIONS 2020**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Ombudsman Amendment (Defence Reparation Scheme) Regulations 2020* (the Regulations) provide a time-limited extension of the Defence Reparation Scheme, which is currently scheduled to conclude on 1 July 2021, to ensure that complainants have a further 12 months to make contact with the Defence Force Ombudsman and potentially still be able to receive a reparation payment in certain circumstances.

The Regulations are made under the *Ombudsman Act 1976* (the Act). 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.

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.

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 the Ombudsman and other matters. The Principal Regulations repealed and remade the *Ombudsman Regulations 1977* (the former Principal Regulations) which were scheduled to sunset on 1 October 2017.

Functions of the Defence Force Ombudsman

The *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2016* (the 2016 Regulations) amended the former Principal Regulations by conferring additional functions on the DFO, including to take appropriate action to respond to complaints about abuse in Defence (such as facilitating counselling for the complainant, using an alternative dispute resolution process or restorative engagement conference to resolve a complaint, and making a recommendation to the Defence Department in respect of a complaint).

The purpose of these functions was to complement reforms undertaken in the Defence Department to prevent and respond to abuse, recognising that an independent complaints mechanism remains desirable for those victims who are uncomfortable reporting abuse within the department. Under the 2016 Regulations, the DFO is authorised to take appropriate action to respond to complaints of abuse, including

where the complainant has not approached the Defence Department in relation to the complaint.

A ‘complainant’ is defined under section 5 of the Principal Regulations to include:

- a person who is or was a member of the Defence Force; and
- a person who is or was an APS employee deployed outside Australia in connection with an operation of the Defence Force, or for the purposes of capacity-building or peacekeeping functions by the Defence Force, and
- a person who is or was contracted to provide services outside of Australia in connection with an operation of the Defence Force, or for the purposes of capacity-building or peacekeeping functions by the Defence Force.

‘Abuse’, in relation to a complainant, is defined in section 5 of the Principal Regulations to include sexual abuse, serious physical abuse, and serious bullying or harassment, of the complainant.

Defence Reparation Scheme

The *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017* (the 2017 Regulations) further amended the Principal Regulations to provide an additional response the DFO can take in relation to an abuse complaint. New section 14A provided that the DFO may recommend that the Defence Secretary make a reparation payment to the complainant in relation to abuse that occurred on or before 30 June 2014 and where the complaint was made to the DFO before 1 July 2021 (Defence Reparation Scheme).

Under the Scheme, the DFO can make a recommendation that the Defence Secretary:

- make a reparation payment of up to \$45,000 to the complainant if the DFO is satisfied that the abuse involved the most serious forms of abuse
- make a reparation payment of up to \$20,000 to the complainant if the DFO is satisfied that the abuse involved unlawful interference with the complainant accompanied by some element of indecency, and
- make an additional payment of up to \$5,000 if the DFO is satisfied that the Defence Department did not respond appropriately to the abuse.

A reparation payment represents an acknowledgement by the Defence Department that the abuse suffered by the complainant was wrong, that it can have a lasting and serious impact. It also acknowledges that, in the past, the Defence Department was not positioned appropriately to respond to abuse in many cases. 30 June 2014 represents a key date from which time people could have confidence in the advances being made by the Defence Department in reforming culture and in Defence’s ability to appropriately address complaints of abuse where it occurred. The payments are not intended to be compensation and complainants are not required to release the Commonwealth from liability.

Reparation payments were originally only to be an available outcome in relation to those complaints which, in addition to meeting other relevant criteria (including the date of abuse), were made to the DFO before 1 July 2021.

Although the ability to make complaints of abuse to the DFO will continue following the conclusion of the Defence Reparation Scheme, the Scheme has been an effective

mechanism to encourage people to come forward and assist the Defence Department to respond to reports of abuse. While the Scheme is scheduled to conclude on 1 July 2021, the Ombudsman continues to receive a steady flow of complaints of abuse from former and serving members of the Defence Force. If the Scheme were to conclude on 1 July 2021, there is a risk that complainants with complaints of abuse may not come forward.

Accordingly, the Regulations provide a time-limited extension of the Defence Reparation Scheme to ensure that complainants may still receive a reparation payment. The Regulations enable the DFO to continue to recommend that Defence make a reparation payment under section 14A where either:

- a complaint has been made to the DFO on or before 30 June 2022; or
- both:
 - a person has provided in writing a notice of intention to make a complaint to the DFO on or before 30 June 2022; and
 - the complaint has been made on or before 30 June 2023.

The Scheme will conclude on 30 June 2023 in order to bring finality to the administration of the reparation payments and to provide a degree of financial certainty to the Commonwealth. The DFO will continue to be able to receive complaints about abuse and continue to offer its other remedies, such as restorative engagement conferences and referrals to counselling.

CONSULTATION

The Defence Reparation Scheme was reviewed by the Department of Defence and the Commonwealth Ombudsman. The review supported a time-limited extension of the Scheme. Consultation was undertaken with the Department of Defence and Office of the Commonwealth Ombudsman on the Regulations.

REGULATION IMPACT STATEMENT

The Regulations do not create any regulatory impact. The OBPR reference is 43274.

OTHER DETAILS

Details of the Regulations are set out in the [Attachment A](#).

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 commence the day after registration.

The Regulations and the Act are available on the Federal Register of Legislation <https://www.legislation.gov.au/>.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Ombudsman Amendment (Defence Reparation Scheme) Regulations 2020

The *Ombudsman Amendment (Defence Reparation Scheme) Regulations 2020* (the Regulations) are 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

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 2017 Regulations) amended the Principal Regulations to provide an additional action the DFO may take in response to a complaint of abuse, namely by recommending that the Secretary of the Department of Defence make a reparation payment to the complainant in certain circumstances (the Defence Reparation Scheme). In order to make a complaint that is eligible for a reparation payment, the complaint must relate to alleged abuse that occurred on or before 30 June 2014, and the complaint must be made before 1 July 2021.

The *Ombudsman (Defence Reparation Scheme Amendment) Regulations 2020* further amend the Principal Regulations to provide that the DFO may recommend that the

Department of Defence make reparation payments in certain circumstances for complaints made on or before 30 June 2023.

Human rights implications

The Regulations engage the following human rights:

- the right to an effective remedy – Article 2 of the International Covenant on Civil and Political Rights (ICCPR); and
- 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.

Both the UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination have stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to victims. Reparation can involve measures including compensation, restitution, rehabilitation, public apologies, guarantees of non-repetition and changes in relevant laws and practices.

The Regulations engage the right to an effective remedy by providing an alternative complaints mechanism for former and serving members of the Defence Force who cannot, or do not feel comfortable, accessing the Defence Department's internal mechanism to report a complaint of abuse. 'Abuse' includes sexual abuse, serious physical abuse, and serious bullying or harassment. The Regulations authorise the DFO to take appropriate action to respond to complaints of abuse in the Australian Defence Force, including by recommending the Defence Secretary make a reparation payment in response to a complaint of abuse in certain circumstances. The Regulations positively engage the right to an effective remedy for such abuse.

The right to just and favourable conditions of work (ICESCR Article 7)

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.

The Regulations positively engage the right to just and favourable conditions of work by authorising the DFO to take appropriate action to respond to complaints of abuse. The DFO may respond to a complaint of abuse in Defence by recommending the making of a reparation payment in certain circumstances. The Regulations provide a time-limited extension of the Defence Reparation Scheme to 30 June 2023 to ensure that complainants may still receive a reparation payment in appropriate circumstances. The Regulations support members of Defence having a workplace that is safe, healthy and free of abuse.

Conclusion

The Regulations are compatible with human rights because they promote the protection of human rights.

NOTES ON SECTIONS

Details of the *Ombudsman Amendment (Defence Reparation Scheme) Regulations 2020*

Section 1 – Name

This section provides that the title of the Regulations is the *Ombudsman Amendment (Defence Reparation Scheme) Regulations 2020*.

Section 2 – Commencement

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

Section 3 – Authority

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

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations 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

Paragraph 14(1)(a) of the *Ombudsman Regulations 2017* provides that the Defence Force Ombudsman (DFO) may take appropriate action to respond to a ‘new complaint’ of ‘abuse’, if satisfied that the abuse is reasonably likely to have occurred.

The DFO may take a range of actions, including facilitating counselling for the complainant (subparagraph 14(1)(a)(i)), or using a process to address or resolve the complaint, such as an alternative dispute resolution process or a restorative engagement conference (subparagraph 14(1)(a)(ii)).

Subsection 14(1A) provides that a complaint is a ‘new complaint’ if the complaint is made to the DFO on or after the 16 December 2017 (the ‘amendment day’) or the complaint was made to the DFO on or after 1 December 2016 but before 16 December 2017 where the complaint had not been finally dealt with.

Section 5 defines the ‘amendment day’ as the day on which the *Ombudsman Amendment (Functions of the Defence Force Ombudsman) Regulations 2017*, which inserted subsection 14(1A), commenced, being 16 December 2017.

Defence Reparation Scheme

Subparagraph 14(1)(a)(iiia) currently provides that a further action the DFO may take, in relation to complaints made before 1 July 2021 which relate to abuse that allegedly occurred on or before 30 June 2014, is to recommend the Defence

Secretary make a reparation payment to the complainant under section 14A. This is known as the ‘Defence Reparation Scheme’.

Under the Scheme, the DFO may recommend that the Defence Secretary:

- make a reparation payment of up to \$45,000 to the complainant if the DFO is satisfied that the abuse involved the most serious forms of abuse
- make a reparation payment of up to \$20,000 to the complainant if the DFO is satisfied that the abuse involved unlawful interference with the complainant accompanied by some element of indecency, and
- make an additional payment of up to \$5,000 if the DFO is satisfied that Defence Department did not respond appropriately to the abuse.

Reparation payments are not intended to be compensation and complainants will not be required to release the Commonwealth from liability by accepting a payment.

Item 1 – Subparagraph 14(1)(a)(iiia)

Item 1 replaces subparagraph 14(1)(a)(iiia) to provide that the DFO may make recommendations under section 14A in relation to a new complaint, if the complaint is covered by new subsection 14(1B). The effect of new subsection 14(1B) is described in item 2 below.

Item 2 – After subsection 14(1A)

Item 2 inserts new subsection 14(1B) which provides that a new complaint is covered by that subsection if it meets the following criteria:

- the complaint must be about abuse allegedly engaged in by a member of Defence on or before 30 June 2014 (new paragraph 14(1B)(a)); and
- either:
 - the complaint is made to the DFO on or before 30 June 2022 (new subparagraph 14(1B)(b)(i)); or
 - a written notice of intention to make a complaint is given to the DFO on or before 30 June 2022, and the subsequent complaint is made to the DFO on or before 30 June 2023 (new subparagraph 14(1B)(b)(ii)).

Extension of the Defence Reparation Scheme

Current subparagraph 14(1)(a)(iiia) provides that the DFO may only make recommendations for reparation payments in relation to complaints made *before* 1 July 2021. New paragraph 14(1B)(b) extends the period during which complaints could be made to the DFO. Taken together, they require contact about the complaint of abuse to have been made with the DFO, in writing, on or before 30 June 2022. Contact can be made in one of two ways: either by making a full complaint on or before 30 June 2022; or by notifying the DFO, in writing, of an *intention* to make a complaint on or before 30 June 2022, with the full complaint then needing to be made on or before 30 June 2023.

This extension allows complaints of abuse from former and serving members of the Defence Force to continue to be made to the DFO. If the Scheme concluded on 1 July 2021, there would be a risk that complainants with complaints of abuse may

not come forward. Paragraph 14(1B)(b) provides a time-limited extension of the Scheme to ensure that complainants may still receive a reparation payment.

Making a complaint

New subparagraphs 14(1B)(b)(i) or (ii) outline the procedural requirements that must be satisfied in order to make a new complaint that could be subject to a recommendation by the DFO for reparation payment. There are two avenues through which such a complaint can be made.

First, new subparagraph 14(1B)(b)(i) provides that a new complaint about alleged abuse engaged in by a member of Defence on or before 30 June 2014 can be made to the DFO on or before 30 June 2022 (i.e. by no later than 11.59pm of 30 June 2022).

Alternatively, new subparagraph 14(1B)(b)(ii) provides that a new complaint about alleged abuse engaged in by a member of Defence on or before 30 June 2014 can be made if:

- a written notice of intention to make a complaint is given to the DFO on or before 30 June 2022 (i.e. by no later than 11.59pm on 30 June 2022), and
- the complaint is made to the DFO on or before 30 June 2023 (i.e. by no later than 11.59pm on 30 June 2023).

A notice of intention to make a complaint should clearly relate to a complaint of abuse. Furthermore, accepting a notice of intention to make a report of complaint does not mean that the DFO will automatically accept this as a complaint of abuse. Rather, the complainant needs to re-approach the DFO on or before 30 June 2023 to make a formal complaint of abuse before that deadline.

The purpose of the notification requirement is to address the risk of complainants not coming forward with complaints of abuse prior to the end of the Scheme. Extending the Scheme in this manner is also trauma-informed and victim-centric, as it recognises that it can often take victims of abuse time to develop trust in the reporting process and then be willing to share their complaint of abuse. The written notification requirement will also ensure there is a distinction between a notification of an intention to make a complaint of abuse, and general enquiries that the Ombudsman's Office may receive about the Defence Reparation Scheme.

New complaints made in compliance with new subparagraphs 14(1B)(b)(i) or (ii) can be considered by the DFO for a recommendation of reparation payment under section 14A.

Item 3 – Section 14A (heading)

Section 14A enables the DFO to recommend to the Defence Secretary that reparation payments be made to a complainant in relation to various types of abuse that occurred on or before 30 June 2014.

Item 3 amends the heading of section 14A to 'Payments to complainants—certain new complaints'. This is a minor clarification to make it clear that section 14A does not apply to

all ‘new complaints’, but rather only to complaints which meet the requirements of new subsection 14(1B).

Item 4 - Paragraphs 14A(1)(a) and 14A(2)(a)

Item 4 amends the reference to complaints ‘of a kind referred to in subparagraph 14(1)(a)(iiia)’ in paragraphs 14A(1)(a) and 14A(2)(a) to refer instead to complaints ‘covered by subsection 14(1B)’. This is a consequential amendment to reflect that as a result of item 1, the substantive requirements to make a new complaint of a kind that enables the DFO to make a recommendation for a reparation payment, are located in new subsection 14(1B), rather than subparagraph 14(1)(a)(iiia).