

Questions for Prof John McMillan
Defence Force Ombudsman

Submission P28

Q: In light of the all the deficiencies you have highlighted about investigative processes (e.g. timeliness, officer training, scoping, evidence collection and collation, analysis and synthesis):

- *Can you see any value in the establishment of some form of independent agency to conduct and convene investigations and inquiries?*

I do not consider that the establishment of another independent agency is the solution to the problems I have outlined. The Defence Force Ombudsman (DFO) is independent and is already tasked with conducting and convening investigations and inquiries. It must be recognised, however, that this Office is not adequately resourced to conduct every review of the significant numbers of complaints that arise in the Defence jurisdiction each year.

In my view, rather than establishing a new independent agency to overcome current concerns, the focus needs to be on improving the internal processes within Defence and refining our own management of Defence complaints. For all agencies the Ombudsman's office generally supports the concept of an initial internal review or investigation, with my office then providing an avenue of external oversight if that is required. In my experience making this model work effectively, rather than replacing it, provides better outcomes for complainants and agencies. The creation of additional review mechanisms runs the risk of a proliferation of agencies involved in review and investigation, which can in turn create problems of a new and different kind.

I recently met with the Chief of the Defence Force and Departmental Secretary to discuss the problems inherent in the current system. I am pleased to advise that we are discussing options for jointly reviewing the

current processes to identify the reasons for the problems and to recommend options for improvement.

Could you elaborate on the 'enhanced role' that you suggest the CRA could undertake?

If the internal review process is to operate more effectively in Defence, it is my view that CRA needs to be given greater authority to manage complaint processes, intervene in matters and make independent recommendations for resolving them.

CRA needs to undertake a role in relation to investigations from the time of their initiation until completion. The earlier any deficiency in an investigation is identified, the better the outcome will be.

It is particularly important that CRA review the quality of the brief prepared for the decision maker as any deficiency in the brief may impact on the decision made. In a number of recent discharge matters, the quality of the brief has been identified as a concern, for example, not including relevant information, the style of language adopted, inaccurate service records included, and inclusion of irrelevant information.

If it is clear that the investigation will require specialist information or opinions (eg medical opinions), CRA could play a role in facilitating the engagement of such specialists, to ensure that the source is independent and that reports are requested and provided within a reasonable timeframe.

Further options for enhancing CRA's role are discussed below. If any of these options are adopted, CRA needs to be appropriately resourced and its personnel adequately trained and skilled.

Q: You mention a number of complaints processes available to ADF personnel. In your opinion, how could they be better streamlined or co-

ordinated to maximise the delivery of satisfactory military justice outcomes?

As noted earlier, I expect that we will be conducting a review with Defence on delays in the current complaints processes. In this context, options for improving the system that my office will seek to discuss will include:

- allowing only one level of internal review, and the complainant then having the option of taking the matter to the DFO (this might require legislative change);
- ensuring that the officers selected to complete reviews or investigations are sufficiently removed from the initial decision (so that they approach the matter with an open mind) and are skilled in conducting reviews and investigations
 - this might best be achieved by providing the resources to CRA to conduct investigations, which would provide an 'arms length' approach to investigations and do much to satisfy complainants' concerns about sufficient independence at the first level of review
 - alternatives might be to engage appropriately skilled non-military personnel on a contract/non-ongoing employment basis, or to second appropriately skilled officers from other parts of Defence, or other agencies, to CRA to conduct specific investigations;
- eliminating the current emphasis on seeking legal advice in a significant proportion of cases;
- identifying areas of overlap and how best to eliminate those, for example, where complainants have taken their matter to a range of external bodies at the same time; and
- promoting a less formal approach to resolving complaints and extending the use of alternative dispute resolution mechanisms i.e. getting the parties together early to identify the issues and negotiate solutions.

I note that the ADF has expressed concern about members approaching the DFO in order to delay discharge action. While in some cases this may have been the case, unless the complainant is able to provide reasonable grounds for their complaint to be considered, my office would decline to investigate the matter. Both Defence and my office progress such cases as quickly as possible. On the other hand, I understand the ADF's concerns. If the number of internal review options can be reduced to a minimum, I believe that this issue will be less of a concern in the longer term. This is another matter that can be addressed in the joint review.

Q: Part of your role as Ombudsman involves making recommendations to the ADF concerning systemic improvements. How well does the ADF receive your recommendations?

Over recent years, my office has conducted relatively few "major" investigations into Defence matters. Of those that have addressed important systemic matters, the majority of my office's recommendations have been accepted by the ADF.

Of concern, however, is the recurrence of complaints of a similar nature to those addressed in major investigation reports, where new instructions may have been issued and procedures may have been modified, but the system has still failed the individuals concerned. There has been a disappointing tendency in a relatively few but very serious matters, for the ADF to lose sight of the complaint and take a very legalistic approach that can impede resolution of the substance of the complaint (for example, raising issues about my office's jurisdiction that are better raised independently of the complaint).

Q: Under what criteria or issues assessment would the DFO initiate an 'own motion' investigation?

I will generally undertake own motion investigation into matters that have the following characteristics:

- where we achieve a remedy for the individual complainant, but choose to pursue a systemic issue in more detail with the agency. In these cases, the outcome of the own motion investigation will not affect the outcome of the individual's complaint (for example, where we recommend a change to policy or procedures which would be prospective, not retrospective);
- where we decide to pursue an own motion investigation as a more effective way to deal with a class of similar complaints from individuals. In these cases, the outcome of the own motion investigation will affect the outcome of the individual's complaint;
- where we decide to investigate a matter without having received a complaint about it; and
- whistleblower complaints.

Own motion investigations are generally resource intensive and it is often a matter of assessing the resource implications of conducting own motion investigations in determining whether or not to undertake a particular inquiry. Conducting an own motion into a Defence matter will need to be assessed against competing priorities across other areas falling within the Ombudsman's jurisdiction. It is therefore necessary to pick issues that are serious and critical and which will not otherwise be addressed by our internal complaint handling processes.