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Department of Defence

DEFENCE INSTRUCTIONS (GENERAL)

Amendment

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Complete Revision

*Inquiries and investigations by the Commonwealth Ombudsman and the
Defence Force Ombudsman*

Department of Defence
CANBERRA ACT 2600

10 February 2009

Issued with the authority of the Chief of the Defence Force and the Secretary of the Department of Defence pursuant to section 9A of the *Defence Act 1903* for members of the Australian Defence Force.

Issued with the authority of the Secretary pursuant to section 20 of the *Public Service Act 1999* for Department of Defence Australian Public Service employees.

NICK WARNER
Secretary

A.G. HOUSTON
Air Chief Marshal
Chief of the Defence Force

LIST B—ISSUE NO PERS B/3/2009

Single Service filing instructions

This instruction should be filed as:

1. NAVY PERS 23-6
2. ARMY PERS 56-1
3. AIR FORCE ADMIN 9-22

Sponsor:

Deputy Secretary People Strategies and Policy

Sponsor contact:

Director Complaint Resolution

Review Date: 10 February 2012

Cancellation

DI(G) PERS 34-3 ISSUE NO PERS B/5/96 of 3 MAY 96 is cancelled.

Note

This amendment incorporates a title change.

INQUIRIES AND INVESTIGATIONS BY THE COMMONWEALTH OMBUDSMAN AND THE DEFENCE FORCE OMBUDSMAN

INTRODUCTION

1. From time to time the Ombudsman, in their role as either the Commonwealth Ombudsman or the Defence Force Ombudsman (DFO), may approach the Department of Defence or the Australian Defence Force (ADF) in relation to a complaint or an own motion investigation. The Fairness and Resolution branch, on behalf of the Secretary and Chief of the Defence Force (CDF) has established processes for managing and responding to the Ombudsman. The content of this Instruction has been endorsed by the Ombudsman.

POLICY STATEMENT

2. Defence must comply with the *Ombudsman Act 1976* (Ombudsman Act). On behalf of Defence, the Director-General Fairness and Resolution (DGFR) is responsible for the management and coordination of responses to the Ombudsman.

SCOPE

3. This Instruction is applicable to all members of the ADF and constitutes a lawful order from the CDF. This Instruction also constitutes a lawful and reasonable direction from the Secretary for the purposes of [subsection 13\(5\)](#) of the *Public Service Act 1999* to Defence Australian Public Service employees.

PURPOSE

4. The purpose of this Instruction is to outline the functions of the Ombudsman and to describe the procedure that must be followed in response to an approach by the Ombudsman and provide guidance to units, functional areas and Service headquarters on contact procedures with the Ombudsman's office.

DEFINITIONS AND ACRONYMS

5. For the purpose of this Instruction, the following definitions apply:
- a. **Defence** means the Department of Defence, the Defence Materiel Organisation, and the ADF.
 - b. **Ombudsman** means the Commonwealth Ombudsman and the DFO, and their delegates, unless indicated otherwise.
6. Acronyms contained in this Instruction are outlined in [annex A](#).

ROLE OF THE OMBUDSMAN

Jurisdiction

7. **Commonwealth Ombudsman.** The Office of the Commonwealth Ombudsman was established by the *Ombudsman Act*. The Commonwealth Ombudsman investigates administrative actions taken by a department or prescribed authority about which a complaint has been made. Under the 'own motion' powers provided in the *Ombudsman Act*, the Ombudsman can also initiate investigations relating to a matter of administration where no complaint has been made. [Annex A](#) provides further details on the powers of the Commonwealth Ombudsman.

8. **DFO.** Amendments to the [Ombudsman Act](#) made by the *Ombudsman Amendment Act 1983* provided the person holding the Office of the Commonwealth Ombudsman with additional powers as the DFO. The DFO may investigate matters of administration related to the service of ADF members or matters that arise as a consequence of a person serving or having served in the ADF.

9. When a complaint is made to the Commonwealth Ombudsman or the DFO, the Ombudsman may choose to investigate the complaint, or part of it, in either capacity.

Conduct of investigations by the Ombudsman

10. The Ombudsman conducts their investigations in private and investigates as they see fit. The Ombudsman has wide investigative powers and may investigate complaints against Defence using a combination of methods, including:

- a. oral inquiry;
- b. written request (email or letter) for comment;
- c. examination of files; and
- d. formal interview of relevant Defence personnel sometimes under oath.

11. Upon completion of an investigation, the Ombudsman would notify Defence of their views. In cases where the Ombudsman forms a view that is critical of Defence, the Ombudsman will formally write to Defence with advice of any preliminary views and recommendations and allow Defence to comment.

RESPONSIBILITY FOR ACTION

12. The Secretary and CDF are 'principal officers' within the terms of the [Ombudsman Act](#) and are responsible for responding to matters raised by the Ombudsman. In accordance with the Secretary and CDF's [Joint Directive 1/2006](#)—*Joint Directive by chief of the Defence Force and Secretary, Department of Defence to Director General, Fairness and Resolution*, the Ombudsman's primary point of contact is the DGFR for all matters referred from the Ombudsman other than defective administration, fraud and probity issues. For these matters, the Ombudsman will write to both the Secretary and CDF.

13. DGFR, through the Directorate of Complaint Resolution (CR), investigates and responds to Ombudsman complaints of a routine nature. In cases that are more serious or for matters relating to defective administration, fraud and probity issues, DGFR prepares responses for the Secretary, CDF, or the Service Chiefs, as appropriate. Where a complaint has become the subject of a formal report under [section 15](#)—'Reports by Ombudsman' or [section 16](#)—'Reports where appropriate action not taken on Ombudsman's report' of the [Ombudsman Act](#), the Secretary or CDF, as appropriate, will respond to the Ombudsman.

14. DGFR reports to the Secretary and the CDF in accordance with [Joint Directive 1/2006](#).

Directorate of Complaint Resolution

15. CR is responsible for collecting and analysing information and responding to inquiries from the Ombudsman. To provide an accurate and detailed response to the Ombudsman, CR will seek advice and information from the relevant units, functional areas or Service headquarters in Defence. The effectiveness of CR's actions is monitored by the Ombudsman.

16. Inquiries from the Ombudsman must be given high priority. CR attempts to provide a substantive response to the Ombudsman within 20 working days of receiving the inquiry. When unavoidable delays are anticipated, CR must advise the Ombudsman of the anticipated delay and the reasons for it. Where appropriate, an interim response will be provided to the Ombudsman.

17. Where an inquiry from the Ombudsman relates to a matter that is capable of being investigated in accordance with the Redress of Grievance (ROG) process (as provided in Part 15 of the Defence Force Regulations 1952), CR must notify the Ombudsman if a ROG has been submitted in relation to that inquiry and, if so, the status of that ROG.

18. Where, during the course of preparing a response to the Ombudsman, or as a result of an Ombudsman's investigation, flaws in Defence's organisation, policies, or procedures are revealed and CR considers a review should be undertaken, the matter must be referred to the appropriate units, functional areas or Service headquarters for comment or action. CR must notify the Ombudsman of any proposed actions and, upon completion of the action, that the remedial action has been taken.

19. Upon completion of an investigation by the Ombudsman, CR must notify the appropriate units, functional areas or Service headquarters within Defence of the outcome.

Units, functional areas or Service headquarters

20. Units, functional areas or Service headquarters within Defence must provide CR with comments on the matters surrounding the complaint, together with appropriate supporting documentation and, if requested, all relevant files relating to the Ombudsman's inquiry. Unless specifically requested, original documents are not required. Responses to CR must be cleared by the relevant One Star/Senior Executive Service Band 1, or their delegate.

21. Inquiries from CR relating to an inquiry by the Ombudsman must be given high priority. A response should be provided to CR as soon as reasonably practicable but, at the latest, within 10 working days. Where units, functional areas or Service headquarters anticipate unavoidable delays, they must:

- a. advise CR of:
 - (1) the nature of the delay;
 - (2) the reasons for the delay; and
 - (3) an anticipated date on which a response will be provided; and
- b. provide CR with an interim response as soon as any significant information is available.

22. **Direct contact with the Ombudsman.** The Ombudsman may make direct contact with units, functional areas or Service headquarters or with individual Defence personnel if considered necessary, but consultation with CR is usually undertaken before contact. In these circumstances, CR will provide prior notice of the Ombudsman's intention. If the Ombudsman's office contacts a unit, functional areas or Service headquarters without the unit, functional area or Service headquarters being given prior notice by CR, the Ombudsman must be advised to raise the matter with CR in the first instance. Normally, documents are provided to the Ombudsman's office through CR. In the case that a unit, functional areas or Service headquarters has had direct contact with the Ombudsman's office and agrees to provide the Ombudsman's office documentation directly, copies of the documents must also be provided to CR.

Offences

23. It is an offence to refuse or fail to respond to the Ombudsman without reasonable excuse, to wilfully obstruct, hinder or resist the Ombudsman or to furnish information or make a statement that is false or misleading in a material particular.

SUSPENSION OF ACTION

24. The Ombudsman is concerned that agencies do not take irrevocable action that would prejudice an appropriate remedy to a complaint or an administrative deficiency. The Ombudsman may request through CR that action be suspended pending the outcome of their investigation. Where such a request is made, CR must forward the request to the appropriate action area within Defence for a decision. If the action area decides not to suspend the requested action, reasons for the decision must be provided to the Ombudsman, through CR, as a decision not to suspend the requested may in itself constitute an administrative defect and be judged unjust or oppressive and require remedy. A decision not to suspend action should only be made where it would be unlawful to do so or where safety, security, discipline or the effective operation of a unit dictates. Where action has been suspended, the Ombudsman will conduct their investigation as a matter of urgency.

INFORMATION MANAGEMENT

Privacy

25. The privacy of individuals must be maintained at all times, and information gathered in any investigation must be treated as being IN-CONFIDENCE. Where the Ombudsman requests information relating to a complaint in accordance with the [Ombudsman Act](#), CR may collect, use and disclose personal information for the purpose of making submissions to the Ombudsman. CR will ensure reasonable steps are taken to safeguard the privacy of Defence personnel. At all times, Defence must comply with the [Privacy Act 1988](#) including [section 14](#)—‘Information Privacy Principles’.

26. The Ombudsman is entitled to see medical and/or psychology reports about serving or ex-members of the ADF that relate to matters under investigation. Release of such material must be made in accordance with [Defence Instruction \(General\) \(DI\(G\)\) PERS 16–20—Privacy of health information in Defence](#), or with the prior written consent of the ADF member (or former member, as the case may be). When the Ombudsman requests medical and/or psychology documents a medical officer or psychologist (as appropriate) of the Service concerned must be made available to interpret or discuss the content with the Ombudsman as and when considered necessary.

27. Normal ‘IN-CONFIDENCE’ handling procedures must be observed when forwarding or delivering documents to the Ombudsman’s office.

Sensitive information

28. If information or a document has been given a security classification or a privacy marking, or that could be otherwise be considered sensitive, CR must be advised of the classification, marking or sensitivity by the unit, functional area or Service headquarters providing the document. CR will advise the Ombudsman of the classification, marking or sensitivity when the information or document is provided, so that it can be given appropriate protection within the Ombudsman’s office. In certain circumstances, CR, on advice from the unit, functional area or Service headquarters may decline to provide information voluntarily. The Ombudsman may consider whether to issue a notice requiring the information. In these circumstances, Defence may consider obtaining a certificate from the Attorney-General permitting Defence not to comply with the Ombudsman’s notice. These cases are to be exceptional.

29. At all stages, CR must be kept informed of any concerns about disclosure, so that it can inform the Ombudsman who can address those concerns and consider the need for the information.

Access to information held by the Ombudsman

30. The Ombudsman is subject to the [Freedom of Information Act 1982](#) in the same way as other Commonwealth agencies. To protect the interests of other agencies, the Ombudsman’s express and strong policy is to transfer any request, or part thereof, for documents that originated from and/or relate to the functions of another agency to that original agency. Transfers of Freedom of Information (FOI) requests are managed through the Directorate of FOI in Defence Legal.

MULTIPLE COMPLAINTS

31. From time to time, a person will make the same or similar complaints to a number of people or complaint handling agencies, including, but not limited to:

- a. the Minister;
- b. the Australian Human Rights Commission; and/or
- c. the Office of the Privacy Commissioner.

32. In these circumstances, CR will inform the Ombudsman of these investigations so that the Ombudsman can decide whether or not to proceed with the investigation. In practice, when such advice is given, the Ombudsman would normally decline to investigate the matter but may offer to resume an investigation if the complainant is dissatisfied with the outcome of their other representation(s).

33. If CR becomes aware that a Ministerial representation has been made on a matter already under investigation by the Ombudsman, CR must advise the Directorate of Ministerial and Parliamentary Liaison Services without delay. A draft interim response for the Minister's consideration should be prepared, advising the correspondent that no further action is proposed until the Ombudsman's inquiries are complete.

Related publications

[Defence Act 1903](#)

[Defence Force Discipline Act 1982](#)

[Freedom of Information Act 1982](#)

[Human Rights and Equal Opportunity Commission Act 1986](#)

[Ombudsman Act 1976](#)

[Privacy Act 1988](#)

[Public Service Act 1999](#)

[DI\(G\) PERS 16-20—Privacy of health information in Defence](#)

[DI\(G\) PERS 34-1—Redress of Grievance—Tri-Service procedures](#)

[Joint Directive 1/2006—Joint Directive by chief of the Defence Force and Secretary, Department of Defence to Director General, Fairness and Resolution](#)

Sponsor: DEPSEC PSP (DGFR)

Annexes:

- A. [Acronyms](#)
- B. [Functions and powers of the Commonwealth Ombudsman](#)
- C. [Functions and powers of the Defence Force Ombudsman](#)

ACRONYMS

1. For the purposes of this Instruction, the following acronyms apply:
 - a. **ADF.** Australian Defence Force.
 - b. **CDF.** Chief of the Defence Force.
 - c. **CR.** Directorate of Complaint Resolution.
 - d. **DFO.** Defence Force Ombudsman.
 - e. **DGFR.** Director General Fairness and Resolution.
 - f. **FOI.** Freedom of Information
 - g. **ROG.** Redress of Grievance.

FUNCTIONS AND POWERS OF THE COMMONWEALTH OMBUDSMAN

FUNCTIONS

1. The Commonwealth Ombudsman (the Ombudsman) investigates complaints about the administrative actions of Commonwealth departments and most authorities. The Ombudsman may also investigate the actions of contractors providing services to the public and other people exercising Commonwealth powers or performing Commonwealth functions, as if the exercise of those powers or performance of those functions were taken by an agency's staff.
2. In addition to investigations arising from complaints, the Ombudsman may investigate an action on their own motion. These investigations typically relate to systemic issues (such as the quality of an internal review or complaint process) or the way similar functions are handled by different agencies.

MATTERS OUTSIDE THE OMBUDSMAN'S JURISDICTION

3. The Ombudsman cannot investigate the following:
 - a. **Action taken by a Minister.** The Ombudsman cannot investigate the actions of a Minister, however, action taken by a delegate of the Minister and advice given to a Minister can be investigated. The Ombudsman can also form the opinion that an action taken in accordance with a law or practice (including a Ministerial determination) was not defective, but that the law or practice was itself defective.
 - b. **Actions of courts and judges.** The Ombudsman cannot investigate the actions of courts or judges; however, the Ombudsman may investigate a court's administrative processes.
 - c. **Action taken in relation to civilian Commonwealth employment, including action taken in relation to promotion, pay, discipline and termination of employment.** The Ombudsman cannot investigate the actions taken in relation to civilian Commonwealth employment, including action taken in relation to promotion, pay, discipline and termination of employment, however, the Ombudsman can investigate complaints by Commonwealth employees about some superannuation, compensation, recruitment and post-employment matters.

DISCRETION TO INVESTIGATE

4. The Ombudsman may decide not to investigate a complaint if it is established that:
 - a. investigation is not warranted;
 - b. the complainant has been aware of the action complained about for more than 12 months;
 - c. the complainant has not tried to resolve the matter directly with the agency concerned at an appropriate level;
 - d. the complainant's representations to the agency concerned are still being considered; and/or
 - e. the complaint is better handled by a court, tribunal or other review body.

POWERS OF THE OMBUDSMAN

5. Despite having extensive formal powers, the Ombudsman usually works on an informal cooperative basis. Investigation officers have delegated powers. The powers of the Ombudsman include the ability to:

- a. require information to be furnished or documents produced;
- b. inspect, take possession of, make copies of, take extracts from, documents or other records;
- c. examine witnesses under oath; and
- d. enter premises occupied by a department or authority (with some exceptions).

6. **Offences.** It is an offence to refuse or fail to respond to the Ombudsman without reasonable excuse, to wilfully obstruct, hinder or resist the Ombudsman or to furnish information or make a statement that is false or misleading in a material particular.

DISCLOSURE OF INFORMATION

7. If the Ombudsman requests information or information is considered relevant to an investigation, an agency or a staff member with authority to do so may voluntarily provide information to the Ombudsman. Such a disclosure would not breach any law, endanger an agency's legal professional privilege nor breach the Information Privacy Principles. Inquiries about the release of information to the Ombudsman's office can be made to the Director Complaint Resolution.

8. When the Ombudsman formally requires a person to provide information, that requirement overrides any obligation of secrecy imposed on the person by other legislation unless the Attorney-General certifies that disclosure would be contrary to the public interest. The Attorney-General may issue a certificate if the disclosure would prejudice the security, defence or international relations of the Commonwealth, or if for other specified reasons the Ombudsman is not entitled to require the person to disclose that information. (Such certificates are practically unknown in practice). Alternatively, the Attorney-General may issue a certificate that does not prevent disclosure to the Ombudsman but prevents the Ombudsman's disclosure of that information. Where an agency is concerned about the implications of disclosure to the Ombudsman the problem must be identified at an early stage.

OUTCOMES OF INVESTIGATIONS

9. Where during the course of an investigation the Ombudsman forms opinions which are critical of Defence's actions or of a person's actions, the Ombudsman is required to give the Chief of the Defence Force (CDF) and Secretary and persons concerned in the taking of the action, or the person criticised, the opportunity to make such submissions as they wish, before the investigation is completed. In practice, this is usually achieved by the Ombudsman providing a copy of a draft report of the formal investigation to the CDF and Secretary for comment, with the request that the report be passed to persons concerned or criticised in the report to afford them the opportunity to make their own submissions.

10. Additionally, where the Ombudsman forms an opinion that there is evidence of misconduct or breach of duty the Ombudsman may disclose the evidence to the CDF or Secretary, or, if the evidence relates to the CDF or Secretary, to the Minister for Defence.

11. On completion of an investigation the Ombudsman forms an opinion as to whether the action:
- a. appears to have been contrary to law;
 - b. was unreasonable, unjust, oppressive or improperly discriminatory;
 - c. was based either wholly or partly on a mistake of law or fact;
 - d. was otherwise in all the circumstances wrong;

- e. was taken on the basis of irrelevant considerations or without taking all the relevant considerations into account;
- f. was defective because the complainant was not given reasons for the action; or
- g. was based on unreasonable law or policy ([section 15\(1\)\(a\)\(iii\)](#) of the *Ombudsman Act 1976*).

12. If the Ombudsman considers that the action was defective for any of the foregoing reasons, the Ombudsman will report to the agency accordingly, with a copy to the Minister, with a recommendation for an appropriate remedy. If adequate and appropriate action is not taken within a reasonable time, the Ombudsman may then report the matter to the Prime Minister and to the Parliament. Very few investigations reach this point; in almost all cases, either:

- a. the Ombudsman will reach the view that the action was not unreasonable in all the circumstances and discontinue investigation and inform the complainant and agency; or
- b. the agency will recognise that it could have done better and provide a remedy that satisfies the Ombudsman, who may decide to take no further action, record a finding of administrative deficiency against the department or produce a formal report under [section 15](#) of the *Ombudsman Act 1976*.

FUNCTIONS AND POWERS OF THE DEFENCE FORCE OMBUDSMAN

FUNCTION

1. The function of the Defence Force Ombudsman (DFO) is to investigate administrative actions of Commonwealth departments and authorities related to the service of a member of the Australian Defence Force (ADF), or arising as a consequence of a person serving, or having served, in the ADF. These matters include actions taken in relation to the payment of service related allowances, pensions or other benefits to ex-members of the ADF or to dependants of members or ex-members of the ADF.

POWERS

2. The *Ombudsman Act 1976* (the Ombudsman Act) confers on the DFO all of the general powers, duties and discretions of the Commonwealth Ombudsman.

Limitations

3. In addition to the limitations of the Commonwealth Ombudsman's jurisdiction described in paragraph 3 of [annex B](#), the DFO may not investigate:

- a. **Defence Force Discipline Act 1982 (DFDA) action.** The DFO cannot investigate action taken in connection with proceedings against a member of the ADF for an offence arising under any law, relating to the discipline of the Defence Force or of an arm or part of the Defence Force. This includes, but is not limited to, proceedings under the *DFDA*, the *Defence Act 1903*, the Defence Force Regulations 1952, and Defence (Inquiry) Regulations 1985. The Ombudsman generally interprets this as meaning that the DFO can investigate actions taken before charges (or similar) are laid, actions that follow a decision on a charge (or similar) and administrative actions that are based on grounds similar to those which have given or could give rise to a disciplinary process.
- b. **Honours and awards.** The DFO cannot investigate the granting or refusal of an individual honour or award to a member of the ADF or the criteria for granting awards to members of the ADF generally or to a particular arm of a Service, such as campaign medals and awards for long service. However, the DFO can investigate actions in relation to the processing of granting awards to members of the ADF generally.
- c. **Redress of Grievance (ROG).** The DFO cannot investigate complaints where a member of the ADF is entitled to seek ROG under part 15 of the Defence Force Regulations and has not done so, unless the DFO is of the opinion that there were special circumstances justifying the member refraining from seeking redress.

4. Where the subject of a member's complaint is being considered as a part of the ROG process, the DFO may not investigate a complaint until 29 days after the submission of the ROG unless the ROG has been finalised prior to the 29th day or there are special reasons for doing so. If the complaint is capable of being considered in the ROG process and the member has not submitted a ROG in relation to the complaint, the DFO will normally advise the member to submit a ROG to their CO in the first instance.

5. In practice, the DFO will not normally investigate a complaint until the ROG has been determined by the Service Chief or delegate, or in the case of officers, chief petty officers, warrant officers or flight sergeants, by Chief of the Defence Force. The DFO may, however, investigate complaints of delay in the resolution of complaints currently subject to the ROG process. If redress is granted, the DFO will generally not investigate further unless the redress granted is considered inadequate (which may include delay) by either the DFO or the complainant.

6. The DFO sometimes receives complaints from a parent or spouse of a member of the ADF about a service matter. The DFO's practice is to adhere to the requirement that the member should seek redress, and as such, usually prefers to deal directly with the member so as not to infringe on the

member's rights to privacy. In some cases, parents or spouses may have their own complaint about the actions of Defence towards them personally, in connection with the member's service; this would normally be dealt with under the jurisdiction of the Commonwealth Ombudsman.