

2021

INDEPENDENT CIVILIAN OVERSIGHT: THE DEFENCE COMMUNITY DESERVES NO LESS

A POSITION PAPER



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ISBN: D74-28/2021F-PDF

978-0-660-40869-9



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PART I – THE CURRENT CONTEXT

Culture change in the Canadian military

The internal workings of the Canadian military system have never before been under such extensive public scrutiny, with calls for immediate and wholesale change. The most recent sexual misconduct scandal has put on display a culture that insulates its bad actors and demands silence of its victims. This is not a new problem, nor is it limited solely to sexual misconduct. It applies to all forms of discriminatory behaviour and misconduct where there is a power imbalance and fear of reprisal. The current situation is at odds with our nation's expectations of its military as well as the ethos and core values professed by our military leaders.

Our military leaders must take this wake-up call seriously. Their response can no longer be another "checklist" exercise. They must take a hard look at the ingrained culture that has perpetuated these problems and take steps to overhaul their internal redress mechanisms and protocols with the intent to restore the confidence of members and of our nation. They have a tough job ahead of them.

No matter the measures they put in place or the steps they take to address culture change, there will always be a need for independent civilian oversight.

Need for civilian oversight

The office of the Ombudsman was established twenty-three years ago outside of the chain of command, but with administrative ties to the Department of National Defence and reporting ties to a minister of the political party in power. We have been making the argument for full independence since our creation, but there has been no political will to act. The recent scandal of sexual misconduct in the Canadian Armed Forces is an unfortunate illustration of how constituents fall between the cracks of a closed system with no fully independent recourse mechanism.

Testimony before Parliamentary Committee on the issue of sexual misconduct in the Canadian Armed Forces pointed to the reality that victims and witnesses are less likely to come forward when they must report through a system that they perceive as being complicit in creating the circumstances that led to the misconduct or maladministration they have experienced. There appears to be a general consensus that there is a need for oversight that is external to the chain of command and any other vested interest, whether political or administrative.

Members of the Defence Community can already turn to the office of the Ombudsman and expect independence and confidentiality, as well as an impartial and fair assessment of their issue. However, we could better serve our constituents if we were not impeded by an insufficient mandate or subject to interference.

Review of military justice – Justice Fish Report

Concurrently, but unrelated to the sexual misconduct scandal, the provisions of the *National Defence Act* related to military justice were being reviewed by the Independent Review Authority led by retired Supreme Court Justice Morris Fish. The office of the Ombudsman was invited to make representations, not because our office is included in these provisions, but in recognition that our office plays a role in the broader functioning of military justice.

Justice Fish, in his Report released on 2 June 2021,¹ noted that a review of the office of the Ombudsman fell outside of the scope of his examination, but acknowledged the importance of independent oversight. Justice Fish recommended that “there should be an independent review of oversight and redress mechanisms of the Canadian Armed Forces”. More specifically, he stated that the review should examine the office of the Ombudsman and whether additional measures are needed to reinforce its independence and effectiveness.

With the greatest respect, there is no need for yet another independent review. There have been a number of such reviews and studies in the past, as well as attempts to throw half-solutions at the problem, but no real political imperative to act. I suggest that this latest scandal may be the catalyst for those in power to take notice and take action to effect institutional change.

Previous studies and calls for independent oversight

The need for independent oversight of the military has been studied *ad nauseum*. Canadian studies and authorities have considered the matter of military oversight since 1977. The contexts and the proposed mechanisms have varied, but the common thread is that independent oversight is needed to curb abuses within the closed military system. Annex A of this position paper sets out a more complete timeline and listing of previous studies. However, the following overview of the most relevant studies is helpful to understand the extent of the analysis that led to the establishment of the office of the Ombudsman.

The concept of a general federal ombudsman whose jurisdiction included the Canadian Armed Forces was first considered in 1977, debated, but gained no real political traction.² In the mid to late 1990s, the reputation of the Canadian Armed Forces was at an all-time low with pervasive media coverage of the scandal in Somalia and the ill-treatment of female soldiers, particularly with respect to sexual assault and harassment. These incidents made evident a number of weaknesses in administration, accountability, and complaint

1 The Honourable Morris J Fish, *Report of the Third Independent Review Authority to the Minister of National Defence* (Ottawa: Independent Review Authority, 2021)

2 See Bill C-43, *Ombudsman Act*, 3rd Sess, 30th Parl, 1978.

resolution mechanisms within the Canadian Armed Forces. It resulted in a domino-effect of investigations, reports, and analyses by both the military itself and external experts commissioned to review the failing systems.

In 1995, the Department of National Defence and the Canadian Armed Forces commissioned retired Brigadier-General Doshen to recommend alternatives to the existing ‘mechanisms of voice’.³ The conclusion was that a classical ombudsman would be the most effective mechanism of complaint resolution, though an institutional ombudsman might be less costly to establish. A second Doshen report was commissioned to prepare an implementation plan for a military ombudsman.⁴ The plan was shelved in 1997 by the senior leadership of the military over concerns that independent oversight would erode military authority and leadership.

In 1996, a complete review of leadership and management in the Canadian Armed Forces was undertaken by the late Chief Justice of Canada Brian Dickson at the behest of the then Minister of National Defence.⁵ The *Dickson Report* stated:

...[I]t is very important that Canadian Forces members be given a voice, consistent with the appropriate authority of the chain of command, so that their concerns and complaints can be independently investigated and, if necessary, dealt with. For in the broadest sense, military justice must include an effective, independent channel or mechanism through which members can express their concerns about any aspect of the military establishment, without feeling their only outlet is the media. Such a mechanism would ultimately strengthen the chain of command.

...We wish to stress, that oversight and review requirements go far beyond the military justice system and the military police. They pertain to a myriad of individual issues in which CF people may feel the need to have a voice and be heard.

...We recommend that an independent office of complaint and review system oversight, such as a military Ombudsman, be established within the Canadian Forces, and that it report directly to the Minister of National Defence.

3 Brigadier-General (ret'd) Larry T. Doshen, *Report on the Study of Mechanisms of Voice / Complaint Resolution in the Canadian Forces* (Ottawa: Department of National Defence, 1995). [The Doshen Paper #1]

4 Brigadier-General (ret'd) Larry T. Doshen, *Proposed Implementation Plan - Organizational Ombudsman* (Ottawa: Department of National Defence, 1996). [The Doshen Paper #2]

5 Special Advisory Group on Military Justice and Military Police Investigation Services, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (Ottawa: Department of National Defence, 1997).

The Report of the Somalia Commission of Inquiry (June 1997)⁶ recommended that the *National Defence Act* be amended to establish an independent civilian review body (called an Inspector General) with a well-defined and independent jurisdiction, comprehensive powers, and reporting directly to Parliament. The Somalia Commission of Inquiry stressed the need for renewed commitment to principles of independence, impartiality, transparency, fairness, and protection from retribution for all members of the military.

[...] left uncorrected, the problems that surfaced in the desert in Somalia and in the boardrooms at National Defence Headquarters will continue to spawn military ignominy. The victim will be Canada and its international reputation.

Creation of the office of the DND/CAF Ombudsman

The Department of National Defence rejected the Somalia Commission of Inquiry recommendation to establish an Inspector General with a reporting structure to Parliament. Ultimately the office of the Ombudsman was created with a reporting structure directly to the Minister of National Defence. In 1998, the first Ombudsman was appointed and tasked with developing an operational framework for the organization. The results of an extensive consultation, both international and domestic, are captured in the report entitled *The Way Forward – Action Plan for the Office of the Ombudsman* (January 1999).⁷

Following the recommendations of *The Way Forward*, the mandate for the office of the Ombudsman was set out in *Ministerial Directives* which contained an express provision that the office would be independent from the departmental administration and the military chain of command.

The intent was that the office of the Ombudsman would operate under the *Ministerial Directives* for an initial period of six months in order to allow time for stakeholders to evaluate the effectiveness of the office before it was enacted in legislation. After the issuance of the *Ministerial Directives*, consultations and negotiations regarding legislation continued between stakeholders until the summer of 2001 when they broke down, leaving the office of the Ombudsman saddled with an inadequate governance structure that was never intended to function in the long term.

⁶ Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair* (Ottawa: Commission of Inquiry into the Deployment of Canadian Forces in Somalia, 1997).

⁷ Ombudsman for the Department of National Defence and the Canadian Forces, *The Way Forward* (Ottawa: DND-CAF Ombudsman, 1999). [*The Way Forward - Action Plan for the Office of the Ombudsman*]

Studies by the Ombudsman

In the twenty-three years of our existence, every incumbent to the position of Ombudsman has seen the effects of the inadequate governance structure and has stressed the need for independence and permanence through a legislated mandate. Our office has published multiple reports calling for legislation to address poor governance and the effects of administrative interference with our office's independence. Without a dramatic hook that captures the public's attention, reports such as these tend to go unactioned. In the case of our repeated requests for independence and legislation, there has been no political appetite or uptake. Sadly, it takes a scandal to bring the importance and full implications of these issues to the forefront of public consciousness.

International precedents

Mr. Justice Fish recommended that further study should examine how other democracies manage their military oversight. Annex B of this position paper outlines the powers and the authorities of our international counterparts. Other nations have opted to give their military oversight bodies proper legislated authorities with enough teeth to ensure that their recommendations are actioned. It is a disgrace that Canada is the only country in the Five Eyes not to have done so.

Why has independent oversight not already been implemented?

The studies and authorities are consistent in their opinion that to be effective, oversight must be free of any influence and control by those who are the subject of that oversight. In the context of our military institutions, this means independence from the military chain of command and from the administration of the civilian department with which the military is integrated. Additionally, the body responsible for such oversight must report to an entity without a politically vested interest in protecting the image and management of the Department and Canadian Armed Forces.

Despite apparent agreement in principle, all attempts at negotiating independence for this office have been scuttled by military and departmental leadership who have no interest in having an external organization authorized to review their behaviour.

The same pattern of resistance to any form of independent oversight is evident in how the Canadian Armed Forces and the Department addressed the recommendations of the 2015 *Deschamps Report*⁸ on sexual misconduct. Seven years after the report's publication, and

⁸ The Honourable Marie Deschamps, *External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces* (Ottawa: External Review Authority, 2015).



faced with a new wave of public outrage, military and departmental leaders are offering their *mea culpas* and promises to do better this time. They have even admitted that the 2015 *Deschamps* recommendations were largely treated as a ‘checklist exercise’.⁹

This alone is compelling evidence that the Canadian Armed Forces and departmental leadership should not have a say in the decision of whether and how they should be subject to oversight.

⁹ See Deputy Minister Jody Thomas and Acting Chief of the Defence Staff Lieutenant-General Wayne Eyre’s remarks on Matt Galloway, “Interview with A/CDS - Part I” *CBC Radio 1 - The Current* (25 May 2021).; See also Deputy Minister Jody Thomas’ remarks in Ashley Burke, “Ottawa failed to properly implement sexual misconduct report, top Defence Civil Servant says” *CBC News* (25 May 2021); See also Lt. Gen. Steve Whelan’s remarks in Lee Berthiaume, “Military’s failure on sexual misconduct feels like existential threat” *National Post* (9 June 2021).



PART II – OMBUDSMAN AS PART OF THE SOLUTION

The purpose of an ombudsman is to shed light on matters that are overlooked or unheeded by the traditional bureaucratic controls. The ombudsman is a response to potential abuses of authority or maladministration that affect those without a voice. By its nature, the ombudsman enhances confidence in the system because Canadian Armed Forces members and the general public know that there is an independent oversight body whose sole purpose is to bring problems into focus and make recommendations to improve the system when it fails.

Proposed legislation

The office of the Ombudsman was set up to resolve complaints of unfairness and maladministration in the Canadian Armed Forces and Department of National Defence. The office operates consistent with the principles of ombudsmanry: fairness, independence, impartiality, and confidentiality.

The Ombudsman addresses issues at both the individual and systemic level, making recommendations aimed at correcting unfairness and making lasting positive change. When constituents feel that those mechanisms have failed them, our office can review the process and decision in order to make a determination whether the criteria of fairness were met. Our office looks at all issues impartially and based on evidence, and may sometimes find that a complaint is groundless.

While we have successfully delivered our mandate, earned the trust of our constituents, and contributed to the ongoing wellbeing of the Defence Community, we have had to do so with hands tied behind our organizational back. In order to loosen those constraints but maintain our core functions, we propose the enactment of the draft legislation included at Annex C of this position paper.

The proposed legislation does not deviate from the principles on which the office was established or the essential functions that we have been performing for the last 23 years. Elements of our mandate that have worked well have been preserved, while those that are lacking have been strengthened. The draft legislation seeks to achieve permanence for our office, full administrative independence from the institutions we oversee, a reporting structure allowing us to flag sensitive matters to Parliament, and additional measures to reinforce our effectiveness and efficiency.

Stable authorities

At this time, the office of the Ombudsman does not exist in legislation. Instead, we exist by way of *Ministerial Directives*¹⁰ that can be withdrawn or modified at any time. This directive only has force through an Order signed by the leadership of the institutions we oversee. This means that the office of the Ombudsman could effectively be dissolved or rendered inert at any time through changes to the Directives or Order.

Without stable authorities enshrined in legislation, the only things protecting the office of the Ombudsman are the good work that we do and the potential political fallout that could arise if we were dismantled.

The draft legislation at Annex C gives the office of the Ombudsman the permanence and stability it requires to continue its work in support of the Defence Community.

Independence

While the Ombudsman's current mandate includes an express provision that the office is independent from the military chain of command and the administration of the Department of National Defence, we consistently encounter governance issues and interference with our operations.

Without legislation, the Ombudsman is reliant on the Deputy Minister of National Defence for financial and human resources authorities. This office is constantly negotiating our delegated authorities and asserting our independence, often with disappointing results. The office has published a number of reports highlighting the administrative and operational challenges linked to this structure and how they impact the office's effectiveness.¹¹

More troubling is that the office of the Ombudsman faces the risk of having its authorities modified or removed in retaliation for performing oversight functions. For example, Ombudsman staff are currently considered employees of the Department, a fact that the Department has used as a justification to interfere in our office's affairs. While subtle and

10 Canada, Minister of National Defence, *Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces* (Ottawa: Government of Canada, 2001). [Ministerial Directives]; Defence Administrative Orders and Directives 5047-1, *Office of the Ombudsman* (Ottawa: Department of National Defence & Canadian Forces, 2001) [DAOD 5047-1].

11 See *The Way Forward*, *supra* note 7; Ombudsman for the Department of National Defence and the Canadian Forces, *Overhauling oversight: Ombudsman white paper* (Ottawa: DND-CAF Ombudsman, 2005); Ombudsman for the Department of National Defence and the Canadian Forces, *The Case for a Permanent and Independent Ombudsman Office* (Ottawa: DND-CAF Ombudsman, 2017); Ombudsman for the Department of National Defence and the Canadian Forces, *A Path Forward: Action Plan for the Office of the Ombudsman* (Ottawa: DND-CAF Ombudsman, 2017).; Auditor General of Canada, 2015 Spring Reports of the Auditor General of Canada, Report 7 - *Office of the Ombudsman for the Department of National Defence and the Canadian Forces*.

insidious, there have been instances that suggest a pattern of personal and institutional reprisal.¹²

The proposed legislation gives the Ombudsman full structural and administrative independence from the Department so that it can carry out its functions unimpeded. Additional provisions protect the office from criminal or civil proceedings for actions taken in good faith in the performance of our functions and duties.¹³

Reporting Structure

There are also concerns with having the office of the Ombudsman report through the Minister responsible for the institutions that we oversee. Regardless of the party that forms government, the Minister responsible for the Defence Portfolio will want to control the narrative around the Department of National Defence and the Canadian Armed Forces. While it is generally easy to keep the reporting relationship with the Ministers of National Defence arms-length and apolitical, vested political interests may become apparent just prior to an election period or in times of crisis.

Under our current mandate, our reports are initially placed on hold with the Minister, delaying their publication and availability to the public. The office has been given Ministerial direction on the conduct of systemic investigations followed by revocation of the direction without operational justification. We have also seen inaction on sensitive information that could be unflattering to the Canadian Armed Forces and Department. This cannot persist.

Reporting directly to Parliament would eliminate political influence and ensure that all pertinent information and recommendations regarding the Canadian Armed Forces and the Department reach all Members of Parliament in a timely manner. The draft legislation at Annex C proposes that the Ombudsman report directly to Parliament.

Confidentiality

Confidentiality is one of the core principles of Ombudsmanry. Without a strong guarantee of confidentiality, constituents may not be comfortable coming to the Ombudsman with complaints of maladministration or misconduct.

¹² For a recent example, on 15 June 2021, the Department of National Defence attempted to exert control over the review and approval of questions prepared for constituents as part of the office of the Ombudsman's ongoing systemic investigation on employment equity. The office pushed back as the approval process put forth by the Department would have undermined the independence of the investigation.; See also Lee Berthiaume, "Ombudsman accuses National Defence of 'insidious' attacks, demands independence", *Canadian Press* (2 April 2017) and Murray Brewster "Former military ombudsman claims DND vendetta drove him into retirement" *CBC News* (23 September 2019).

¹³ See the testimony of former Ombudsman, Gary Walbourne in Canada, Parliament, House of Commons, Standing Committee on National Defence, Proceedings, 43rd Parl, 2nd Sess, No 018 (3 March 2021)

Both in Parliamentary Committee and in the press, we have heard accounts from members who have chosen not to engage with internal complaint mechanisms within the military due to fears of reprisal or career consequences. This is one of the reasons why it is crucial that there be a confidential channel through which our constituents can report issues without fear of retaliation.

Without legislation, the confidentiality protections that the office of the Ombudsman provides to constituents can be legally trumped by any organization with the statutory authority to demand records. We have consistently pushed back against requests of this type and have always successfully argued confidentiality. As of present, we have never released the confidential information of our constituents without their consent. Nonetheless, it is essential that this critical principle be protected in legislation.

The draft legislation at Annex C gives a privileged status to constituent communications with our office and contains an express provision protecting the Ombudsman and staff from being compelled to act as witnesses or provide evidence on matters relating to the exercise of our functions.

A legislated mandate would also protect information gathered during investigations by making them eligible for exemptions under access to information and privacy legislation and accompanying regulations.

Reporting and escalation

The office of the Ombudsman's primary means of affecting positive change is through the recommendations that we make. However, these recommendations are of little value to the Defence Community if they are not implemented. Luckily, there are tools at our disposal that help ensure implementation.

The majority of inquiries received by our office come from serving members of the Canadian Armed Forces. This means that most of our operational efforts to resolve issues involve communication with Canadian Armed Forces authorities. Generally, we experience cooperation and are able to resolve files without need for further escalation.

No organization relishes the idea of oversight or review of its business. Some push-back is to be expected.

One of the principal tools available to my office to apply pressure is the ability to make our reports and findings available to the public. Another is the ability to control our communications and make statements to the press. The draft legislation at Annex C would permanently enshrine these powers.¹⁴

As strong as these tools may be, they are not always appropriate in every circumstance. Often, my office must deal with complaints of a sensitive nature, where constituents may not

¹⁴ With respect to formal reporting structures, under a legislated mandate, reports of the Defence Ombudsman would first be tabled with the Speaker of the House and would then go to the Standing Committee on National Defence for review and action.

wish for us to make matters public or have their identities revealed. While we always aim to resolve matters with the lowest possible authority, without the ability to go to the public, we must be able to escalate matters in cases of inaction or undue delay.

This is why the draft legislation at Annex C contains provisions requiring authorities to respond to our recommendations and allowing us to escalate matters up the departmental hierarchy and military chain of command, all the way to the Minister, the Prime Minister, and ultimately Parliament.



PART III - CONCLUSION

The cycle of scandals followed by studies, recommendations for independent oversight, half-solutions, and resistance by the Department or the Canadian Armed Forces will only be broken when action is taken.

The office of the Ombudsman is calling for independence in our role as an objective oversight body for the Defence Community. While we have done our best to perform this function with inadequate authorities, it is clear that we need a mandate with legislative strength and sufficient teeth. Although we have been successful with moral suasion and our recommendations get accepted in principle, greater powers and protections are needed to help us better serve the Defence Community and hold leadership accountable for implementing our recommendations.



ANNEX A Studies and Evolution of Military Oversight in the Canadian Context

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Nov 1995	<p>Doshen Report</p> <p><i>Report On The Study Of Mechanisms Of Voice/ Complaint Resolution In The Canadian Forces</i></p> <p>Brigadier-General (ret'd) Larry T. Doshen, <i>Report on the Study of Mechanisms of Voice / Complaint Resolution in the Canadian Forces</i> (Ottawa: Department of National Defence, 1995).</p>	<p>Retired Brigadier-General Larry Doshen was tasked to provide options for strengthening mechanisms of voice in the Canadian Forces. The options examined included an outside review agency, inspector general, union for military personnel, and classical and organizational ombudsman offices.</p> <p>The report concluded that either the inspector general or a classical ombudsman would “do the most to give members confidence that their grievances would be resolved justly.” However, an organizational ombudsman was put forward as the preferred option on the basis that it would be less expensive.</p> <p>The Doshen Report did not present any figures as to the projected costs of such an option and did not provide any form of cost/benefit analysis with respect to the various policy options.</p>
Jul 1996	<p>Doshen Report #2</p> <p><i>Canadian Forces Organizational Ombudsman Implementation Plan</i></p> <p>Brigadier-General (ret'd) Larry T Doshen, <i>Proposed Implementation Plan - Organizational Ombudsman</i> (Ottawa: Department of National Defence, 1996).</p>	<p>Retired Brigadier-General Larry Doshen submitted a report outlining the steps needed to create an ombudsman for the Canadian Forces, based on an organizational ombudsman model.</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Mar 1997	<p>Dickson Report</p> <p><i>Report of the Special Advisory Group (SAG) on Military Justice and Military Police Investigation Services</i></p> <p>https://military-justice.ca/wp-content/uploads/2018/12/Report-of-the-Special-Advisory-Group-on-Military-Justice-and-Military-Police-Investigation-Services.pdf</p>	<p>Former Chief Justice of Canada Brian Dickson was appointed to head a Special Advisory Group (SAG) to make recommendations about accountability and oversight for the Military Justice system and the Military Police.</p> <p>In addition to these recommendations, the SAG found that there was a need for independent review and oversight of all Canadian Forces activities, operating outside of the chain of command.</p> <p>“It is very important that CF members be given a voice, consistent with the appropriate authority of the chain of command, so that their concerns and complaints can be independently investigated and, if necessary, dealt with. For in the broadest sense, military justice must include an effective, independent channel or mechanism through which members can express their concerns about any aspect of the military establishment, without feeling their only outlet is the media. Such a mechanism would ultimately strengthen the chain of command.</p> <p>... We wish to stress, that oversight and review requirements go far beyond the military justice system and the military police. They pertain to a myriad of individual issues in which CF people may feel the need to have a voice and be heard. Therefore:</p> <p>We recommend that an independent office of complaint review and system oversight, such as a military ombudsman, be established within the Canadian Forces, and that it report directly to the Minister of National Defence”</p>



STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Mar 1997	<p>Young Report</p> <p><i>Report to the Prime Minister on the Leadership and Management of the Canadian Forces,</i></p> <p>The Honourable Douglas Young, <i>Report to the Prime Minister on the Leadership and Management of the Canadian Forces</i> (Ottawa: Department of National Defence, 1997).</p>	<p>Former Minister of National Defence, Douglas Young initiated a full-scale review of the state of the Canadian Forces, following the deployment to Somalia. The review included 12 separate studies by independent academic advisors on the subject of authority, responsibility, and accountability in the military.</p> <p>All of the authors agreed that there was a need to reform the accountability structures, although they disagreed on the best approach.</p> <p>The Young Report accepted the recommendations of the <i>Dickson Report</i> and a commitment was made to set up an ombudsman outside the chain of command, but reporting to the Chief of the Defence Staff and the Deputy Minister.</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Jun 1997	<p>Somalia Inquiry</p> <p><i>Dishonoured Legacy: The Lessons of the Somalia Affair: Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia.</i></p> <p>http://publications.gc.ca/site/eng/9.700365/publication.html</p>	<p>The Somalia Commission of Inquiry was called to investigate systemic issues relating to leadership before, during, and after the deployment of Canadian Forces to Somalia in 1993.</p> <p>The Commission of Inquiry found that Parliamentary oversight of the military was hampered by a lack of information being provided to Parliament. It also highlighted the need for greater civilian oversight of the Canadian Forces and recommended creating an Inspector General (with powers similar to those that a classical parliamentary ombudsman) directly responsible and reporting to Parliament.</p> <p>Findings:</p> <p>"Mechanisms for parliamentary oversight of the Department of National Defence and military activities are ineffective. ...Parliament is particularly effective in promoting accountability when it receives, examines and publicizes reports from bodies with a responsibility to report to Parliament (as would be the case, for example, with the responsibilities that we propose entrusting to an inspector general)."</p> <p>"There is evidence that Canadians and members of the CF want a review process that is straightforward and independent. We also believe that a civilian inspector general, properly supported and directly responsible to Parliament, must form an essential part of the mechanism Canadians use to oversee and control the CF and the defence establishment. While the CF and its members would merit the primary attention of this new office, the close ties between the CF and DND, and public servants in DND, especially at NDHQ, requires that the Inspector General must act in and for members of both institutions."</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Oct 1997	<p>Department of National Defence Report</p> <p><i>A Commitment to Change: Report on the Recommendations of the Somalia Commission of Inquiry</i></p> <p>http://publications.gc.ca/collections/collection_2015/mdn-dnd/D2-111-1997-eng.pdf</p>	<p>The Department of National Defence issued a report in response to the Somalia Inquiry's recommendations. The recommendation for an inspector general reporting to Parliament was rejected due to concerns that it would "obscure the authority of the Minister before Parliament and introduce ambiguities regarding the responsibilities and accountabilities of the Chief of the Defence Staff and Deputy Minister in both practice and law."</p> <p>Instead, the Department contended that the objectives of the recommendations were to be achieved through other means, specifically the creation of the Canadian Forces Grievance Board, the National Investigation Service division of the Military Police, the Military Police Complaints Commission, and the office of the Ombudsman. *See Note</p> <p>The report outlined the appointment of a "DND/CF organizational Ombudsman by the Minister with direct access to the Minister, the Chief of the Defence Staff and the Deputy Minister, independent of the chain of command, accessible to all members of the CF and DND without fear of retribution, and capable of addressing either individual or systemic problems."</p> <p>*Note:</p> <p>It is to be noted that all of these bodies were created and incorporated into legislation with the exception of the office of the Ombudsman. The office of the Ombudsman was established under <i>Ministerial Directive</i> with a promise that it would be reviewed in six months then enacted in legislation.</p>
Jan 1999	<p>Ombudsman Report (A. Marin)</p> <p><i>The Way Forward: An Action Plan for the Office of the Ombudsman</i></p> <p>http://ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/wf-aa.pdf</p>	<p>In 1998, the first Military Ombudsman was appointed and tasked with creating a mandate for the office.</p> <p>A study was conducted examining other ombudsman organizations within Canada, as well as military oversight bodies around the world. Practitioners and experts in military oversight were also consulted.</p> <p>Following the study, an action plan was prepared outlining what authorities would be needed by the newly established office.</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Sept 2003	<p>Lamer Report</p> <p><i>The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35</i></p> <p>https://www.canada.ca/content/dam/canada/military-grievances-external-review/migration/documents/lamer-eng.pdf</p>	<p>Former Chief Justice of Canada Antonio Lamer was tasked by the Minister of National Defence to conduct an independent review of the military justice provisions added to the <i>National Defence Act</i> in 1998.</p> <p>As the office of the Ombudsman was not created through any of the provisions under review, Justice Lamer chose to omit it from the review. However, the report stressed the importance of independence and distance from the chain of command in the context of the new review authorities.</p>
Mar 2005	<p>Ombudsman Report (A. Marin)</p> <p><i>Overhauling Oversight: Ombudsman White Paper</i></p> <p>http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/overhauling.pdf</p>	<p>At the end of his tenure, the first Ombudsman published a paper outlining the challenges of working within the mandate set out in the <i>Ministerial Directives</i>.</p> <p>The Ombudsman called for a legislated office with the robust protections and investigative powers of classical ombuds institutions.</p>
Dec 2011	<p>LeSage Report</p> <p><i>Report of the Second Independent Review Authority to The Honorable Peter G. MacKay Minister of National Defence</i></p> <p>https://military-justice.ca/wp-content/uploads/2018/12/07_LeSage_Report1.pdf</p>	<p>Former Chief Justice of the Ontario Superior Court of Justice Patrick LeSage was appointed to conduct a second independent review of the military justice provisions of the <i>National Defence Act</i>.</p> <p>As the mandate of the Second Independent Review shared similar parameters with the first, Justice LeSage chose to adopt Justice Lamer's reasoning for excluding the office of the Ombudsman from the review.</p> <p>"An issue raised in the Lamer Report and was whether a review of the Office of the Ombudsman was included in his mandate Former Chief Justice Lamer concluded that since the Office of the Ombudsman was not created by Bill C-25 it was not part of his review. Because of the similar parameters of the mandate for this Review, I concur with this approach taken by former Chief Justice Lamer."</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Mar 2015	<p>Deschamps Report</p> <p><i>External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces</i></p> <p>https://www.canada.ca/en/department-national-defence/corporate/reports-publications/sexual-misbehaviour/external-review-2015.html</p>	<p>Former Supreme Court Justice Marie Deschamps was appointed to conduct an external review into how sexual misconduct is dealt with in the Canadian Armed Forces.</p> <p>Justice Deschamps “heard repeatedly from participants that the only way to increase the frequency of reporting is to create a reporting mechanism outside of the chain of command. Indeed, a number of other military organizations—for example in the United States, Australia and France—have created independent offices to receive reports of sexual misconduct, as well as to provide victim support, conduct training, and track data. Most of these offices allow victims to decide whether or not they wish their complaint to trigger a formal complaint and investigation process. Regardless of which path they choose, however, victims are offered treatment and support.”</p>
Spring 2015	<p>Auditor General Report Spring 2015</p> <p><i>Report 7 – Office of the Ombudsman for the Department of National Defence and the Canadian Forces of the Auditor General’s Spring Reports</i></p> <p>https://www.oag-bvg.gc.ca/internet/English/parl_oag_201504_07_e_40353.html</p>	<p>The Auditor General conducted a routine audit of the performance and existing controls in the office of the Ombudsman.</p> <p>The Auditor General highlighted problematic governance issues related to administrative ties between the Department of National Defence and the office of the Ombudsman. Notably, it was observed that the office of the Ombudsman relied on the Deputy Minister for its delegations and that Ombudsman staff were subject to departmental investigation and review.</p> <p>The report indicated that situations of mutual review needed to be carefully negotiated and that reviews of the office conducted by the Department could be perceived as a threat to independence. The report cautioned that while controls were necessary, they “should not impede on the operational independence of the Ombudsman.”</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Mar 2017	<p>Ombudsman Report (G. Walbourne)</p> <p><i>The Case for a Permanent and Independent Ombudsman Office</i></p> <p>http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/governance_ministerresponseincl_nov-30-2017.pdf</p>	<p>The Ombudsman published an evidence-based report outlining the problems with operating under <i>Ministerial Directives</i> rather than legislation. The report proposed that the legislation originally planned for the office be actioned.</p> <p>“For any ombudsman to be effective the principles of independence, impartiality, fairness, and confidentiality are critical. Many of the practical challenges for the office of the Ombudsman are a direct result of the governance structure butting up against one or more of the principles of ombudsmanry, particularly those of independence and confidentiality.”</p>
Oct 2017	<p>Ombudsman Report (G. Walbourne)</p> <p><i>A Path Forward: Action Plan for the Office of the Ombudsman.</i></p> <p>http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/a-path-forward-report.pdf</p>	<p>The Minister of National Defence did not accept the recommendation to legislate the Ombudsman’s mandate, and directed the Ombudsman to set out a plan to work within the existing framework in a manner that respects the need for independence.</p> <p>While noting that this was not optimal, the Ombudsman proposed a framework that maximized administrative independence from the Department.</p> <p>Note:</p> <p>While the office did receive a response letter indicating positive reception of the proposal by the Minister, none of the report’s recommendations were ever actioned and the governance issues that were highlighted remain outstanding.</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
Jun 2021	<p>Fish Report</p> <p><i>Report of the Third Independent Review Authority to the Minister of National Defence</i></p> <p>https://www.canada.ca/en/department-national-defence/news/2021/06/third-independent-review-of-the-national-defence-act.html</p>	<p>Former Supreme Court Justice Morris Fish was appointed to conduct the third independent review of the military justice provisions of the <i>National Defence Act</i>.</p> <p>While the office of the Ombudsman fell outside of the scope of Justice Fish's review, it was nonetheless included in recognition of the role it plays in the larger context of military justice. Certain governance issues affecting the office were touched on and a new review was recommended to examine whether the office requires additional measures to reinforce its independence and effectiveness.</p> <p>"Recommendation #103: There should be an independent review of oversight and redress mechanisms for the Canadian Armed Forces.</p> <p>The review should examine the operation of the Office of the Ombudsman for the Department of National Defence and the Canadian Forces, and whether additional measures are needed to reinforce its independence and effectiveness. The review should examine the experience of other democracies and best practices elsewhere in government. It should consider the roles and responsibilities of a general oversight organization in relation to subject-specific oversight organizations within the Defence portfolio."</p>
June 2021	<p>The House of Commons Status of Women Committee (FEWO) Report</p> <p>Canada, Parliament, House of Commons, Standing Committee on the Status of Women, <i>Eliminating Sexual Misconduct within the Canadian Armed Forces: Report of the Standing Committee on the Status of Women</i>, 43rd Parl, 2nd Sess (18 June 2021) (Chair: Marilyn Gladu).</p>	<p>The House of Commons Status of Women Committee (FEWO) conducted hearings into allegations of sexual misconduct against high-ranking members of the Canadian Armed Forces.</p> <p>The Committee heard from numerous witnesses and experts that an independent external oversight body was needed to ensure that initiatives to generate culture change and eliminate sexual misconduct are effectively implemented.</p> <p>The Committee published its findings in a report on 18 June 2021, where it recommended that Canada establish a fully independent Inspector General's office headed by an Officer of Parliament and reporting directly to Parliament.</p>

STUDIES OF INDEPENDENT MILITARY OVERSIGHT IN THE CANADIAN CONTEXT		
YEAR	STUDY	SIGNIFICANCE
TBC	<p>The House of Commons National Defence Committee (NDDN) Report</p> <p><i>No report tabled before adjournment of session</i></p>	<p>The House of Commons National Defence Committee (NDDN) conducted hearings into allegations of sexual misconduct against high-ranking members of the Canadian Armed Forces.</p> <p>The Committee heard extensive testimony on the allegations from witnesses and experts, including from the Minister of National Defence, senior military officials, current Ombudsman Lick, and former Ombudsman Walbourne.</p> <p>The Committee was expected to release its findings in the summer of 2021. However, lengthy debates and filibustering related to the calling of witnesses resulted in the Committee adjourning on 21 June 2021 without tabling a report.</p>
TBC	<p>Arbour External Review</p> <p><i>Independent External Comprehensive Review of current policies, procedures, programs practices and culture within DND/CAF</i></p> <p><i>Terms of Reference:</i></p> <p>https://www.canada.ca/en/department-national-defence/campaigns/external-review-terms-of-reference.html</p>	<p>Former Supreme Court Justice Louise Arbour was appointed by the Minister of National Defence to review and investigate sexual misconduct in the military.</p> <p>The <i>Terms of Reference</i> for the review require that Justice Arbour “review to identify the causes for continued presence of harassment and sexual misconduct despite efforts to eradicate it, identify barriers to its reporting, and assess the adequacy of the policies, procedures and practice to respond when reports are made.”</p>



ANNEX B Comparative Chart: International Military Ombudsman

COUNTRY*	CREATED BY LEGISLATION	YEAR OF ESTABLISHMENT	REPORTING STRUCTURE	APPOINTMENT PROCEDURE	INVESTIGATIVE POWER	AUTHORITY TO MAKE RECOMMENDATIONS	CLASSICAL OMBUDSMAN PRINCIPLES			
							FULL INDEPENDENCE	CONFIDENTIALITY	IMPARTIALITY	FAIRNESS
AUSTRALIA	YES Part II A of the Ombudsman Act 1976	1977	Submits reports to the Minister of National Defence for presentation before Parliament	Appointed by the Governor General	YES	YES	YES	YES	YES	
CANADA	NO Ministerial Directives and Defence Administrative Orders and Directives	1998	Reports to the Minister of National Defence	Appointed by the Governor in Council on the recommendation of the Minister of National Defence	YES	YES	NO	YES	YES	
DENMARK	YES Ombudsman Act, 1996	1996	Reports directly to the Folketing	Elected by the Folketing (national assembly) after every general election or when a vacancy occurs	YES	YES	YES	YES	YES	
GERMANY	YES The German Constitution at s 45b and Act on the Parliamentary Commissioner for the Armed Forces	1959	Reports directly to the Bundestag	Elected by the Members of the Bundestag in a secret ballot	YES	YES	YES	YES	YES	
IRELAND	YES Ombudsman (Defence Forces) Act 2004	2005	Reports to the Minister of Defence	Appointed by the President on the recommendation of the Government	YES	YES	YES	YES	YES	
ISRAEL	YES Military Justice Law, Part II, 1972	1972	Reports to the Defense Minister and the Knesset Foreign Affairs and Defense Committee	Appointed by the Minister of Defense in consultation with the Minister of Justice and with the approval of the Knesset Foreign Affairs and Defense Committee	YES	Information unavailable	NO	YES	YES	

COUNTRY*	CREATED BY LEGISLATION	YEAR OF ESTABLISHMENT	REPORTING STRUCTURE	APPOINTMENT PROCEDURE	INVESTIGATIVE POWER	AUTHORITY TO MAKE RECOMMENDATIONS	CLASSICAL OMBUDSMAN PRINCIPLES			
							FULL INDEPENDENCE	CONFIDENTIALITY	IMPARTIALITY	FAIRNESS
NORWAY	NO legislation - this is an elected parliamentary position Instructions for the Ombudsman Board for the Armed Forces	1952	Reports directly to the Storting.	Elected by the Storting (national assembly) after every general election or when a vacancy occurs.	YES	YES	YES	YES	YES	
SOUTH AFRICA	YES Military Ombud Act 4 of 2012	2012	Reports to the Minister responsible for defence	Appointed by the President	YES	YES	YES	YES	YES	
UNITED KINGDOM	The Armed Forces (Service Complaints and Financial Assistance) Act 2015 YES	2006	Reports to Parliament and the Defence Council	Appointed by Her Majesty on the recommendation of the Secretary of State	YES	YES, and BINDING on certain matters	YES	YES	YES	
UNITED STATES	Established by Congress in s 1117 of the Department of Defense Authorization Act, 1983 and the Inspector General Act of 1978 YES	1982	Reports to the United States Secretary of the Army and the Chief of Staff of the United States Army	Appointed by the President with the advice and consent of the Senate. The inspector general cannot be a member of the Armed Forces, active or reserve	YES	YES	YES	YES	YES	

* This table compares international military ombudsman organizations from members of the “Five Eyes” intelligence sharing agreement (Australia, Canada, New Zealand, the United Kingdom, and the United States) as well as International Conference of Ombuds Institutions for the Armed Forces (ICOAF) participants with dedicated military oversight bodies.

Although the ICOAF has 80 member states, not all have established dedicated oversight bodies for their armed forces. Many are actively exploring the possibility of establishing an armed forces ombudsman, while others have chosen to assign these functions to organizations with broader general mandates, such as national human rights commissions.



ANNEX C An Act to Establish the Office of the Defence Ombudsman

An Act to Establish the Office of the Defence Ombudsman

PREAMBLE

Recognizing that

a principle of Canada's democratic form of government is that the military is accountable to the elected civilian legislature;

oversight of the Department of National Defence and Canadian Forces enhances public confidence in the integrity of these institutions and contributes to the lasting welfare of individual members of the defence community;

oversight of the Department of National Defence and the Canadian Forces must be independent of both institutions in order to ensure accountability and public confidence;

oversight of the Department of National Defence and the Canadian Forces must be carried out in keeping with the principles of fairness, independence, impartiality, and confidentiality;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

- 1 This Act may be cited as the *Defence Ombudsman Act*.

Short Title

INTERPRETATION

- 2 The definitions in this section apply in this Act.

Cadets means participants of the Cadet Organizations referred to in section 46 of the *National Defence Act*;

Canadian Forces means the armed forces referred to in section 14 of the *National Defence Act*;

Code of Service Discipline means the provisions of Part III of the *National Defence Act*;

Department means the Department of National Defence;

Staff of Non-Public Funds means persons appointed to the Staff of Non-Public Funds by the Minister of National Defence pursuant to section 3 of the *Non-Public Funds Staff Regulations*;

Office means the Office of the Defence Ombudsman;

Ombudsman means the person appointed under section 4 of this Act;

Provost Marshal means the person appointed under section 18.3 (1) of the *National Defence Act*.

Definitions

OFFICE OF DEFENCE OMBUDSMAN

	3	There is hereby established the Office of the Defence Ombudsman.
Office Established	4	(1) The Governor in Council shall, by commission under the Great Seal, appoint a Defence Ombudsman after consultation with the leader of every recognized party in the Senate and House of Commons and approval of the appointment by resolution of the Senate and House of Commons.
Appointment		(2) The Ombudsman holds office during good behaviour for a non-renewable term of five years, but may be removed for cause at any time by the Governor in Council.
Term	5	The Ombudsman shall have the rank and powers of a deputy head of a department.
	6	The Ombudsman shall report to Parliament.
Rank	7	(1) The Ombudsman shall receive such salary as may be fixed by the Governor in Council and is entitled to be paid reasonable travel and living expenses incurred in the performance of duties under this Act.
Reports to Parliament	(2)	The Ombudsman is deemed to be employed in the public service of Canada for the purposes of the Public Service Superannuation Act, and to be employed in the federal public administration for the purposes of the Government Employees Compensation Act and any regulations made under section 9 of the Aeronautics Act.
Salary		
Other benefits		

Administration of the Office

Management and control of the Office	8	The Ombudsman has the control and management of all matters relating to the Office of the Ombudsman.
	9	The Ombudsman may, in carrying out the work of the Office, enter into contracts, memoranda of understanding, or other arrangements
	10	The Ombudsman may employ such officers and employees as the Ombudsman considers necessary for the efficient operations of the Office, and such employees shall be appointed in accordance with the <i>Public Service Employment Act</i> .
Staff and advisors	11	The Ombudsman may engage the services of any agents, advisers and consultants that the Ombudsman considers necessary for the proper conduct of work of the Office.
	12	The salaries of the officers and employees of the Office, and the expenses associated with the operations and management of the Office, shall be paid out of moneys provided by Parliament for that purpose.
	13	(1) The Ombudsman shall designate, from among the employees of the Office, an individual who will act as a Temporary Ombudsman in the event of the absence or incapacity of the Ombudsman.
Budget		(1) In the event of the absence or incapacity of the Ombudsman, the Temporary Ombudsman shall exercise the full powers and perform the functions of the Ombudsman.
		(2) In the event that the Temporary Ombudsman assumes the full powers and functions of the Ombudsman, the Temporary Ombudsman shall be entitled to be paid at the same rate as the Ombudsman.
Temporary Ombudsman	14	The Ombudsman shall have his or her own legal counsel.
	15	Except as otherwise provided or the context otherwise requires, these provisions that apply to or in respect of the Ombudsman apply to or in respect of the representative of the Ombudsman and the staff of the Ombudsman while performing duties or functions on behalf of the Ombudsman.
Absence or incapacity		
Legal counsel		

Delegation

Delegation	16	Any of the powers, duties or functions of the Ombudsman under these provisions, other than the power of delegation and the duty or power of submitting or publishing reports under section 50, may be delegated by the Ombudsman to any member of the Ombudsman's staff.
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Advisory Committee

Specialized knowledge	17	(1) The Ombudsman may establish an Advisory Committee to provide advice to the Ombudsman on matters relating to the activities of the Office.
		(2) The representation on the Committee shall be determined by the Ombudsman having regard to the need to ensure a broad based representation.
Advisory Committee		

Oath

Oath	18	All members of the Ombudsman's staff, on appointment, and any other person performing any duty or function under this Act shall swear or affirm an oath of secrecy.
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DUTIES AND FUNCTIONS

Duties and functions	19	The Ombudsman shall
	(1)	act as a neutral and objective investigator and reporter on matters related to the Department and Canadian Forces;
	(2)	act as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress;
	(3)	accept and deal with complaints in accordance with the provisions of this Act; and
Media relations and communications	(4)	serve to contribute to substantial and long-lasting improvements to the welfare of members of the Defence Community.
	20	The Ombudsman has control of his or her own media relations and communications.
	21	The Ombudsman shall exercise such powers and shall perform such duties and functions as are conferred or imposed by or pursuant to any other Act of Parliament or any order of the Governor in Council.
Direction to Ombudsman	22	The powers conferred on the Ombudsman may be exercised despite any provision in any Act to the effect that any such decision, recommendation, act or omission is final, or that no appeal lies in respect thereof, or that no proceeding or decision of the person or organization whose decision, recommendation, act or omission it is shall be challenged, reviewed, quashed or called in question.
Exercise of powers	23	The Ombudsman may, subject to these provisions, on the Ombudsman's own motion, investigate any matter concerning the Department or Canadian Forces.
Own-motion investigations		

Confidentiality

Office operated in a confidential manner	24	(1) The Office of the Ombudsman shall be operated in a confidential and secure manner so as to protect the information received by the Office in the course of its operations.
		(2) Except as otherwise authorized by law,
Information protected	(a)	no communication to the Ombudsman or information provided to the Ombudsman in any form shall be disclosed by the Ombudsman, except where it is, in the opinion of the Ombudsman, subject to these provisions, necessary for an investigation, report or other purpose authorized by this Act; and
	(b)	communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman are private and confidential.

Proceedings Privileged

- | | |
|------------------------|---|
| Proceedings Privileged | <p>25 Except on the ground of lack of jurisdiction, no finding, report or recommendation by the Ombudsman is liable to be challenged, reviewed, quashed or called into question in any court or before any administrative body.</p> <p>26 No criminal or civil proceedings lie against the Ombudsman, or against any person acting on behalf or under the direction of the Ombudsman, for anything done, reported or said in good faith in the course of the exercise or performance of any function, power or duty of the Ombudsman.</p> |
|------------------------|---|

Immunity

- 27 For the purposes of any law relating to libel, slander or defamation
- (1) anything said, any information furnished or any document, paper or thing produced in good faith in the course of an investigation by or on behalf of the Ombudsman is privileged; and
- (2) any report made in good faith by the Ombudsman, and any fair and accurate media account of the report made in good faith, is privileged.

Libel and slander

- 28 The Ombudsman or any person acting on behalf or under the direction of the Ombudsman is not a competent or compellable witness in respect of any matter coming to the knowledge of the Ombudsman or that person in the course of the exercise or performance of any function, power or duty of the Ombudsman.

Not compellable

JURISDICTION

Complaints

- | | |
|------------------------------|---|
| Subject matter of complaints | <p>29 Subject only to the limitations set out in section 32, the Ombudsman may deal with a complaint about any matter related to the administration of the Department or the Canadian Forces, including any authority or process reporting to the Chief of the Defence Staff or the Deputy Minister of National Defence.</p> <p>30 Any of the following persons may bring a complaint to the Ombudsman, directly and free of charge</p> |
| Right to complain | <p>(1) a member or former member of the Canadian Forces;</p> <p>(2) a member or former member of the Cadets;</p> <p>(3) an employee or former employee of the Department;</p> <p>(4) an employee or former employee of the staff of Non-Public Funds, Canadian Forces;</p> <p>(5) a person who applies to become a member of the Canadian Forces;</p> <p>(6) a member of the immediate family of a person referred to in paragraphs (1) to (5); or</p> <p>(7) a person who, pursuant to law or pursuant to an agreement between Canada and the state in whose armed forces the person is serving, attached or seconded as an officer or non-commissioned member to the Canadian Forces.</p> |

Discretion

Discontinuance

- 31 (1) The Ombudsman may refuse to deal with a complaint or may discontinue dealing with a complaint at any stage if the Ombudsman considers that it is in the public interest to do so.
- (2) In exercising the discretion under subsection (1), the Ombudsman shall consider relevant factors, including:
- (a) whether the complaint is frivolous, vexatious, or otherwise made in bad faith;
 - (b) whether the complainant lacks sufficient personal interest in the matter;
 - (c) the age of the complaint, including the effect of the passage of time on one or both of
 - i. the availability of evidence; and
 - ii. the possibility of meaningful resolution;
 - (d) the amount of time between when the complainant became aware of the matters giving rise to the complaint and when the complaint is received by the Ombudsman;
 - (e) whether the complainant has, within the applicable time limit, utilized existing complaint mechanisms; and
 - (f) the existence of a more appropriate mechanism.

Limitations

Limitations

- 32 The Ombudsman shall not investigate any complaint or matter relating to
- (1) a decision or an order of a military judge, a court martial or a summary trial;
 - (2) individual cases of the exercise of discretion in laying charges by the chain of command or the Canadian Forces National Investigation Service or in preferring charges by the Director of Military Prosecutions;
 - (3) matters which are within the exclusive jurisdiction of the Treasury Board as the employer and within the exclusive jurisdiction of the bargaining agent, under the *Federal Public Sector Labour Relations Act*;
 - (4) Military Police that is being dealt with under Part IV of the *National Defence Act*; or
 - (5) professional conduct and professional standards under the jurisdiction of a professional standards organization acting pursuant to a Canadian statute.

- 33 (1) When the Ombudsman investigates a complaint with an aspect involving an allegation of criminal activity, the Ombudsman investigation shall not deal with that aspect of the complaint.

Complaints where allegation of criminal activity

- (1) If at any time during the course of dealing with a matter, the Ombudsman is of the opinion that there is evidence of
- (a) a criminal act or a breach of the Code of Service Discipline committed by any employee or member of the Department or Canadian Forces, the Ombudsman may report the matter to the Provost Marshal; or
 - (b) a criminal act committed by a person who is not subject to the Code of Service Discipline, the Ombudsman may report the matter to the competent authority.
- (3) In exercising the discretion under subsection (2), the Ombudsman shall take into account, if known, the wishes of the individual or individuals most affected by the criminal act or breach of the Code of Service Discipline

COMPLAINTS AND INVESTIGATIONS

Complaints resolution

Resolution at
lowest level

- 34 The Ombudsman shall attempt to resolve complaints at the level at which they can be resolved and shall make recommendations to the lowest level of authority that can effect the change considered necessary by the Ombudsman.
- 35 If an investigation is necessary to carry out the Ombudsman's mandate, the Ombudsman shall thoroughly investigate the complaint in an independent and objective manner.

Investigation

- 36 In dealing with complaints, the Ombudsman may determine the most appropriate method, including by
 - (1) referring individuals to an appropriate complaint handling mechanism;
 - (2) assisting individuals and authorities within the Department and the Canadian Forces resolve an issue;
 - (3) reviewing the way in which an existing mechanism has dealt with a complaint to determine if there was fair treatment;
 - (4) investigating a matter to determine if there was fair treatment; and
 - (5) conducting a systemic investigation into broad issues affecting all or a portion of the Defence Community.
- 37 A complaint to the Ombudsman is considered resolved when:
 - (1) the Ombudsman refuses or discontinues to deal with the complaint in accordance with section 31;
 - (2) the complainant no longer wishes for the Ombudsman to deal with the complaint;
 - (3) the matter complained of has been resolved to the satisfaction of the Ombudsman;
 - (4) the Ombudsman has issued a report, in a manner determined by the Ombudsman, with a conclusion about the fairness of the treatment of the complainant; or
 - (5) the Ombudsman has issued a report to relevant authorities, in accordance with section 43.

Investigation Powers

38 In the course of an investigation, the Ombudsman may require any person

Power to compel

- (1) to furnish any information that, in the opinion of the Ombudsman, the person may be able to furnish in relation to the matter being investigated;
- (2) to produce, for examination by the Ombudsman, any document, paper or thing that, in the opinion of the Ombudsman relates to the matter being investigated and that may be in the possession or under the control of that person; and
- (3) to facilitate access or entry to a facility.

39 In the course of an investigation, the Ombudsman may order that a hearing be convened, and make such inquiries as the Ombudsman considers appropriate, but no person is entitled as of right to be heard by the Ombudsman.

Hearings

40 The Ombudsman may summon before him or her and examine on oath or solemn affirmation any person and for that purpose may administer an oath or solemn affirmation.

41 Except in a prosecution of a person for the offence of perjury in respect of a statement made to the Ombudsman under oath or solemn affirmation, evidence given by a person in hearings held by the Ombudsman and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings

Administration of oaths

Temporary Restrictions on Access

42 (1) Access pursuant to subsection 38 by the Ombudsman is subject to

Evidence inadmissible in other proceeding

- (a) compelling operational or security priorities, when confirmed in writing by the Chief of the Defence Staff; and
 - (b) the need to protect the integrity of an ongoing military police investigation, when confirmed in writing by the Provost Marshal.
- (1) The written confirmation referred to in subsection (1) (a) and (b) shall include information about
- (a) the basis for refusing to provide information and access; and
 - (b) the expected duration of the circumstances, including when the Ombudsman will be able to obtain information and access.

Operational and Security Priorities

Integrity of a Military Police Investigation

Reports to Relevant Authorities

Report to authorities	<p>43 The Ombudsman shall send a report, including any recommendations, opinions, and reasons, to the relevant authority, if on completing an investigation of any matter, the Ombudsman is of the opinion that</p> <ul style="list-style-type: none"> (1) the matter should be referred to the relevant authority for further consideration; (2) an omission should be rectified; (3) a decision or recommendation should be quashed or substituted; (4) a law, policy or practice on which a decision, recommendation, act or omission was based should be reviewed; (5) reasons should have been given for a decision or recommendation; (6) a delay should be rectified; or (7) other steps should be taken to achieve improvements to the welfare of members of the Defence Community.
Insufficient response	<p>44</p> <ul style="list-style-type: none"> (1) An authority that receives a report under section 43 shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response to recommendations in the report, including reasons for not following any recommendation. (2) If, in the opinion of the Ombudsman, the response to a report received from the appropriate authority is insufficient or no response is received, the Ombudsman may send a copy of the report to a higher authority up to and including the relevant minister, and in such case the higher authority shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response to recommendations in the report, including reasons for not following any recommendation. (3) If, in the opinion of the Ombudsman, the response from the relevant minister is insufficient or no response is received, the Ombudsman may inform, in writing, the Prime Minister and include such information and documents as the Ombudsman considers necessary.

Refusal or Failure to Assist the Ombudsman

Failure to assist

- 45** (1) Any person shall fully cooperate with and assist the Ombudsman, and facilitate the work of the Ombudsman, upon the Ombudsman's request.
- (2) No person shall willfully and without lawful reason,
- (a) refuse or fail to comply with any lawful request of the Ombudsman made in connection with the performance of the Ombudsman's duties and functions;
 - (b) make any false statement or attempt to mislead the Ombudsman in the performance of the Ombudsman's duties and functions;
 - (c) fail to forward immediately to the Ombudsman's office, unopened and unread, communications directed to the Ombudsman from any person who
 - i. resides on any Canadian Forces base or is with any Wing or Formation or who is deployed by the Canadian Forces or is a member of the person's family; or
 - ii. is in detention, incarceration or is hospitalized;
 - (d) intercept, access, or take steps to breach the confidentiality or privacy of any communication made to or information in the possession of the Ombudsman;
 - (e) discriminate, retaliate or take an adverse action against, or impose an adverse consequence on, any person as retribution or reprisal for bringing in good faith a complaint forward to or lawfully cooperating with the Ombudsman in relation to the Ombudsman's duties and functions; or
 - (f) make comments that a reasonable person would know are likely to compromise or prejudice the integrity of a review or an investigation being carried out by the Ombudsman.
- 46** (1) A person who contravenes section 45 shall be considered to have obstructed, impeded or interfered with the Ombudsman and committed an infraction.
- (2) Every person who commits an infraction under this Act is liable to a fine not exceeding \$1,000 for a first offence and to a fine not exceeding \$5,000 in the case of a second or subsequent offence.
- 47** Communications between the Ombudsman and any person shall not be covered by or counted against any restrictions on that person's right to send letters, documents or correspondence or to receive or make telephone calls.

Infractions

Fines

Information to Complainants and Other Parties

Information regarding progress	48 The Ombudsman shall in each case, inform the complainant and other parties involved in the case in such manner and at such time as the Ombudsman deems appropriate, as to the progress of the case and of the disposition of the complaint and provide the complainant and parties with a copy of any opinion or recommendation that the Ombudsman has rendered in connection with the complaint together with such comments as the Ombudsman considers appropriate.
Adverse comments	49 (1) If a report by the Ombudsman under section 43 will contain an adverse comment about any person, the Ombudsman shall inform the person of the nature of the intended comment and allow the person 14 days to submit representations in response. (2) The Ombudsman may, on application by any person who is unable to submit representations pursuant to subsection (1) within the 14 days, extend the person's time for submitting representations, if it is in the public interest to do so. (3) Representations referred to in subsection (1) shall be in writing unless the Ombudsman, on application, considers it appropriate in the circumstances to allow oral representations to be made.
Submission of representations	(4) A copy of all written representations received under this section shall be appended to any report made pursuant to section 43.
Representations in writing only	

REPORTS

	50 (1) The Ombudsman
Annual report	(a) shall submit an annual report to Parliament on the activities of the Office; (b) may submit reports to the minister of the relevant government department on the implementation of any recommendations made by the Ombudsman; and
Special Reports	(1) The Ombudsman may publish reports concerning any investigation or other matter within the mandate of the Ombudsman, if the Ombudsman considers that it is in the public interest to do so.
Publication of reports	(2) In considering the public interest in publishing a report, the Ombudsman may consider whether a response has been received from the relevant authority, and if so the adequacy of the response in the opinion of the Ombudsman.

REVIEW OF ACT

Review by Parliament	51 At the start of the fifth year after the day on which this Act receives royal assent, this Act is to be referred to Parliament or a committee thereof for review.
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CONSEQUENTIAL AMENDMENTS

Schedule IV of the *Financial Administration Act* should be amended to include The Office of the Defence Ombudsman. This would allow the Ombudsman to be able to meet the definition of “deputy head” in section 11 (1) of the *Financial Administration Act*, and be eligible for delegation of the powers discussed in the report.

The *Contraventions Regulations* should be amended to list the fines set out in section 46, to ensure that fines issued under the *Defence Ombudsman Act* are considered a statutory offence, and do not result in a criminal record.

The *Privacy Regulations* should be amended to add the Office of the Defence Ombudsman to Schedule II.

WE ARE READY TO HELP.
NOUS SOMMES PRÊTS
À VOUS AIDER.

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