

**Défense nationale et  
Forces armées canadiennes**

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# Introduction

## Why was this review of DND complaint mechanisms necessary?

The mandate of the Office of the Ombudsman for the Department of National Defence and the Canadian Armed Forces (Ombudsman) includes conducting process reviews for constituent complaints concerning the handling of files under an existing Department of National Defence (DND) complaint-mechanism. Process reviews involve the examination of the file to determine whether the constituent was treated in a fair manner and according to applicable legislation and policy requirements.

Past Ombudsman process reviews of DND decisions have demonstrated that procedural fairness requirements are not always met by the decision-maker, often resulting in unfair outcomes. In some of the files the Office has reviewed, the procedural flaws were minor and would not have changed the final decision. In other files, the procedural flaws were such that they produced absurd and unfair outcomes.

Recently, the Office reviewed two complex files that involved multiple administrative mechanisms within the DND, were under the authorities of multiple Assistant Deputy Ministers (ADM), involved multiple outside investigators, and were escalated through the system for more than five years. The reviews found problems at every level of administration and in every mechanism that was engaged, including several egregious procedural errors that invalidated the legitimacy of the decision-making process.

To provide an example, in one file a constituent was found to have improperly hired staff when that individual had, in fact, recused themselves from the final hiring decision. In another instance, a DND official was tasked with deciding whether one of their own previous decisions constituted harassment. Yet another example involved a constituent who was never advised of the allegation against them until after the finding was communicated.

The Office made recommendations to the DND to implement checks and balances to ensure that similar unfairness would not reoccur.<sup>1</sup> In addition to findings that were specific to the resolution of the individual files, there was evidence of a possible systemic issue related to how the DND generally manages complaint files. The Office recommended that the DND examine its processes and implement standard safeguards to ensure administrative fairness in all decision-making.

Whether in response to Ombudsman recommendations, important judicial commentary,<sup>2</sup> or both, we note that the DND has been responsive to critical input. The DND is now in the final stages of reworking its internal whistleblowing process and has recently redesigned its harassment resolution process based on the recently amended *Canada Labour Code* requirements.

We reviewed decision-making practices and procedures for three civilian complaint mechanisms at the DND, with a focus on procedural fairness safeguards.

We are pleased to note that the DND was generally receptive to our review. When brought to their attention, some DND officials took proactive steps to implement recommendations and respond to issues prior to the publication of this report.

While this is encouraging, our findings still show outstanding gaps in departmental policy and procedure. We anticipate that the recommendations made for each mechanism will help guide further improvements. However, even a perfectly designed process is only the starting point – the true test of a process is how it is put into practice. Furthermore, a good process can still be abused or misused in the absence of strong safeguards and accountability.

**One of the three processes under review, the DND's disclosure of wrongdoing (whistleblowing) process, is currently undergoing an internal overhaul, including a new policy suite and a new organizational structure. We are delaying the publication of our analysis, findings, and recommendations for this process until this DND initiative is complete.**

## Note to the reader

This initial report contains comprehensive analyses of two distinct departmental processes and does not have to be read in its entirety - though we hope that you will!

Whether you choose to read just one or both analyses, we recommend reading the introductory pages in order to understand the background to this report and our approach, as well as the final section that sets out best practices that are directly related to our findings.

### Scope

This review looks at the most recent iterations of the DND's internal complaints processes to determine whether they are properly designed to produce fair outcomes for our constituents. The focus of our analysis is on compliance with legislation, process design, and incorporation of procedural fairness principles into policy. Our hope is that the DND's new process designs will allow for the consistent application of policy and procedural fairness protections at all levels of decision-making.

### Administrative mechanisms under review

The internal complaint mechanisms we reviewed are the DND's:

1. Workplace harassment and violence resolution process
2. Individual civilian grievance process
3. Internal disclosure of wrongdoing process (whistleblowing)

One of the three processes under review, the DND's disclosure of wrongdoing (whistleblowing) process, is currently undergoing an internal overhaul, including a new policy suite and a

new organizational structure. We are delaying the publication of our analysis, findings, and recommendations for this process until this DND initiative is complete.

We chose these mechanisms because they are:

- Based in a legislative requirement
- Complaints-driven
- Internal to the Department and applicable to its civilian employees
- Have produced unfair outcomes as previously found in reviews by the Ombudsman's office

For each internal complaint mechanism, we determined whether:

- DND policies and procedures are compliant with legislation and central agency policy / directives / guidance
- Procedural fairness concepts are integrated into policy and procedures
- Organizational structure exists to ensure proper process and fair decisions
- Communication tools exist to promote awareness and understanding of the process
- Quality controls and accountability measures exist

## Methodology

### Documentary review

For each mechanism, we conducted a documentary review of the legislative, regulatory, and policy frameworks that give the decision-makers their authority. More specifically, we looked at the DND's policies and supporting documents to determine their compliance with the enabling legislation and whether they sufficiently incorporate baseline concepts of procedural fairness.

### Interviews with DND officials

We sought information directly from the DND officials responsible for the various complaint mechanisms to determine if standard operating procedures and/or guidelines exist and the extent to which they are accessible to participants. Further areas of inquiry included statistics for each mechanism, resourcing, costing, communication, training, service standards, and accountability structures.

### Analysis and recommendations

This data allowed us to analyze and formulate recommendations to bolster fairness and improve the functionality of each internal complaint mechanism. More importantly, we were able to find commonalities and recommend some best practices.

## Abbreviations

ADM	Assistant Deputy Minister
CPCC	Chief Professional Conduct and Culture
DAOD	Defence Administrative Orders and Directives
DG	Director General
DSEI	Directorate Special Examinations and Inquiries
DND	Department of National Defence
DID	Directorate Internal Disclosure
DWAN	Defence Wide Area Network
<i>Labour Code</i>	<i>Canada Labour Code</i>
<i>Labour Relations Act</i>	<i>Federal Public Sector Labour Relations Act</i>
Labour Relations Board	Federal Public Service Labour Relations and Employment Board
Labour Relations Regulations	Public Service Labour Relations Regulations
QR&O	<i>Queen's Regulations and Orders for the Canadian Forces</i>
SOP	Standard Operating Procedures
WCMS	Workplace Case Management System



# Part 1 – First principles of decision-making

## Decision-making - How do we know that decisions are sound?

On any given day, there are hundreds of thousands of administrative decisions made in the federal public service. These range from mundane decisions, such as purchasing stationery, to the more complicated decisions of contracting for military equipment. This is the stuff of bureaucracy – sometimes tedious, but often critical to the better functioning of the government and our society.

Government decision-making generally follows established processes to ensure that decisions can stand as reasonable and justifiable. Processes include checks and balances, as well as managerial approvals and accountabilities. Given the enormous volume of administrative decisions taken by government officials on a day-to-day basis, problems will inevitably arise. Bureaucratic controls should catch most anomalies and rectify them before they negatively affect outcomes.

Additional internal complaint mechanisms exist within the federal public service that allow public servants to flag important issues related to how decisions are made and the fairness of their outcomes. These mechanisms are intended to safeguard the integrity and effectiveness of the public service along with the health and safety of its employees. Examples include ombudsman organizations, whistleblower complaint mechanisms, and grievance systems.

When standard processes or internal complaint mechanisms fail, problems compound. In the worst cases, serious issues fester, individuals are negatively impacted, taxpayer money is wasted, and faith is lost in government decision-makers.

## The authority for government decision-making

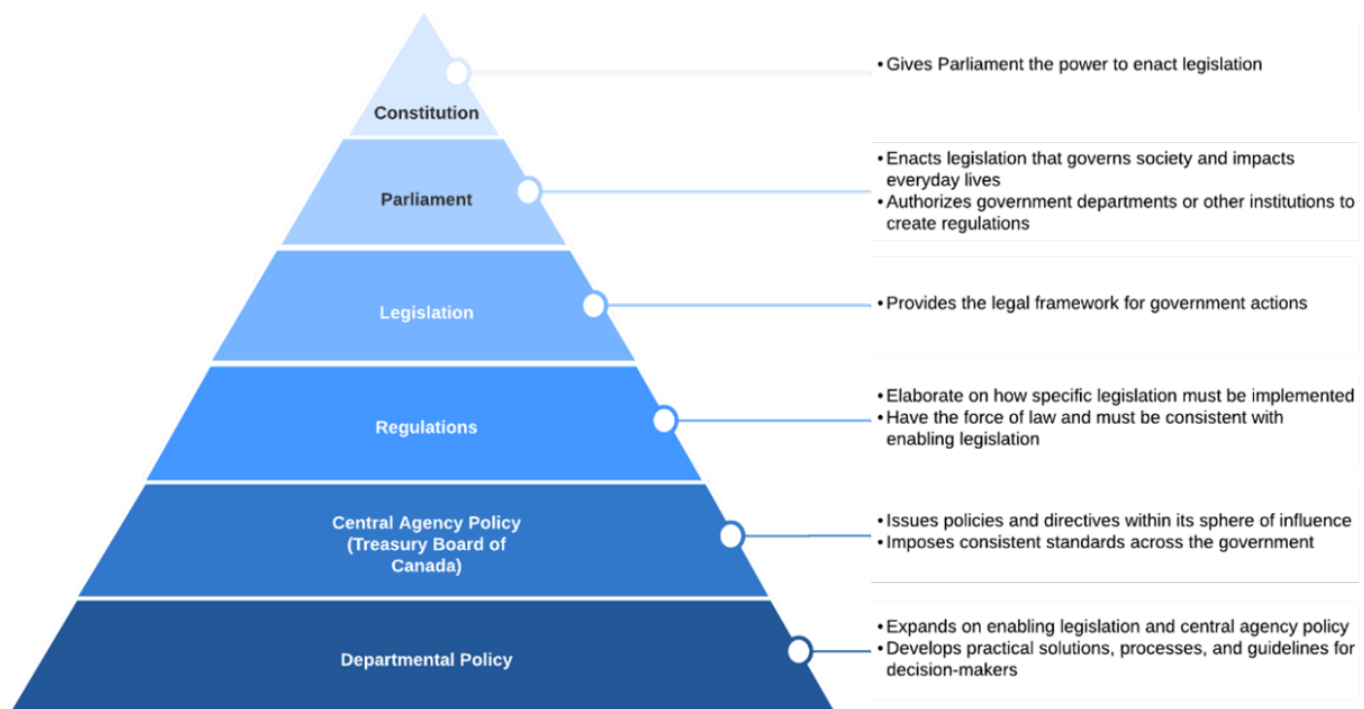
The decisions made every day by federal public servants must all be rooted in legal authority. Decisions made outside the scope of legal authority are non-compliant and ultimately without force. In cases where non-compliant decisions negatively impact the rights and interests of Canadians, there may be grounds for a judicial challenge.

## Legislation

Everything starts with the Constitution.<sup>3</sup>

The Constitution gives Parliament the power to enact legislation that governs our society and impacts our everyday lives.<sup>4</sup> The sheer volume and complexity of enacting legislation means that Parliament will often authorize Cabinet, government departments, or other institutions to create regulations that explain how a particular piece of legislation must be implemented and enforced. Regulations have force of law<sup>5</sup> and must be consistent with their enabling legislation.

## How decision-makers get their authority



## Policy

A further level of detail is found in policy instruments.

The Treasury Board of Canada is the central agency responsible for financial and human resource management for the federal public service. The Treasury Board is often tasked with issuing policies and directives that have government-wide application.<sup>6</sup> These policies impose standards across government, while allowing departments the flexibility to develop internal policies that account for their respective structures, activities, and cultures.

Departmental policies expand on the enabling legislation and Treasury Board policy by developing practical solutions and creating processes that guide decision-making toward rational and consistent outcomes.

It is critical that public service decision-makers make their decisions in accordance with departmental policy and that the policy itself is consistent with the enabling legislation, applicable regulation, and relevant central agency policy.

# Making it operational

## Policymakers

The policymaker must ensure that legislation is operationally functional. This task can be challenging as it requires:

- An expert understanding of the enabling legislation, subordinate regulation (if any), and central agency policy (if any)
- A knowledge of the ever-evolving body of administrative law that applies to policy
- A familiarity with the activities and organizational structure of the department to which the policy applies
- An ability to translate concepts into operational processes that can be implemented

Policymakers must also ensure that the processes they elaborate incorporate baseline principles of procedural fairness even where the legislation, regulation, and central agency policy are silent or lacking in detail. This is particularly important for departmental policies that guide decisions that impact the rights or interests of individuals.

Policymakers may also have to make sense of legislation that was poorly conceived or difficult to operationalize. Despite the complexity of the task, it is the policymaker's responsibility to effectively put into practice the legislation passed by Parliament.

## Procedural fairness

Decision-makers have a legal obligation to make decisions in a procedurally fair and transparent manner. To ensure that this duty is met, parties to an administrative process are given certain procedural fairness protections based on the nature of the decision being made and its impact on the parties.<sup>7</sup> The greater the impact of the decision on the individual, the greater the level of procedural fairness protections are required. At a minimum, parties to an administrative process generally have the following procedural fairness protections:

- **Unbiased decision-maker:** Parties have a right to a decision-maker who acts in a neutral and unbiased manner, free from influence that could lead a reasonable person to doubt their impartiality.<sup>8</sup>
- **Notice:** Parties must be given enough information about the matter being considered and the decision being made to participate meaningfully in the decision-making process.<sup>9</sup>
- **The right to be heard (*audi alteram partem*):** Parties must have a reasonable opportunity to present their points of view, respond to facts presented by others, and have their arguments considered by the decision-maker.<sup>10</sup>

Parties may be entitled to additional procedural fairness protections if the applicable legislation, regulation, or policy provides for it. Processes in which the degree of impact on the participants is potentially greater may require increased fairness protections such as:

- **Timeliness:** Delays in the decision-making process cannot be so lengthy as to prejudice the parties' ability to make representations or present evidence.
- **Reasons:** Where a written rationale is appropriate, it must have a coherent overarching logic with a line of analysis that takes into consideration the context and facts as well as the applicable legislative and regulatory framework.<sup>11</sup>

Parties may also be entitled to additional procedural fairness protections if they are implied by representations, promises, or past practices of the decision-maker.<sup>12</sup>

# Part 2 – Workplace harassment and violence resolution

There are complaint mechanisms within the Federal Public Service that allow public servants to draw attention to matters of concern so that they can be addressed internally. The DND's workplace harassment and violence resolution process is meant to address and resolve occurrences of harassment and violence with the goal of restoring a safe and healthy work environment.

## Legal and policy framework

In this section, we examine the legal and policy basis that gives decision-makers the authority to act and outlines how the process must be directed.

We recognize that the DND's harassment and violence resolution process is a new mechanism that has only been in effect since 1 January 2021. Prior to 2021, the Department addressed complaints of harassment through a process mandated by the Treasury Board<sup>13</sup> and incidents of workplace violence through a process set out in the Canada Occupational Health and Safety Regulations.<sup>14</sup>

In 2021, a single framework for addressing both harassment and violence was implemented for all federally regulated workplaces, replacing the previous mechanisms. Responsibility for addressing harassment and violence within the DND was shifted from its previous home with the Assistant Deputy Minister, Human Resources – Civilian, [ADM(HR-Civ)] to the newly constituted Chief Professional Conduct and Culture (CPCC).

This analysis is focused on the new harassment and violence resolution process administered by CPCC. Nonetheless, where gaps or other issues were identified, illustrative examples from processes administered under the previous framework will be used to highlight potential impacts.

## Legal authority

Legal authority is the lawful basis for a decision-maker's authority to act and usually outlines the decision-making process. This authority is generally set out in Acts of Parliament and Regulations. In some cases, it exists in instruments under the Royal Prerogative.<sup>15</sup>

The harassment and violence prevention and resolution framework for federally regulated workplaces is set out in the *Canada Labour Code*<sup>16</sup> (the *Labour Code*), Part II. This legislation is supplemented by the *Work Place Harassment and Violence Prevention Regulations*<sup>17</sup> (the *Harassment and Violence Regulations*) developed by the Labour Program at Employment and Social Development Canada.

The harassment and violence resolution process is primarily preventive in nature and addresses occurrences as occupational hazards rather than a human resources issue. The process is non-

disciplinary and instead seeks to identify and resolve the circumstances that give rise to harassment and violence.

Under the *Labour Code*, “harassment and violence” have a single definition comprising:

*... any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.*<sup>18</sup>

The resolution process, along with other general requirements under the *Labour Code and Harassment and Violence Regulations* are contextualised for the federal public service in the Treasury Board’s *Directive on the Prevention and Resolution of Workplace Harassment and Violence*.<sup>19</sup>

## Policy framework

Subject to applicable legislation and Treasury Board policy, each department must establish its own internal policy and procedures for harassment and violence prevention that is tailored to its organizational needs.<sup>20</sup>

## Process

In keeping with regulatory requirements, the DND’s internal policies must provide employees with a choice of two channels for submitting notices of occurrence for harassment and violence.<sup>21</sup> The first channel is a manager in the employee’s reporting chain. The second channel is a “designated recipient” identified by the Department.<sup>22</sup> Whichever channel receives the notice must administer the ensuing resolution process.<sup>23</sup>

Under the *Harassment and Violence Regulations*, each employer has an “applicable partner” for the joint development of policy, identification of workplace risks, and assessment of the workplace. Depending on the size of the workplace, this will normally be a local workplace health and safety committee or representative.<sup>24</sup>

The harassment and violence resolution process begins when an employee who has experienced an occurrence (the principal party) or a witness to an occurrence submits a notice to either the designated recipient or a manager within their reporting chain. The process is then administered in three main stages:

- **Negotiated resolution:** the principal party meets with their manager or designated recipient to discuss whether the occurrence meets the definition of harassment and violence in the *Labour Code* and to identify potential actions for resolution.
- **Conciliation:** the principal party and responding party<sup>25</sup> agree to attempt resolving the occurrence with the help of a mutually agreed upon conciliator.
- **Investigation:** if the occurrence cannot be resolved through negotiated resolution or conciliation, the principal party can request a formal investigation aimed at determining whether harassment and violence occurred, identifying root causes, and generating recommendations to prevent similar occurrences in the future.

At the conclusion of an investigation, the investigator provides a report to the parties, the employer, and the applicable partner. This investigation report cannot contain any information that could identify the parties or witnesses. It must contain recommendations aimed at preventing future occurrences. Upon receipt of the report, the manager and applicable partner jointly consider which recommendations they will implement. In the event of a disagreement, the manager's decision prevails.<sup>26</sup>

## Policy documents

For the Department of National Defence, the central policy framework for addressing occurrences of harassment and violence currently consists of a Defence Administrative Order and Directive (DAOD) and policy manual, which are supported by a set of internal Standard Operating Procedures (SOPs). The contents of each document are as follows:

- **DAOD 5014-0, *Workplace Harassment and Violence Prevention*<sup>27</sup>** : sets out the Department's general harassment and violence prevention obligations and identifies the Department's designated recipient and applicable partners.
- ***Workplace Harassment and Violence Prevention Policy Manual*<sup>28</sup> (*Harassment and Violence Policy Manual*)**: elaborates the Department's harassment and violence prevention obligations and sets out the steps of the harassment and violence resolution process.
- ***Standard Operating Procedures Intake and Resolution Process*<sup>29</sup> (*Intake and Resolution SOPs*)**: provides step-by-step guidance to the Department's designated recipient for the administration of the resolution process.

## Compliance

In all cases, the policy framework must be consistent with the enabling legal authority. Inconsistencies with the legal requirements could result in successful challenges to the decision-maker's decision.

The DND's policy framework for addressing harassment and violence is consistent with applicable legislation, regulation, and Treasury Board policy. (**Finding 1**)

### Finding 1

The DND's policy framework for workplace harassment and violence is compliant with applicable legislation, regulation, and Treasury Board policy.

## Procedural fairness

Procedural fairness for government decision-making exists in common law regardless of whether it is explicitly identified in legislation. It is critical that departmental policy documents identify baseline principles of procedural fairness, especially where applicable legislation or regulation is silent or lacks sufficient detail. Clarity contributes to the consistent administration of the decision-making process and to fair outcomes for parties.



The Department's policy framework does not explicitly identify or elaborate upon the procedural fairness protections owed to parties. (**Finding 2**)

### **Finding 2**

The DND's policy framework for workplace harassment and violence does not adequately identify and elaborate upon the following procedural fairness protections owed to parties, creating a risk for breaches of procedural fairness:

- Unbiased decision-maker
- Notice
- Right to be heard
- Reasons

**Recommendation:** The DND review its policy framework for harassment and violence to ensure that the procedural fairness protections owed to parties are clearly identified and elaborated upon.

The resolution process is principally focused on the prevention of future occurrences and is not designed to produce findings or recommendations related to disciplinary action. The focus on preventive action and the non-adversarial resolution of occurrences suggests that the process requires procedural fairness at the lower end of the scale.

Nonetheless, findings of harassment and violence may result in recommendations or decisions that could impact the rights and interests of the parties.<sup>30</sup> Given the subject matter addressed by this process, findings or allegations may also impact the professional reputations of responding parties.

While the process emphasizes confidentiality and the protection of the parties' identities, these protections can be circumvented through other mechanisms. The *Harassment and Violence Policy Manual* recognizes this limitation. It notes that:

*...the full privacy of affected persons or witnesses to an occurrence of harassment and violence may not always be possible due to legal obligations including those respecting access to information and privacy, and the natural justice and procedural fairness principles.<sup>31</sup>*

Consequently, parties are still owed a minimum level of procedural fairness protections during the decision-making process.



### Workplace Harassment and Violence Resolution Process

Instrument	Unbiased decision-maker	Notice	Right to be heard	Timeliness	Reasons
<b>Legislation</b>	Silent	Silent	Silent	Silent	Silent
<b>Regulation</b>	Partial	Substantial	Silent	Substantial	Partial
<b>TBS policy</b>	Silent	Silent	Silent	Silent	Partial
<b>Departmental policy</b>	Partial	Partial	Silent	Substantial	Partial

## Unbiased decision-maker

Decisions must be based on a fair and unbiased assessment of the facts and evidence before the decision-maker. When a decision-maker is perceived to be influenced by personal interests, relationships, or inappropriate external considerations, a reasonable apprehension of bias may exist, delegitimizing the decision and opening it to challenge.

The Department's policy framework for harassment and violence does not contain any provisions explicitly addressing the issue of bias. (See **Finding 2**) Nonetheless, several provisions exist in the *Harassment and Violence Policy Manual* that offer a degree of protection against bias or the perception of bias.

In keeping with the requirements set out in the *Harassment and Violence Regulations*, any investigators involved in a preventive investigation must provide a written statement to the employer or designated recipient indicating that they are free of any conflicts of interest.<sup>32</sup>

In cases where an occurrence involves an employee's manager, the *Harassment and Violence Policy Manual* prevents that manager from being involved in the administration of the resolution process or any final decision-making. Instead, decision-making authority is escalated higher within the employee's reporting chain and the file is transferred to a designated recipient within CPCC for administration.<sup>33</sup>

The policy framework does not specify who the final level decision-maker would be in cases where a notice of occurrence involves an individual at the top of an employee's reporting chain. This is problematic as it could result in a reasonable apprehension of bias for any manager within the chain tasked with exercising the employer's decision-making authority. (**Finding 3**)

**Finding 3**

The DND's policy framework for workplace harassment and violence does not identify an alternate decision-maker in the event that a complaint is filed against an individual at the top of the complainant's reporting chain, creating a risk for breaches of procedural fairness.

**Recommendation:** The DND review its policy framework for harassment and violence to identify an alternate decision-maker in the event that a complaint involves a decision-maker at the top of a complainant's reporting chain.

While this issue has not arisen since the publication of the *Harassment and Violence Policy Manual*, complaints of harassment have been made against senior departmental officials in the past. If such an occurrence were to take place, officials interviewed within CPCC indicated that they would reach out to the Labour Program at Employment and Social Development Canada for clarification on how to proceed.

As an additional concern, some policy documents and template documents prepared by CPCC use the terms "affected persons" or "victim" instead of "principal party".<sup>34</sup> For instance, the template letter for notifying responding parties contains information about confidentiality that refers to the privacy of "... Victims, witnesses and responding parties ..."<sup>35</sup>

The terms "affected persons" and "victim" could be interpreted as presuming that an occurrence is founded. Using these terms risks creating the perception of a predetermined outcome, undermining the decision-maker's credibility and leading to a potential apprehension of bias. (**Finding 4**)

**Finding 4**

The DND's template letters for workplace harassment and violence use non-neutral language to describe complainants, such as "victim" or "affected person". This could give parties the impression of a pre-determined outcome, contributing to a possible apprehension of bias.

**Recommendation:** The DND review its template documents to ensure that they employ neutral language when referring to parties.

**Note:** Officials at DND were provided, as per our process, with draft copies of this report for comment prior to publication. CPCC has been proactive in responding to the issues identified and has already updated its template letters to remove the terms "victim" and "affected persons".

**Notice**

Sufficient notice at the outset of a process leading to a decision, including the substance of what is being decided, is essential to ensuring that parties can prepare and bring forward relevant evidence. Without sufficient notice, decision-makers may not receive or be aware of relevant information, resulting in unfair outcomes.

The Department's policy framework does not require that the responding party be provided with notice at the outset of the resolution process. During the initial screening and negotiated resolution

phase, the responding party is only contacted if their participation is requested by the principal party or if the principal party wishes to attempt conciliation or initiate an investigation.<sup>36</sup>

This approach is consistent with guidance provided by the Labour Program at Employment and Social Development Canada<sup>37</sup> and aims to resolve the occurrence with minimal disruption to the workplace. As noted in the *Intake and Resolution SOPs* provided by CPCC:

*There are situations in which the occurrence may be resolved without the participation of the [responding party] or where it is preferable that it be resolved without the [responding party] in order to preserve working relationships (i.e. The occurrence is resolved between just the [principal party] and the Employer and/or the [designated recipient]).<sup>38</sup>*

As the principles of procedural fairness, including notice, only apply to processes that will result in a decision impacting the rights or interests of a party,<sup>39</sup> there is no legal requirement to engage the responding party at the negotiated resolution stage unless they will be impacted by the terms of resolution.

However, if the resolution process proceeds to a preventive investigation, which necessarily impacts the interests of both parties, the *Harassment and Violence Policy Manual* requires that the responding party be provided with “... A written notice that an investigation will be carried out.”<sup>40</sup>

This requirement is broad and does not specify what information is to be shared. Nonetheless, some clarity can be found in the *Intake and Resolution SOPs* and template notice letters prepared by CPCC. These instruct managers and designated recipients not to provide the responding party with a copy of the notice of occurrence.<sup>41</sup> Instead, they are asked to provide a general description of how the principal party perceived the occurrence and when it was alleged to have occurred.<sup>42</sup>

In addition to this general information, the template notice letter provides the responding party with an overview of the resolution process and informs them that the manager or designated recipient will, “...schedule a meeting to share with you what the principal party is seeking as a way forward prior to engaging with the principal party.”<sup>43</sup>

Notably, the template letter does not indicate the stage of the resolution process or whether an investigation has been initiated. It is not until after the responding party has met with the manager or designated recipient that they are provided with formal written notice of any preventive investigation.<sup>44</sup>

Depending on the nature of the occurrence and what the principal party is seeking, the contents of the template notice letter may not provide the responding party with an adequate opportunity to respond, potentially resulting in a breach of procedural fairness. (See **Finding 2**)

**Note:** Officials at DND were provided, as per our process, with draft copies of this report for comment prior to publication. In response, CPCC has updated its template acknowledgement letter for responding parties to clarify which step of the resolution process is underway.

## Right to be heard

Parties to a decision-making process must be able to make a fulsome response to any allegations or information that may serve as the basis for a decision. If they are unable to do so, the decision-maker may not receive or be aware of relevant information, resulting in unfair outcomes.

The process set out in the *Harassment and Violence Policy Manual* does not explicitly provide parties with an opportunity to respond to all allegations, evidence, or other information that may serve as the basis for a decision.

In the context of a formal investigation, the process reflected in the *Harassment and Violence Policy Manual* does not provide parties with an opportunity to respond to each other's arguments or to any statements or allegations made by witnesses. The *Intake and Resolution SOPs* and *Statement of Work for Investigators* used by CPCC are also silent on this point.

While the *Harassment and Violence Policy Manual* requires that parties be provided with a copy of the final investigation report,<sup>45</sup> they are not given the opportunity to provide any comments or feedback before it is sent to the employer and applicable partner for consideration.

In the absence of clear guidance, there is a risk that investigations may be conducted without providing all parties with a full opportunity to be heard, resulting in a breach of procedural fairness. (See **Finding 2**)

## Timeliness

The longer an administrative process is delayed, the higher the likelihood that relevant witnesses or evidence will become unavailable to the decision-maker. Memories can gradually fade and pertinent information may be moved or misplaced over time. The timely administration of a process reduces these risks.

In keeping with the *Harassment and Violence Regulations*, the policy framework provides clear timelines for submitting complaints and for the administration of the resolution process.

All resolution processes must be completed within one year after the day on which the notice of occurrence is submitted.<sup>46</sup> However, if either the principal party or responding party is absent from work for more than 90 consecutive days, causing the one year time limit to be missed, an additional six months are granted to complete the process, starting on the date that the party returns to work.<sup>47</sup>

## Reasons

The parties to a process must understand the basis upon which the decision-maker's decisions are made. The reasons provided for a decision must be sufficiently clear, precise, and understandable for the parties to be able to adequately challenge them if needed.

When a resolution process is completed via a preventive investigation, the parties are provided with anonymized copies of the investigation report. These reports contain a description of the occurrence, findings, recommendations, and an analysis explaining how the investigator reached their conclusions.<sup>48</sup>

While these reports provide the parties with insight into the preventive investigation, the decision to accept or reject recommendations ultimately rests with the employer and applicable partner.

When the resolution process is deemed complete, the associated file is closed and a “Notice of Occurrence Closed” letter is provided to each party.<sup>49</sup> The template letters provided to administrators by CPCC inform the parties of the file closure, identify the stage at which the process was deemed resolved, and provide a list of some or all of the steps that are being taken to respond to the occurrence.<sup>50</sup>

Notably, these templates do not prompt administrators to provide the parties with any rationale for the steps taken. In the context of a preventive investigation, there is no rationale for why recommendations were accepted or rejected.

In addition, only the principal party is guaranteed to be provided with a full list of the steps being taken. The template letter to the responding party prompts administrators to only:

*Describe the steps taken to respond to the incident after having discussed with the principal party on what measures they agree to be disclosed with the responding party.<sup>51</sup>*

Depending on the nature of the occurrence and how it was resolved, closure letters based on the current templates may not provide a sufficient rationale for the parties to understand the basis of the decision. In such cases, parties may not be able to effectively challenge the decision, potentially resulting in a breach of procedural fairness. (See **Finding 2**)

## Other expectations / commitments

In keeping with the *Harassment and Violence Regulations*, the policy framework allows a “support person” to accompany the parties during the resolution process. The *Harassment and Violence Policy Manual* clearly explains the role of the support person, clarifying that they may assist the party, but cannot represent or make representations on their behalf.<sup>52</sup>

Parties are informed of their right to be accompanied at the beginning of the process and are provided with clear information regarding the support person’s role.<sup>53</sup>

## Organizational structure

Even where the legal authority and the policy frameworks are fully aligned and incorporate principles of procedural fairness, the decision-maker needs to be supported by an organizational structure that includes the delegation of appropriate authorities, robust quality controls, relevant training, and sufficient resourcing.

## Governance

The governance, or process design, of any administrative complaint mechanism must consider the needs of the organization, including its culture, its size, the anticipated use of its process, and like considerations. The decision-makers, in addition to being adequately trained, must be individuals who have the appropriate level of authority within the organizational structure.

The CPCC is the functional authority for the prevention of workplace harassment and violence within the DND. The CPCC is responsible for issuing policies, instructions, directives, and guidelines pertaining to harassment and violence. The CPCC is also responsible for identifying a designated recipient to receive notices of occurrence submitted by DND employees.<sup>54</sup>

Reporting to the CPCC is the Director General (DG) Conflict Solutions and Services. The DG Conflict Solutions and Services is responsible for several programs aimed at promoting professional conduct and inclusivity within the Defence Team.

Reporting to the DG Conflict Solutions and Services is the Director Support Services. The Director Support Services is the official responsible for workplace harassment and violence prevention services for both the DND and the CAF.

Reporting to the Director Support Services is the Workplace Harassment and Violence Prevention Program (the Prevention Program) which houses the Department's designated recipients, as well as the Centre of Expertise (a dedicated source of information on matters relating to harassment and violence).

The Prevention Program is responsible for administering resolution processes stemming from notices of occurrence submitted to its designated recipients. If a principal party submits a notice to their manager instead, then that manager is expected to administer the process and provide updates to an intake officer at the Prevention Program.<sup>55</sup>

In the event of a formal investigation, the Prevention Program will provide the parties with a list of possible investigators to choose from. Normally, this list consists of investigators outside of the Prevention Program who report directly to the Director Support Services.

At the conclusion of the investigation, the investigator's findings and recommendations are jointly considered by the principal party's manager and the applicable partner for the employee's workplace.<sup>56</sup> For most DND workplaces, the applicable partner will be the workplace health and safety committee.

All notices involving occurrences that took place before 1 January 2021 must be submitted to ADM(HR-Civ) for resolution under the Treasury Board's previous harassment resolution process.<sup>57</sup>

Access to expertise, ongoing training, and time to focus on the decision-making task is critical to reduce the risk of delays, procedural defects, and dissatisfaction with the decision.



The Prevention Program currently consists of approximately fifteen officials, seven of whom act as the designated recipient unit for the Department.<sup>58</sup>

Designated recipients within the Prevention Program are required to complete mandatory harassment and violence prevention training provided by the Canada School of the Public Service. In addition to this mandatory training, the designated recipients also receive training related to workplace sensitivity and working with vulnerable people.

Outside of the Prevention Program, an additional team of 16 harassment and violence investigators report directly to the Director Support Services. These investigators interface with the designated recipients at the Prevention Program for occurrences that have passed to the preventive investigation phase of the resolution process.

## Quality control

A properly functioning administrative process must incorporate quality-control measures to ensure consistent and fair decision-making. These measures are even more important where processes are de-centralized and where decision-making authority is widely delegated. Further, controls themselves need to be bolstered by a constant evaluation of how the process is functioning and where it might need to be adjusted.

The Prevention Program is responsible for tracking information relating to the harassment and violence resolution process. The Prevention Program's tracking system, known as the Workplace Case Management System (the Case Management System), operates on the Enterprise resource planning platform,<sup>59</sup> Microsoft Office Dynamics 365.<sup>60</sup>

The Case Management System is used to collect, store, manage, and interpret data related to the resolution process. Each case file in the Case Management System is linked to an accompanying file in the federal government's standardized electronic document and records management system, GCdocs.<sup>61</sup>

In accordance with the reporting requirements set out in the *Harassment and Violence Regulations*,<sup>62</sup> the Prevention Program tracks the following information to report back to the Labour Program at Employment and Social Development Canada:

- The total number of occurrences submitted within the DND
- Whether occurrences were sexual or non-sexual in nature
- The number of occurrences resulting in deaths
- The number of occurrences relating to each prohibited ground of discrimination identified in the Canadian Human Rights Act<sup>63</sup>
- The location where each occurrence took place
- The means through which the resolution process was completed
- The average time that it takes for the organization to complete the resolution process

In addition to this mandatory information, the Prevention Program also tracks:

- The current stage of the resolution process for each ongoing file

- The channel through which notices of occurrence are submitted
- The format used to submit notices of occurrence
- Whether a party is absent for 90 days or more, resulting in a time extension for resolution under the Harassment and Violence Regulations
- The name of the conciliator used if the parties attempted conciliation
- Information about investigators if a preventive investigation is initiated

Moving forward, officials interviewed within CPCC have indicated that they also intend to track the types of measures that parties request as terms of negotiated resolution.

One of the Case Management Coordinators is responsible for inputting file-related data into the Case Management System.<sup>64</sup> Additional inputs are made by the designated recipients assigned to each file.

Quality control checks are performed on the system on a weekly basis by the designated recipient team lead. Every Monday, the team lead examines all active files to determine when they were most recently updated, whether progress is being made, and that all associated files in GCdocs are named in accordance with the Prevention Program's naming conventions.<sup>65</sup>

To ensure that files are properly closed and that all relevant data is entered and captured in a consistent manner, the Prevention Program has developed a comprehensive *Workplace Case Management System* (WCMS) Data Entry Guide<sup>66</sup> and *WCMS File Closure Checklist*<sup>67</sup> to help guide designated recipients. (**Finding 5**)

### **Finding 5**

**The DND has clear and robust internal procedures and practices for the information management of harassment and violence files.**

As an additional accountability measure, a note to file (called "Letter of Closure") must be placed on each file by the designated recipient team lead before they can be closed. This letter is prepared after the team lead has reviewed the file to ensure its completeness. The document is not shared with the parties. This is a strong quality control measure that is not based in any requirements set out in either the *Labour Code* or *Harassment and Violence Regulations*.

## **Operational reality / Implementation**

The reality of designing and implementing a complaints process necessarily involves more than a process chart and the right organizational resourcing. Once the responsible official determines that the step-by-step process is compliant with the enabling lawful authority and policy, there are a myriad of other tools and best practices that should be established.

## **Communication**

Adequately communicating information is key to the parties' meaningful engagement in the process. Even an unfavourable decision has a better chance of being accepted if the parties understand the process, they have the opportunity to be heard, and the eventual decision is clearly explained.



Effective communication of the process itself, including its purpose, the basis for decisions, and the procedural protections afforded to parties is critical.

The Prevention Program is a relatively new program, operating in a new organization and administering a new process. The program has noted that many DND employees are confused when seeking relevant information. Often, it can be difficult for employees to distinguish information about the new resolution process from guidance on the CAF harassment process or the now defunct Treasury Board harassment complaint process.

The primary means through which CPCC makes information about the harassment and violence resolution process available to potential parties and decision-makers is through the Prevention Program's public-facing internet page on Canada.ca and the departmental intranet page accessed through the Defence Wide Area Network (DWAN or Defence Network).

As noted by DND officials, not all DND employees have consistent access to the Department's intranet. Some employees work in positions that do not make frequent use of computers, while others are on leave or work in remote parts of the country where access to the Defence Network is inconsistent. Following consultations with union stakeholders, the Prevention Program decided to prioritize making resources available on its public-facing page to maximize accessibility.

The Prevention Program's public-facing webpage is somewhat difficult to locate. **(Finding 6)** From the CPCC's home page, one must click through three consecutive links, two of which are buried amongst links to other DND and CAF processes. Little is done to distinguish between DND and CAF focused pages, potentially exacerbating employees' confusion about which process to engage.<sup>68</sup>

Once located and accessed, the Prevention Program's portion of the CPCC's public-facing webpage is clearly laid out, easily navigable, and organized logically into six distinct pages. **(Finding 6)** Each page can be easily accessed at the top of the landing page and are separated as follows:

1. How to report an incident
2. Policy and regulations
3. Tools and templates
4. Training
5. Workplace harassment and violence assessments
6. Emergency procedures and Support services

### **Finding 6**

The DND's intranet and public-facing webpages for harassment and violence resolution are difficult to locate. However, once accessed, they are clearly laid out, easily navigable, and provide DND employees with necessary information and resources.

**Recommendation:** The DND make its intranet and public-facing webpages for harassment and violence resolution easier to locate.

The information on the Prevention Program's site is comprehensive and clearly indicates which information is relevant to employees or managers. At the top of each page, there is an additional

“Important note” providing guidance on what to do if an individual’s life or physical safety is at immediate risk.

In addition to its internet page, the Prevention Program has directly engaged other organizations to help increase awareness of its program. This has included recurring presentations to other DND organizations, virtual training sessions for employees, and messages in the DND’s internal newsletters.

The Prevention Program is cognizant that employees often submit notices of occurrence to the wrong DND organization. To address this issue, the Prevention Program has coordinated with other organizations to ensure that they point employees towards the correct resources.

Finally, to ensure greater ease of access to tools and templates, the electronic copy of the *Harassment and Violence Policy Manual* contains hyperlinks to various pages on the Prevention Program’s public-facing site. These links will need to be updated if these pages are ever relocated.

## Effective administration

In large government organizations, internal administrators may be faced with a regular and ongoing influx of complaint files. The ability of administrators to efficiently screen complaints, administer processes, and provide timely resolution is crucial to ensuring that workplace issues do not compound and that the integrity of the public service is preserved.

Since 1 January 2021, the DND has administered over 500 harassment and violence resolution processes. Approximately 94% of these processes were resolved at the negotiated resolution stage, while 3% were resolved in conciliation and an additional 3% were resolved through investigation.<sup>69</sup>

These statistics are reflective of the Prevention Program’s focus on negotiated resolution as the primary means of achieving resolution. In facilitating negotiated resolution, the Prevention Program aims to ensure that the principal party feels heard and that their concerns are acknowledged. An emphasis is then placed on what the employer can do to help prevent future occurrences, rather than on attempts to repair the relationship between the parties. This approach has been effective in producing the early and timely resolution of occurrences.

The Prevention Program goes beyond its regulatory requirements in ensuring meaningful resolution for parties. Notably, while unfounded occurrences are deemed resolved under the *Harassment and Violence Regulations* once the investigation report is shared, the Prevention Program takes extra steps before closing the file. This includes an internal requirement for investigators to provide recommendations for consideration and implementation even in unfounded cases. The rationale behind this approach is that the launch of a formal investigation is itself indicative of a workplace issue that warrants being addressed.

While most resolution processes are completed within the one-year timeframe required in the *Harassment and Violence Regulations*, extensions are sometimes needed to account for the absence of parties. In at least one case, a resolution process was significantly delayed due to the 18-month absence of a party.

The Prevention Program has also encountered issues with potentially frivolous or vexatious notices of occurrence. While both the *Labour Code* and *Harassment and Violence Regulations* are silent on the issue of notices made in bad faith, the DND's *Harassment and Violence Policy Manual* makes it clear that parties who wilfully make frivolous or vexatious allegations may face disciplinary measures, administrative measures, or both. This is an important protection to ensure that the resolution process is not weaponized or otherwise misused.

The Prevention Program's standard procedure for addressing frivolous or vexatious complaints is informal and not recorded in any policy documents. If the Prevention Program determines that a notice may have been made in bad faith, they will contact the Labour Program at Employment and Social Development Canada for an external assessment of the notice's merit. If the Labour program identifies the notice as frivolous or vexatious, it will be rejected.

## Use of contractors

The federal government frequently uses the services of external contractors for short-term projects or where specific expertise is required. Where the services of contractors are engaged, it is crucial that they be provided with clear instructions, emphasizing adherence to procedure and procedural fairness. Quality control measures should be in place to ensure that requirements are met and that processes are carried out consistently. In all cases, the decision-maker has ultimate accountability.

Regardless of whether a manager or a designated recipient receives a notice of occurrence, CPCC remains responsible for conducting preventive investigations.

Under normal circumstances, one of the 16 investigators reporting to the Director Support Services will conduct preventive investigations under the resolution process. However, the Director Support Services has indicated that external contractors may be used in the following situations:

- Internal investigators are unavailable due to an unusually high workload, absences, or other exceptional circumstances
- The investigation requires an investigator with a specific linguistic profile and no internal investigators with the required profile are available
- The investigation would benefit from an investigator from a specific background, particularly if one or both of the parties belong to the same group

Since 1 January 2021, CPCC has had an annual budget of \$500,000 for contracting. In that time, CPCC has conducted 19 investigations using internal investigators and 6 using contractors. The average cost of each contractor-led investigation was approximately \$40,000, resulting in around \$240,000 in expenses since 2021.<sup>70</sup> The CPCC used contractors for these 6 investigations, because it was still a new organization and the investigation team reporting to the Director Support Services was not yet fully trained.

Officials within CPCC are aware that not all investigators have the same level of experience and expertise. The Prevention Program has standard procedures to ensure that contractors are properly adhering to the requirements set out in the *Harassment and Violence Regulations* and *Harassment and Violence Policy Manual*.

A dedicated corporate services coordinator within the Prevention Program monitors all ongoing investigations, tracks their progress, and ensures that investigators are provided with all relevant file information. In addition to this, investigators are provided with templates to maintain consistency.

## Use of multiple mechanisms

Parties are often uncertain what the appropriate mechanism is to address their concerns. Where possible, decision-makers and administrators should ensure that parties address their concerns through the appropriate channel.

DND officials have indicated that, at the outset of the resolution process, time is taken to identify what the principal party is seeking and whether another mechanism might be more appropriate. If a party has already attempted to address the occurrence through another mechanism, this is noted on the case file.

The *Harassment and Violence Policy Manual* notes that parties can concurrently seek recourse relating to an occurrence through the department's grievance process.<sup>71</sup> In practice, the Prevention Program generally recommends that parties put any concurrent grievances in abeyance<sup>72</sup> to avoid unnecessary duplication of efforts.

Where the alleged conduct of a responding party may warrant discipline or administrative action, the employee's manager may take action, including an administrative investigation, outside of the resolution process. The Prevention Program has noted that a simultaneous management investigation can be beneficial to the resolution process, as the knowledge that management is acting allows principal parties to better focus on prevention.

If a party believes that their employer or the designated recipient has failed to comply with the requirements set out in the *Labour Code* or *Harassment and Violence Regulations*, they are encouraged to raise the issue and attempt to resolve it. If the issue remains unresolved, they can make a complaint to the Labour Program at Employment and Social Development Canada.

## Findings and recommendations

### Finding 1

The DND's policy framework for workplace harassment and violence is compliant with applicable legislation, regulation, and Treasury Board policy.

### Finding 2

The DND's policy framework for workplace harassment and violence does not adequately identify and elaborate upon the following procedural fairness protections owed to parties, creating a risk for breaches of procedural fairness:

- Unbiased decision-maker
- Notice
- Right to be heard
- Reasons

**Recommendation:** The DND review its policy framework for harassment and violence to ensure that the procedural fairness protections owed to parties are clearly identified and elaborated upon.

### Finding 3

The DND's policy framework for workplace harassment and violence does not identify an alternate decision-maker in the event that a complaint is filed against an individual at the top of the complainant's reporting chain, creating a risk for breaches of procedural fairness.

**Recommendation:** The DND review its policy framework for harassment and violence to identify an alternate decision-maker in the event that a complaint involves a decision-maker at the top of a complainant's reporting chain.

### Finding 4

The DND's template letters for workplace harassment and violence use non-neutral language to describe complainants, such as "victim" or "affected person". This could give parties the impression of a pre-determined outcome, contributing to a possible apprehension of bias.

**Recommendation:** The DND review its template documents to ensure that they employ neutral language when referring to parties.

### Finding 5

The DND has clear and robust internal procedures and practices for the information management of harassment and violence files.

### Finding 6

The DND's intranet and public-facing webpages for harassment and violence resolution are difficult to locate. However, once accessed, they are clearly laid out, easily navigable, and provide DND employees with necessary information and resources.

**Recommendation:** The DND make its intranet and public-facing webpages for harassment and violence resolution easier to locate.

# Part 3 – Individual grievances

There are complaint mechanisms within the Federal Public Service that allow public servants to draw attention to matters of concern so that they can be addressed internally.

Where a public service employee at DND feels aggrieved by an action of their employer, the individual grievance mechanism permits the employee to challenge this action if it was made further to the interpretation or application of legislation or of an applicable collective agreement or under applicable terms and conditions of employment.

## Legal and policy framework

In this section, we examine the legal and policy basis that gives decision-makers the authority to act and outlines how the process must be directed.

This analysis is focused solely upon the individual grievance process as it relates to civilian employees of the public service of Canada who are employed at the Department of National Defence (DND).<sup>73</sup>

There are also group grievances and classification grievances, but these are outside the scope of this review.<sup>74</sup> This review also excludes National Joint Council grievances, which are the subject of a separate process.<sup>75</sup>

## Legal authority

Legal authority is the lawful basis for a decision-maker's authority to act and usually outlines the decision-making process. This authority is generally set out in Acts of Parliament and Regulations. In some cases, it exists in instruments under the Royal Prerogative.<sup>76</sup>

The legal authorities applicable to the process for individual grievances made by public service employees at the DND are set out in Part 2 of the *Federal Public Sector Labour Relations Act*<sup>77</sup> and Part 2 of the *Federal Public Sector Labour Relations Regulations*.<sup>78</sup>

The grievance process is responsive and reactive rather than proactive or preventative. The statutory right to grieve arises where an employee “feels aggrieved” in relation to actions of their employer under the terms and conditions of their employment or the provision of an applicable collective agreement. Collective agreements generally contain further legal aspects applicable to grievances which can constitute rights under labour law.<sup>79</sup>

## Policy framework

Subject to applicable legislation and Treasury Board policy, each department is responsible for establishing its own internal policy and procedures for the resolution of grievances tailored to its organizational needs.



The Treasury Board has no current policy instruments which specifically address individual grievances. Instead, the Treasury Board delegated authority to the Treasury Board's Chief Human Resources Officer to direct deputy heads with respect to grievances under the *Labour Relations Act*.<sup>80</sup> The Chief Human Resources Officer has not issued directives with respect to individual grievances at this time.<sup>81</sup>

Despite the absence of specific Treasury Board policy and any directives from the Chief Human Resources Officer, the Treasury Board Secretariat Employer Representative in Recourse Team in the Office of the Chief Human Resources Officer<sup>82</sup> has published a *Handbook on Grievances and Adjudication*.<sup>83</sup> Part A of that publication (titled "Grievances") provides a good summary of the grievance process and applicable legislation.

## Process

The individual grievance process for public servants employed with the DND begins when an employee who feels aggrieved files the Individual Grievance Presentation form with their immediate supervisor or to the Department's designated representative.<sup>84</sup>

If the employee is dissatisfied with the response to their grievance at the first level, the grievance may be presented to the second level representative. If the employee is dissatisfied with the response at the second level, then it can be presented to the third (final) level representative.<sup>85</sup>

Where an employee is dissatisfied with the response at the final level, in some cases the employee may refer their grievance to the Federal Public Sector Labour Relations and Employment Board (Labour Relations Board) for adjudication.<sup>86</sup>

Where the employee is represented, their union is usually involved, through a union representative. All collective agreements set timelines for presenting grievances.<sup>87</sup>

An offer to address a grievance via alternative dispute resolution must be made at the first level and is also available at the second and final levels.<sup>88</sup> If the parties agree to alternative dispute resolution the grievance is placed in abeyance.<sup>89</sup>

Where there is an inconsistency as between a collective agreement and the Labour Relations Regulations, including in relation to grievance deadlines, the collective agreement takes precedence.<sup>90</sup>

At each level, the decision-maker will permit the grievor or their representative to present their case<sup>91</sup> before rendering a decision on the grievance within the timeframe set out in the relevant collective agreement.

The *Labour Relations Regulations* permit the extension of grievance deadlines by agreement of the parties or by the Labour Relations Board on application by one of the parties.<sup>92</sup>

The duration of grievance cases from initiation to resolution at each level is tracked by officials reporting to the DND's Assistant Deputy Minister (Human Resources-Civilian) (ADM(HR-Civ)). For

the fiscal year 2022/23 the average duration of grievances from initiation to resolution (not including the time that the grievance may have been placed in abeyance) at the first level is 3.7 months, at the second level is 2.6 months and at the third and final level is 5.6 months.<sup>93</sup>

## Policy documents

The central policy framework for individual grievances made by public service employees at the DND is currently set out in a Defence Administrative Orders and Directives (DAOD) and in policy manuals. These include:

- **DAOD 5026-0, Civilian Grievances<sup>94</sup>** : among other things requires that the DND establish a grievance procedure and develop and implement guidelines for grievances. It identifies the ADM(HR-Civ) as the authority to issue directives on grievances and oversee their effectiveness.<sup>95</sup>
- **Guidelines for Civilian Grievances<sup>96</sup> (Grievance Guidelines)**: outlines the procedure to be followed in dealing with grievances. It is published by the Director General Workplace Management (DGWM).
- **National Standardized Grievance Process<sup>97</sup> (NSGP)**: outlines the actions required at each level and the assessment criteria necessary to process a grievance. ADM(HR-Civ) publishes this document.
- **Instrument of Delegation of Labour Relations, Human Rights and Political Activities Authorities<sup>98</sup>** : sets out those persons authorized to respond to individual grievances at each level.

While these documents are key for participants to understand the individual grievance process for civilian employees at the Department, only the first is publicly available on the internet (see **Finding 8** below). Department officials have advised that in some employment locations, access to the intranet for the Department and the CAF (the Defence Wide Area Network (DWAN)) may be limited. This may affect employees' access to documents and information only available on the DWAN.

In addition, every collective agreement which applies to civilian employees in the public service who work at the DND contains provisions related to individual grievances.<sup>99</sup> These form part of the grievance process framework.<sup>100</sup>

## Compliance

In all cases, the policy framework must be consistent with the enabling legal authority. Inconsistencies with the legal requirements could result in successful challenges to the decision-maker's decision.

The DND's policy framework for individual grievances is consistent with applicable legislation, regulations and guidance. (**Finding 1**)

### Finding 1

The DND's policy framework for individual grievances is consistent with applicable legislation and regulations.



## Procedural fairness

Procedural fairness for government decision-making exists in common law regardless of whether it is explicitly identified in legislation. It is critical that departmental policy documents identify baseline principles of procedural fairness, especially where applicable legislation or regulation is silent or lacks sufficient detail. Clarity contributes to the consistent administration of the decision-making process and to fair outcomes for parties.

With respect to individual grievances, collective agreements also incorporate aspects of procedural fairness by requiring adequate notice, providing the right to be heard, imposing timelines for the response to grievances, and requiring a different decision-maker in cases where they are the respondent in a grievance alleging harassment or discrimination.

Principles of procedural fairness, along with legislative, policy and contractual sources, are correlated below:

<b>Civilian public service employees' individual grievance process</b>					
<b>Reasons</b>	<b>Instrument</b>	<b>Unbiased decision-makers</b>	<b>Notice</b>	<b>Right to be heard</b>	<b>Timeliness</b>
Legislation	Silent	Silent	Silent	Silent	Silent
Regulations	Silent	Substantial	Substantial	Substantial	Silent
Treasury Board policy	N/A	N/A	N/A	N/A	N/A
Department policy	Partial	Substantial	Substantial	Silent	Substantial
Collective Agreements	Substantial	Substantial	Substantial	Substantial	Silent

## Unbiased decision-maker

Decisions must be based on a fair and unbiased assessment of the facts and evidence before the decision-maker. When a decision-maker is perceived to be influenced by personal interests, relationships, or inappropriate external considerations, a reasonable apprehension of bias may exist, delegitimizing the decision and opening it to challenge.

The right to an unbiased decision-maker for grievances made by civilian public service employees at the DND is not reflected in relevant legislation, regulations, or Treasury Board policy.

The *Grievance Guidelines* do address bias in a limited fashion. These provide that:

*In the case of grievances alleging harassment or discrimination and where the Grievance Level Officer is the respondent, the Grievance Level Officer shall not deal with the grievance. Consequently, the next higher level in the chain of command, as indicated in the Instrument of Delegation of Labour Relations Authorities, shall respond.<sup>101</sup>*

Many collective agreements also contain provisions precluding an official from hearing the same grievance at more than one level in the grievance<sup>102</sup> or from hearing a grievance if decision-maker is the subject of a complaint of discrimination or sexual harassment.<sup>103</sup>

There may be grievances where the respondent is the delegated official who was responsible for the actions leading to the grievance, but where the grievance does not allege harassment or discrimination. In such cases it may also be inappropriate for that official to deal with the grievance.

In addition, even where the delegated official is not the respondent in the grievance, there may be other grounds that justify a reasonably informed bystander to reasonably perceive bias on the part of that official as the decision-maker.<sup>104</sup> Although the *Grievance Guidelines* do not go into this level of detail, the test for a reasonable apprehension of bias will be the one applied in courts and by the Labour Relations Board.<sup>105</sup>

The DND's policy framework for individual grievances addresses bias, but not in a manner that is consistent with the test for a reasonable apprehension of bias used by the by the Supreme Court of Canada and applied by the Labour Relations Board. (**Finding 2**)

### **Finding 2**

The DND's policy framework for individual grievances addresses bias, but not in a manner that is consistent with the test for a reasonable apprehension of bias used by the Supreme Court of Canada and applied by the Federal Public Sector Labour Relations and Employment Board.

In addition, the framework does not identify an alternate decision-maker in the event that a grievance is filed against an individual at the top of the grievor's reporting chain, creating a risk for breaches of procedural fairness.

**Recommendation:** The DND review its policy framework for individual grievances to ensure that it addresses a reasonable apprehension of bias in a manner that is consistent with the Supreme Court of Canada and the Federal Public Sector Labour Relations and Employment Board.

## **Notice**

Sufficient notice at the outset of a process leading to a decision, including the substance of what is being decided, is essential to ensuring that parties can prepare and bring forward relevant evidence. Without sufficient notice, decision-makers may not receive or be aware of relevant information, resulting in unfair outcomes.

Both the *Labour Relations Regulations* and the *Grievance Guidelines* set out aspects of how employees can participate meaningfully in the decision-making process. This includes ensuring that the

grievor (or their representative) is aware of when and by whom the grievance was received<sup>106</sup> and the requirement in the *Grievance Guidelines* that at each level the grievor (or their representative) is consulted.<sup>107</sup>

The *Labour Relations Regulations* also require employees to be advised of the names or titles of those who will make decisions at each level of the grievance process. Employees must also be informed of the name or title, as well as the contact information, of the person to whom an individual grievance may be presented. This information must be posted “in conspicuous places” where it is most likely to come to the attention of employees.<sup>108</sup>

Collective agreements also specify employee participatory rights.

For example, many collective agreements set out requirements for the recipient of the grievance to provide a receipt when it is presented, for the employer to inform the grievor of decision-makers at each grievance level, and that a grievor may be assisted and/or represented by a member of their union.<sup>109</sup>

Collective agreements also set out deadlines for grievances to be submitted and decisions on those grievances to be made.<sup>110</sup>

## Right to be heard

Parties to a decision-making process must be able to make a fulsome response to any allegations or information that may serve as the basis for a decision. If they are unable to do so, the decision-maker may not receive or be aware of relevant information, resulting in unfair outcomes.

The DND’s policy framework for individual grievances ensures that a grievor is given a reasonable opportunity to present their position in a grievance and that the relevant decision-maker considers these prior to making a decision. (**Finding 3**)

### Finding 3

The DND’s policy framework for individual grievances ensures that a grievor is given a reasonable opportunity to present their point of view in a grievance, and that a relevant decision-maker consider these prior to making a decision.

The *Regulations* set out the requirement to present a grievance in the form set out by the employer.<sup>111</sup>

Unions play an important role in informing their members of the process involved in making a grievance. They can also provide invaluable assistance to their members in navigating this process.

## Timeliness

The longer an administrative process is delayed, the higher the likelihood that relevant witnesses or evidence will become unavailable to the decision-maker. Memories can gradually fade and pertinent

information may be moved or misplaced over time. The timely administration of a process reduces these risks.

The *Labour Relations Regulations* set out a deadline to make a decision in the grievance process. Deadlines in the individual grievance process are also set out in the *Grievance Guidelines* and in the *National Standardized Grievance Process*.<sup>112</sup>

Collective agreements also set out aspects of timeliness, with an emphasis upon time limits for the actions of both the Department and employees in the grievance process.<sup>113</sup> Depending on the availability of parties, the Department and unions may agree to delays in the process that go beyond existing timelines.

Failure to meet the time limits can have legal consequences. For example, a grievor who does not submit their grievance in the time required can have their grievance denied on that basis.<sup>114</sup> If the employer does not respect the time limit applicable to the rendering of a decision, this may ground a successful judicial review application before the Federal Court. However, applications of this nature are made at the grievor's own expense and can be costly.<sup>115</sup>

The average duration of individual grievances from receipt to resolution/closure (exclusive of the time spent in abeyance) has significantly improved between 2018 and 2023. According to ADM(HR-Civ), for the fiscal year 2018-19 individual grievance cases took on average 14.5 months at level one, 11.7 months at level two and 32.8 months at level three. In fiscal year 2022-23, they took 3.7 months at level one, 2.6 months at level two and 5.6 months at level three.<sup>116</sup>

**Observation:** Departmental officials indicated that delays were primarily the result of an insufficient number of union representatives for the number of grievances being heard. We did not consult with the relevant unions for confirmation.

## Reasons

The parties to a process must understand the basis upon which the decision-maker's decisions are made. The reasons provided for a decision must be sufficiently clear, precise, and understandable for the parties to be able to adequately challenge it if needed.

The DND's policy framework for individual grievances provides limited guidance and information with respect to the requirement for written reasons to be given by decision-maker and the content of those reasons. (**Finding 4**)

### Finding 4

The DND's policy framework for individual grievances provides limited guidance and information with respect to the requirement for written reasons to be given by decision-makers, and the content of those reasons.

**Recommendation:** The DND review its policy framework for individual grievances to ensure that it requires written reasons from decision-makers and provides guidance as to the appropriate content of such reasons.

The *Grievance Guidelines* briefly mention that the authorized decision-maker must provide the reasons for their decision in their written reply to the grievance and provide no guidance as to the content of those reasons.<sup>117</sup>

The *Handbook on Grievances and Adjudication* provides general guidance:

*A grievance reply should not provide an overly detailed rationale for the decision or mention or discuss subject or issue [sic] not specifically mentioned in the grievance.*<sup>118</sup>

## Other expectations / commitments

The *Regulations* require the acknowledgement of the receipt of a grievance<sup>119</sup> as do the *National Standardized Grievance Process*.<sup>120</sup> These are also required by Collective Agreements.<sup>121</sup>

The *Labour Relations Act* requires that an informal dispute resolution system be available to resolve the grievance informally and this requirement is amplified by DAOD 5046-0, Alternative Dispute Resolution.<sup>122</sup>

The DND policy framework for individual grievances requires a mandatory offer for alternative dispute resolution at level one of the grievance procedure and that alternative dispute resolution be available at levels two and three.<sup>123</sup> (**Finding 5**)

### Finding 5

**The DND's policy framework for individual grievances requires a mandatory offer for alternative dispute resolution at level one of the grievance procedure and that alternative dispute resolution be available at levels two and three.**

The *Grievance Tool Kits* go into some detail regarding how the offer of alternative dispute resolution fits into the procedure for grievances at the first level.<sup>124</sup> Some Collective Agreements briefly mention “the value of informal discussion between employees and their supervisors” without much further detail.<sup>125</sup>

ADM(HR-Civ) advised that, while they are responsible for ensuring that offers of alternative dispute resolution are made, once the offer is accepted the alternative dispute resolution process is administered by the Chief of Professional Conduct and Culture (CPCC).

## Organizational structure

Even where the legal authority and the policy frameworks are fully aligned and incorporate principles of procedural fairness, the decision-maker needs to be supported by an organizational structure that includes the delegation of appropriate authorities, robust quality controls, relevant training, and sufficient resourcing.

## Governance

The governance, or process design, of any administrative complaint mechanism must consider the needs of the organization, including its culture, its size, the anticipated use of its process, and like considerations. The decision-makers, in addition to being adequately trained, must be individuals who have the appropriate level of authority within the organizational structure.

Pursuant to DAOD 5026-0, ADM(HR-Civ) issues directives on grievances and oversees their effectiveness.<sup>126</sup>

Reporting to ADM(HR-Civ) is the Director General Workplace Management (DGWM) who is the functional authority in labour relations, grievances, and workplace and employee well-being, including total health and disability management.

Reporting to DGWM is the Director Labour Relations Operations who provides expert advice concerning the management of employees at all levels of the DND and whose areas of responsibility include grievances.

While ADM(HR-Civ) is responsible for the implementation of civilian grievances, the grievance system is functionally administered by officials exercising delegated authority.

Those officials exercising delegated authority to make decisions at each level of the individual grievance process are identified in the Department's 2019 HR *Delegation Instrument*.<sup>127</sup>

Decision-makers in the individual grievance system have access, through the Defence Learning Network, to training on individual grievances.<sup>128</sup>

The decision-makers in the individual grievance process should continue to be individuals who, in addition to being adequately trained, are at the appropriate level of authority within the Department's organizational structure.

Access to expertise, ongoing training, and time to focus on the decision-making task is critical to reduce the risk of delays, procedural defects, and dissatisfaction with the decision.

We were advised by ADM(HR-Civ) that there are approximately one hundred employees supporting the civilian grievance process.

This includes a team of labour relations advisors who provide labour relations advice to decision-makers at the first and second level grievance. A dedicated team of one manager and seven employees are responsible for providing labour relations advice for third level grievance decisions, adjudications, and *Canadian Human Rights Act* complaints.



## Quality control

A properly functioning administrative process must incorporate quality-control measures to ensure consistent and fair decision-making. These measures are even more important where processes are de-centralized and where decision-making authority is widely delegated. Further, controls themselves need to be bolstered by a constant evaluation of how the process is functioning and where it might need to be adjusted.

The DND has detailed policy guidelines (*Grievance Guidelines* and the *Grievance Tool Kits* which set out the *National Standardized Grievance Process*) which aim to ensure consistency and quality in addressing grievances.

Aggrieved employees have the right to have a grievance decision reconsidered at a second and third level. As well, certain grievance decisions can be adjudicated before the Labour Relations Board.<sup>129</sup> Finally, a decision of the Labour Relations Board is subject to judicial review in the Federal Court as is a third-level decision that cannot be adjudicated before the Labour Relations Board.<sup>130</sup>

In addition, certain internal studies of the DND's civilian grievance system have been commissioned in the last decade.<sup>131</sup> None of these studies focused upon the application of the principles of procedural fairness in the civilian grievance system, except, perhaps, in their reference to timeliness.

There does not appear to be a requirement for any public reporting of civilian grievance statistics. However, ADM(HR-CIV) reported to us the statistics it tracks in its new system, the Workplace Case Management System (WCMS) (from September 2020) and its legacy system (until September 2020), the Human Resources Management System (HRMS).

ADM(HR-Civ) was able to generate statistics showing the total number of grievances received and resolved, the number of cases where alternative dispute resolution was engaged, the average time of grievances from receipt to resolution, the number of grievances which were resolved at each level and the number of grievances which were referred for adjudication before the Labour Relations Board.

Data relating to individual grievances is inconsistently entered into WCMS. For example, two of the resolution categories for grievances, "rejected" and "waived", are sometimes used interchangeably. This makes pulling data, and then identifying and monitoring trends difficult. (**Finding 6**)

### Finding 6

Data relating to individual grievances is inconsistently entered into WCMS. This makes pulling data, and then identifying and monitoring trends difficult.

**Recommendation:** The DND review its case management procedures and practices for individual grievances to ensure logical and consistent data collection and capture.

The DND generates depersonalized statistics regarding individual grievances which are reviewed at least quarterly. However, the review of individual case files is not formalized and only takes place on an as-needed basis.<sup>132</sup> (**Finding 7**)

### **Finding 7**

The DND generates depersonalized statistics regarding individual grievances which are reviewed at least quarterly. However, the review of individual case files is not formalized and only takes place on an as-needed basis.

**Recommendation:** The DND conduct a recurring, and systematic review of a sampling of individual case files to ensure the quality of grievance files, the accuracy of the information entered into the DND's case management system, the timeliness of the individual grievance process from receipt to decision, and the sufficiency of the reasons provided by the decision-makers.

## **Operational reality / Implementation**

The reality of designing and implementing a complaints process necessarily involves more than a pretty process chart and the right organizational resourcing. Once the responsible official determines that the step-by-step process is compliant with the enabling lawful authority and policy, there are a myriad of other tools and best practices that should be established.

## **Communication**

Adequately communicating information is key to the parties' meaningful engagement in the process. Even an unfavourable decision has a better chance of being accepted if the parties understand the process, they have the opportunity to be heard, and the eventual decision is clearly explained. Effective communication of the process itself, including its purpose, the basis for decisions, and the procedural protections afforded to parties is critical.

Grievances are an established and long-standing manner for employees to challenge the actions of their employer.

The Treasury Board Secretariat Employer Representation in Recourse Team has published a *Handbook on Grievances and Adjudication* which provides general guidance on grievances.<sup>133</sup>

The DND's intranet sites for its individual grievance process are easy to locate, clearly laid out and provide DND employees with helpful information and resources. However, this information is not available on the public internet nor on the DND's human resources application. (**Finding 8**)

### **Finding 8**

The DND's intranet sites for its individual grievance process are easy to locate, clearly laid out and provide DND employees with helpful information and resources. However, this information is not available on the public internet nor on the DND's human resources application.



**Recommendation:** The DND publish information and resources with respect to individual grievances on the DND's public internet site and on the DND's human resources application.

The intranet for the Department and the CAF (the Defence Wide Area Network (DWAN)) sets out a summary of redress mechanisms available to civilian employees at the DND (including grievances) and hyperlinks to relevant policies, tools, and forms.<sup>134</sup>

The DND has made detailed policy guidelines (*Grievance Guidelines*, and the *Grievance Tool Kits* which set out the *National Standardized Grievance Process*) available on the DWAN. These policies set out detailed steps taken during the civilian grievance process which help to ensure consistency and quality in addressing grievances.

The documents setting out DND's policy framework for individual grievances contain inaccuracies in terminology and process description. **(Finding 9)**

For example, the *Grievance Guidelines* refer to Canadian Human Resources Service Centres, which no longer exist, while the *Grievance Tool Kit for HR Practitioners* and the *Grievance Tool Kit for Managers* refer to Civilian Human Resources Offices, which also no longer exist. The *National Standardized Grievance Process* refers to "post hearing research and discussion conducted prior to decision. Further investigation if necessary" but we are advised that this no longer takes place.

Examples of inaccurate terminology in the *Grievance Guidelines* include references to "Grievance Level Officers", which are now supposed to be referred to as "First Level / Second Level Delegated Managers." The *Grievance Tool Kits* refer to "Human Resources Officer" when these are now "Labour Relations Advisors."

### Finding 9

The DND's policy framework for individual grievances contains inaccuracies in terminology and process description.

**Recommendation:** The DND review and update its policy framework for individual grievances to include current and correct terminology as well as an accurate description of the current individual grievance process.

Union representatives and union websites also have information available for employees who wish to file a grievance.<sup>135</sup>

While collective agreements do not apply to grievances made by unrepresented employees, in practice a similar process is followed.<sup>136</sup>

## Effective administration

In large government organizations, internal administrators may be faced with a regular and ongoing influx of complaint files. The ability of administrators to efficiently screen complaints, administer processes, and provide timely resolution is crucial to ensuring that workplace issues do not compound and that the integrity of the public service is preserved.

According to ADM(HR-Civ), since 1 January 2013, over seven thousand civilian grievances from public service employees at the DND have been administered.<sup>137</sup>

Of the grievances received from 1 January 2013 to 1 June 2023, Alternative Dispute Resolution was engaged in a little over 1,200 cases. Alternative dispute resolution resolved only approximately 345 (less than five percent) of these cases.

As stated above, the average duration of individual grievances from receipt to resolution/closure (exclusive of the time spent in abeyance) has significantly decreased between 2018 and 2023.<sup>138</sup>

The consent of both the employee and the employer is required to place a grievance in abeyance. The reasons for which a file may be placed in abeyance include:

- Where an employee is on leave and therefore not able to be an active participant in their grievance
- Where management is not available either to conduct a grievance hearing or to make a decision on the grievance
- Where, following a grievance hearing, management and a labour relations officer review the information presented, and may need to do some research into what occurred to lead to the grievance (such as consulting with a compensation advisor if the grievance relates to a pay issue)
- Where another dispute resolution process has been engaged which could resolve the grievance (for example, alternative dispute resolution)
- Where the employee's union requests that the grievance be placed in abeyance<sup>139</sup>

Another important element of effective administration is dealing with frivolous and vexatious grievances. The DND's policy framework for individual grievances does not provide a mechanism for decision-makers to address frivolous or vexatious grievances. (**Finding 10**)

### **Finding 10**

The DND's policy framework for individual grievances does not provide a mechanism for decision-makers to address frivolous or vexatious grievances.

**Recommendation:** The DND review its policy framework for individual grievances to provide guidance on addressing frivolous or vexatious grievances.

## **Use of contractors**

The federal government frequently uses the services of external contractors for short-term projects or where specific expertise is required. Where the services of contractors are engaged, it is crucial that they be provided with clear instructions, emphasizing adherence to procedure and procedural fairness. Quality control measures should be in place to ensure that requirements are met and that processes are carried out consistently. In all cases, the decision-maker has ultimate accountability.

ADM(HR-Civ) confirmed that contractors are used in the grievance process where the complexity or seriousness of the file warrants a separate investigation by a private third-party.

The DND's policy framework for individual grievances does not provide guidelines as to when an investigation of the facts alleged by a grievor is required and when such an investigation can be conducted internally or contracted to an external third party. (**Finding 11**)

### **Finding 11**

The DND's policy framework for individual grievances does not provide guidance as to when an investigation of the facts alleged by a grievor is required and when such an investigation can be conducted internally or contracted to an external third party.

**Recommendation:** The DND review its policy framework for individual grievances to include guidance as to when an investigation of the facts alleged by a grievor is required and when such an investigation can be conducted internally or could be contracted to an external third party.

The DND's policy framework for individual grievances does not provide guidance as to the conduct of an internal investigation into the facts alleged by a grievor. (**Finding 12**)

### **Finding 12**

The DND's policy framework for individual grievances does not provide guidance as to the conduct of an internal investigation of the facts alleged by a grievor.

**Recommendation:** The DND review its policy framework for individual grievances to include guidance as to the conduct of an internal investigation into the facts alleged by a grievor.

When a third party is contracted by the DND to investigate the facts alleged by the grievor in an individual grievance, the third party is provided with a statement of work, but does not receive terms of reference or other guidance relating to how the investigation should be conducted. (**Finding 13**)

### **Finding 13**

When a third party is contracted by the DND to investigate the facts alleged by a grievor in an individual grievance, the third party is provided with a statement of work, but does not receive terms of reference or other guidance relating to how the investigation should be conducted.

#### **Recommendations:**

- The DND develop and provide contractors with clear instructions as to the proper conduct of external investigations into facts alleged by a grievor in an individual grievance;
- The DND include in such instructions, requirements that the investigation be conducted in a manner which respects federal privacy requirements as well as the principles of procedural fairness, and that the information collected be reliable and relevant; and
- The DND have quality control measures in place to ensure that the said instructions are followed and that investigations are carried out consistently.

The DND does not collect statistics in relation to internal or external investigations including in relation to their costs. (**Finding 14**)

#### **Finding 14**

The DND does not collect statistics in relation to internal or external investigations including in relation to their cost.

**Recommendation:** The DND collect statistics in relation to internal and external investigations including in relation to their cost.

## **Use of multiple mechanisms**

Parties are often uncertain what the appropriate mechanism is to address their concerns. Where possible, decision-makers and administrators should ensure that parties address their concerns through the correct or appropriate channel.

According to the *Labour Relations Act*, an individual cannot present a grievance if there is another relevant redress process created by an Act of Parliament, other than by the *Canadian Human Rights Act*.<sup>140</sup>

In addition, an individual cannot present a grievance if they have already availed themselves of a complaint procedure under another internal process, and the policy governing that other process precludes grievances in relation to the same matter.<sup>141</sup>

## **Findings and recommendations**

#### **Finding 1**

The DND's policy framework for individual grievances is consistent with applicable legislation and regulations.

#### **Finding 2**

The DND's policy framework for individual grievances addresses bias, but not in a manner that is consistent with the test for a reasonable apprehension of bias used by the Supreme Court of Canada and applied by the Federal Public Sector Labour Relations and Employment Board.

In addition, the framework does not identify an alternate decision-maker in the event that a grievance is filed against an individual at the top of the grievor's reporting chain, creating a risk for breaches of procedural fairness.

**Recommendation:** The DND review its policy framework for individual grievances to ensure that it addresses a reasonable apprehension of bias in a manner that is consistent with the Supreme Court of Canada and the Federal Public Sector Labour Relations and Employment Board.

**Finding 3**

The DND's policy framework for individual grievances ensures that a grievor is given a reasonable opportunity to present their point of view in a grievance, and that a relevant decision-maker consider these prior to making a decision.

**Finding 4**

The DND's policy framework for individual grievances provides limited guidance and information with respect to the requirement for written reasons to be given by decision-makers, and the content of those reasons.

**Recommendation:** The DND review its policy framework for individual grievances to ensure that it requires written reasons from decision-makers and provides guidance as to the appropriate content of such reasons.

**Finding 5**

The DND's policy framework for individual grievances requires a mandatory offer for alternative dispute resolution at level one of the grievance procedure and that alternative dispute resolution be available at levels two and three.

**Finding 6**

Data relating to individual grievances is inconsistently entered into WCMS. This makes pulling data, and then identifying and monitoring trends difficult.

**Recommendation:** The DND review its case management procedures and practices for individual grievances to ensure logical and consistent data collection and capture.

**Finding 7**

The DND generates depersonalized statistics regarding individual grievances which are reviewed at least quarterly. However, the review of individual case files is not formalized and only takes place on an as-needed basis.

**Recommendation:** The DND conduct a recurring, and systematic review of a sampling of individual case files to ensure the quality of grievance files, the accuracy of the information entered into the DND's case management system, the timeliness of the individual grievance process from receipt to decision, and the sufficiency of the reasons provided by the decision-makers.

**Finding 8**

The DND's intranet sites for its individual grievance process are easy to locate, clearly laid out and provide DND employees with helpful information and resources. However, this information is not available on the public internet nor on the DND's human resources application.

**Recommendation:** The DND publish information and resources with respect to individual grievances on the DND's public internet site and on the DND's human resources application.

**Finding 9**

The DND's policy framework for individual grievances contains inaccuracies in terminology and process description.

**Recommendation:** The DND review and update its policy framework for individual grievances to include current and correct terminology as well as an accurate description of the current individual grievance process.

**Finding 10**

The DND's policy framework for individual grievances does not provide a mechanism for decision-makers to address frivolous or vexatious grievances.

**Recommendation:** The DND review its policy framework for individual grievances to provide guidance on addressing frivolous or vexatious grievances.

**Finding 11**

The DND's policy framework for individual grievances does not provide guidance as to when an investigation of the facts alleged by a grievor is required and when such an investigation can be conducted internally or contracted to an external third party.

**Recommendation:** The DND review its policy framework for individual grievances to include guidance as to when an investigation of the facts alleged by a grievor is required and when such an investigation can be conducted internally or could be contracted to an external third party.

**Finding 12**

The DND's policy framework for individual grievances does not provide guidance as to the conduct of an internal investigation of the facts alleged by a grievor.

**Recommendation:** The DND review its policy framework for individual grievances to include guidance as to the conduct of an internal investigation into the facts alleged by a grievor.



**Finding 13**

When a third party is contracted by the DND to investigate the facts alleged by a grievor in an individual grievance, the third party is provided with a statement of work, but does not receive terms of reference or other guidance relating to how the investigation should be conducted.

**Recommendations:**

- The DND develop and provide contractors with clear instructions as to the proper conduct of external investigations into facts alleged by a grievor in an individual grievance;
- The DND include in such instructions requirements that the investigation be conducted in a manner which respects federal privacy requirements as well as the principles of procedural fairness, and that the information collected be reliable and relevant; and
- The DND have quality control measures in place to ensure that the said instructions are followed and that investigations are carried out consistently.

**Finding 14**

The DND does not collect statistics in relation to internal or external investigations including in relation to their cost.

**Recommendation:** The DND collect statistics in relation to internal and external investigations including in relation to their cost.



# Part 4 – Effective strategies and best practices

In this report, we have reviewed departmental decision-making for two complaint-mechanisms and provided findings and recommendations to address areas in need of improvement. Stemming from these, we have identified effective strategies and best practices that may help departmental officials avoid recurring issues and common pitfalls.

## Legal and policy framework

The departmental policy framework for any given process will normally serve as the first frame of reference for decision-makers, administrators, parties, and other participants.

With this in mind, policy frameworks should be thorough, logically organized, accessible for employees, and compliant with all applicable legislation, regulation, and Treasury Board direction. In order to help ensure fair, effective, and consistent decision-making, policy frameworks should clearly identify the roles and responsibilities of all participants, the basis upon which decisions will be made, and any procedural fairness protections owed to parties.

The process of developing clear and effective policy is rarely easy. Often, departmental officials are given the unenviable task of operationalizing flawed, confusing, or ambiguous legislative or regulatory requirements. Keeping in mind the constraints set by Parliament and the central agencies, each federal organization has an obligation to ensure that their internal processes are procedurally fair and meet their respective needs.

This can be difficult when a process' enabling legislation is silent on elements of the process, such as timeframes, or the procedural fairness protections owed to parties. In order to maximize the likelihood of fair outcomes and reduce the risk of internal administrative or judicial challenges, we encourage the DND's policymakers and administrators to provide parties with procedural protections above the bare minimum thresholds identified in law.

## Procedural fairness

Within the limits set by legislation, policymakers can enhance the procedural fairness of a process by including provisions in policy that:

- Set out recognized principles of procedural fairness in a manner consistent with the way such principles have been explained and applied by courts and tribunals
- Ensure that alternative and informal dispute resolution options are available to the parties
- Identify alternate decision-makers in cases of potential bias or conflict of interest
- Require a thorough, timely, and substantive notice to parties, including a description of all allegations and information about the process

- Allow parties to respond to all arguments or evidence before the decision-maker, including witness statements and the written arguments of other parties
- Establish clear timeframes for administrative action
- Require thorough, timely, and substantive reasons for decision that identify the basis for the decision and provide a clear rationale

## Organizational structure

Any process will falter if decision-makers are not adequately supported and equipped to carry out their functions. Often, these needs will depend on how the process is structured.

Some internal complaint processes have highly centralized structures, with a single senior official acting as the decision-maker for all complaints. Other structures are highly decentralized, with decisions frequently being made by the complainant's direct manager or supervisor.

Both approaches to process design have their own advantages and disadvantages. Decision-makers in highly centralized processes are often very experienced and consistent in their decisions, but may form a bottleneck when faced with a high volume of complaints. Conversely, decision-makers in highly de-centralized processes may not possess any previous experience or expertise beyond mandatory "check-the-box" training.

Regardless of structure, it is important that decision-makers be supported by highly prescriptive policy guidance and have access to expert advice.

For centralized processes, this may take the form of a dedicated team responsible for preparing the information and analysis that the decision-maker will base their decision on. For decentralized processes, this may take the form of a centre of expertise that can answer questions and provide policy interpretation to individual decision-makers.

In either case, ultimate responsibility for the decision rests with the decision-maker. Accordingly, decision-makers should still be sufficiently familiar with each case file and the applicable policy-framework to be confident that the process has been followed without defect or breach of procedural fairness.

## Quality control

While many organizations adopt some form of case management system in order to meet statutory record-keeping and reporting requirements, we have found that these tools are often under-utilized.

Robust case management systems are more than just a repository of basic case-related data. When used effectively, these systems are an invaluable repository of information, promoting consistent decision-making and allowing officials to make informed decisions regarding internal procedure and the allocation of time and resources. Ideally, a good case management system will:

- Be logically structured for the comprehensive capture of relevant data
- Be user friendly to ensure easy data-input and capture

- Allow for the easy extraction of data for analysis
- Be conducive to the creation of dashboards, charts, maps, graphs, and other visual representations of data
- Allow the identification of larger trends and issues
- Make evident any outliers or inconsistencies in process or outcome

The effectiveness of even the best case management systems can be compromised by inaccurate or inconsistent data entry. One way to avoid this issue is through the implementation of Standard Operating Procedures (SOPs) for accurate data input. Another is to undertake a periodic review of case files to validate data accuracy.

In our review of the DND's harassment and violence resolution process, we were pleased to see robust case-management procedures and practices supported by thorough SOPs and regular internal quality checks. By designing a system that captures more than the bare minimum required by the applicable legislation, the DND gets a better picture of the effectiveness of their harassment and violence resolution process.

Unfortunately, in our review the individual grievance process for public service employees, we identified several deficiencies in data input practices.

## Operational reality / Implementation

Complaints processes, no matter how complex, ultimately concern the rights and interests of individuals. Depending on the subject matter of a given complaint, decision-makers may need to deal with sensitive and often unforeseen issues.

## Communication

Before an incident occurs and a complaint is filed, responsible departmental authorities must ensure that employees are aware of the complaint processes available to them, their purpose, and how they function. A clear understanding of the decision-maker's authority, the rights of parties, and the potential outcomes for a given process can help set expectations and facilitate productive engagement.

The primary means by which most employees will seek information about the process is through the DND intranet or its public facing website. Numerous departmental officials have informed us that many DND employees do not always have reliable access to the internal network. Accordingly, administrators should ensure that important information about the process can be easily located and accessed on both the DND intranet and public-facing websites. Where information is missing or not easily understood, users should be able to quickly locate contact information to obtain additional support.

## Participants

Even with a clear understanding of the process, participants may themselves present challenges. Antagonistic party behaviour, undue delays, and other abuses of process can undermine the

effectiveness of complaints process, risking unfair outcomes and further negative impacts on the workplace. Decision-makers and administrators should be trained and equipped to deal with difficult parties and know where to seek guidance in cases of frivolous, vexatious, or otherwise bad faith complaints.

## **Contractors**

Depending on internal policy, operational tempo and the availability of resources, the DND may occasionally need to hire third-party contractors to conduct internal investigations. DND should provide clear guidance as to when an internal or external investigation is warranted. As indicated by several departmental officials in our review, not all investigators possess the same level of skill, discretion, and expertise.

Accordingly, departmental officials should ensure that both internal investigators and outside contractors are provided with all relevant policy documents, a consistent point of contact, and terms of reference containing highly prescriptive instructions on how to carry out their work in a manner that is consistent with federal legislation (including privacy requirements), and principles of procedural fairness.

It is incumbent upon any decision-maker to thoroughly review the work produced by third-parties and to avoid falling into the trap of simply “rubber-stamping” the reports they produce.

The costs associated with contractors should be recorded and tracked. In addition, any poor work or performance by contractors should be documented to prevent repeated issues.

# Endnotes

- 1** It was recommended that:  
the DND ensure that the officials responsible for the DND's internal administrative processes have appropriate knowledge of the principles of procedural fairness;  
that these principles be included the DND's internal standard operating procedures for its processes;  
that responsible officials develop quality control methodology to ensure procedural fairness for their processes; and  
that parties be provided with logically consistent written reasons for decision.
- 2** *Chapman v Canada (Attorney General)*, 2019 FC 975 (CanLII). [Chapman]
- 3** Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.; The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
- 4** In limited cases the executive has authority under the Royal Prerogative to act without enabling legislation.
- 5** The term “force of law” means that a rule has binding legal effect.
- 6** Treasury Board is the central agency that is relevant to the review that we are conducting. Note, however, that there are other central agencies which issue policies of government-wide application within their sphere, of influence.
- 7** *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 21 [Baker].
- 8** *Ibid* at para 45.
- 9** See Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 1998) (loose-leaf), vol 2 at 1200. See also Colleen M Flood & Lorne Sossin, *Administrative Law in Context* (Toronto, Emond Montgomery Publications, 2013) 2nd ed, at 73.
- 10** *Baker*, supra note 4.
- 11** *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 at para 85.
- 12** *Canada (Attorney General) v Mavi*, 2011 SCC 30, [2011] 2 SCR 504 at para 68. See also Flood & Sossin, supra note 3 at 169.
- 13** Treasury Board of Canada, Policy on Harassment Prevention and Resolution (Ottawa: Treasury Board, 2012), rescinded 1 April 2020.
- 14** SOR/86-304.
- 15** The Royal Prerogative means “the powers and privileges accorded by the common law to the Crown” (*Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 819 at para 54) and includes the authority that Parliament has left in the hands of the King from the wide powers his ancestors enjoyed as absolute monarchs (*Canada v Operation Dismantle Inc.*, [1983] 1 FC 745 at 779, 49 NR 363, Marceau J (FCA)). Always subject to parliamentary statute, these prerogative authorities currently include aspects of military operations such as the authority to deploy the CAF internationally – see *Aleksic v Canada (Attorney General)* (2002), 215 DLR (4th) 720, 165 OAC 253 (DC) at para 41.
- 16** RSC 1985, c L-2 [Canada Labour Code].
- 17** SOR/2020-130 [Harassment & Violence Regulations].
- 18** Canada Labour Code, supra note 4, s 122(1).
- 19** The legal “employer” for the federal public service, including the Department of National Defence, is the Treasury Board of Canada. See Public Service Employment Act, SC 2003, c 22, ss 12, 13 at s 2(1).
- 20** Treasury Board of Canada Secretariat, Directive on the Prevention and Resolution of Workplace Harassment and Violence (Ottawa: Treasury Board of Canada, 2021); and Treasury Board of Canada Secretariat, Policy on People Management (Ottawa: Treasury Board of Canada, 2021).
- 21** Harassment & Violence Regulations, supra note 5, s 15(1).
- 22** *Ibid*, s 14.

- 23** Ibid, ss 14, 15.
- 24** [1] Ibid, s 1(2).
- 25** Ibid, s 1(1). The “responding party” is the person who is alleged to have been responsible for the occurrence.
- 26** Ibid, ss 2, 31.
- 27** Canada, Deputy Minister of National Defence, and the Chief of the Defence Staff, Defence Administrative Order and Directive 5014-0, Workplace Harassment and Violence Prevention (29 May 2023) [DAOD 5014-0].
- 28** Canada, Department of National Defence, Chief Professional Conduct and Culture, Workplace Harassment and Violence Prevention Policy Manual (Ottawa: Department of National Defence, 2023) [Harassment & Violence Policy Manual]. The Manual is supported by a series of additional guidance documents and templates made available on the Department’s “Canada.ca” website. These resources can be readily accessed through hyperlinks contained in the electronic version of the Harassment & Violence Policy Manual.
- 29** Canada, Department of National Defence, Workplace Harassment and Violence Prevention Program, Designated Recipient Unit – Standard Operating Procedures Intake and Resolution Process (Ottawa: Department of National Defence, 2023) [Intake & Resolution SOPs].
- 30** Employment and Social Development Canada, Labour Program, Work Place Harassment and Violence Prevention (HVP) – 943-1-IPG-104 (Ottawa: Employment and Social Development Canada, 2021) online: <<https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/104-harassment-violence-prevention.html>> [Regulations Guidance Document].
- 31** Harassment & Violence Policy Manual, supra note 16 at 20.
- 32** Ibid at 16.
- 33** Ibid at 11.
- 34** Ibid at 20.
- 35** Canada, Department of National Defence, Chief Professional Conduct and Culture, New Regulations on Prevention of Harassment and Violence in the Workplace for Defence Team Public Service Employees: Message Templates (Ottawa: Department of National Defence, 2023) online: <<https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/new-workplace-harassment-and-violence-prevention-regulations-for-defence-team-public-servants-bill-c65/message-templates.html>> [Letter Templates].
- 36** Intake & Resolution SOPs, supra note 17 at 19.
- 37** Regulations Guidance Document, supra note 18.
- 38** Intake & Resolution SOPs, supra note 17 at 19.
- 39** Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond Montgomery Publications, 2013) at 147.
- 40** Harassment & Violence Policy Manual, supra note 16 at 15.
- 41** Intake & Resolution SOPs, supra note 17 at 19.
- 42** Letter Templates, supra note 23.
- 43** Ibid.
- 44** Intake & Resolution SOPs, supra note 17 at 26.
- 45** Harassment & Violence Policy Manual, supra note 16 at 15.
- 46** Harassment & Violence Regulations, supra note 5, s 33(1).
- 47** Ibid, s 33(2).



- 48** The Ombudsman's office was provided with past investigation reports for reference.
- 49** Harassment & Violence Policy Manual, *supra* note 16 at 11.
- 50** Letter Templates, *supra* note 23.
- 51** *Ibid.*
- 52** Harassment & Violence Policy Manual, *supra* note 16 at 15.
- 53** Letter Templates, *supra* note 23.
- 54** DAOD 5014-0, *supra* note 15 at s 5.1.
- 55** Harassment & Violence Policy Manual, *supra* note 16 at 8.
- 56** *Ibid* at 16. Depending on the size of the workplace, the applicable partner for this purpose is either a workplace health and safety committee or representative.
- 57** Intake & Resolution SOPs, *supra* note 17 at 12-13.
- 58** This number does not account for vacancies. With respect to staffing, the senior manager responsible for the Prevention Program has indicated that focus was placed on hiring employees from diverse backgrounds with a focus on experience working with individuals in difficult situations.
- 59** Enterprise resource planning platforms are a type of software used to collect, store, manage, and interpret data from business activities.
- 60** The current version of the Case Management System used by the Prevention Program was developed by ADM(HR-Civ) in 2020 and transferred over to CPCC after the new organization's creation. Prior to 2020, information relating to the now-defunct Treasury Board harassment complaint process was stored in a separate case management system, the Human Resources Management System. As of the date of writing, the Prevention Program does not have access to information stored in the old system and does not use this data for tracking purposes.
- 61** Statistics Canada, GCdocs - Privacy impact assessment (Assessment) (Ottawa: Statistics Canada, 2021) online: <<https://www.statcan.gc.ca/en/about/pia/GCdocs>>.
- 62** Harassment & Violence Regulations, *supra* note 5, s 36.
- 63** Canadian Human Rights Act, RSC 1985, c H-6, s 3(1).
- 64** More specifically, the Case Management Coordinator within the Prevention Program at the AS-03 level.
- 65** In the event of the team lead's absence, quality control checks are to be performed by one of the designated recipients at the AS-05 level who has received special training. Officials interviewed within CPCC indicated that case files in GCdocs are named in accordance with Access to Information and Privacy standards.
- 66** Canada, Department of National Defence, Chief Professional Conduct and Culture, WCMS Data Entry Guide (Ottawa: Department of National Defence, 2022).
- 67** Canada, Department of National Defence, Chief Professional Conduct and Culture, WCMS File Closure Checklist (Ottawa: Department of National Defence, 2023).
- 68** From the CPCC's home page, one must select "Conduct and culture change overview" from a sidebar entitled "Related links". Upon clicking, one is brought to a new page listing initiatives, activities, programs, services, and events provided by both the Department and the Canadian Forces relating to culture change. From a list of eight items, one must then select "Workplace conflict, misconduct, and harassment resolution" which leads to another page listing services for both Departmental employees and CAF members. It is here, among another list of nine items, that one can find the link to the Prevention Program's page.
- 69** Statistics provided in June of 2023. These numbers do not account for processes that were deemed resolved, because the principal party could not be identified.
- 70** Figures provided in June 2023.



- 71** Harassment & Violence Policy Manual, *supra* note 16 at 17.
- 72** “Abeyance” refers to a temporary suspension of the grievance process.
- 73** These do not include civilians who are not part of the public service (for example, those with the Canadian Forces Morale and Welfare Services).
- 74** Refer to: Office of the Ombudsman for the Department of National Defence and the Canadian Forces, *Positions over People: An investigation into delays in the administration of civilian classification at the Department of National Defence* (Ottawa: Office of the Ombudsman for the Department of National Defence and the Canadian Forces, 2018).
- 75** The grievance process for an employee who feels aggrieved by the interpretation or application by the employer of any directive or policy which has been agreed to by the National Joint Council (NJC), and which has been approved by the appropriate executive body of the government, is set out at Section 15 of the NJC Bylaws.
- 76** The Royal Prerogative means “the powers and privileges accorded by the common law to the Crown” (*Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 819 at para 54) and includes the authority that Parliament has left in the hands of the King from the wide powers his ancestors enjoyed as absolute monarchs (*Canada v Operation Dismantle Inc.*, [1983] 1 FC 745 at 779, 49 NR 363, Marceau J (FCA)). Always subject to parliamentary statute, these prerogative authorities currently include aspects of military operations such as the authority to deploy the CAF internationally – see *Aleksic v Canada* (Attorney General) (2002), 215 DLR (4th) 720, 165 OAC 253 (DC) at para 41.
- 77** SC 2003, c 22, s 2 [Labour Relations Act].
- 78** SOR/2005-79 [Labour Relations Regulations].
- 79** Refer to, for example, *Alberta Union of Provincial Employees v Lethbridge Community College*, 2004 SCC 28, 238 DLR (4th) 385 at para 56.
- 80** Pursuant to the Financial Administration Act, RSC 1985, c F-11, s 6(4.1); and Treasury Board of Canada, *Policy on People Management* (Ottawa: Treasury Board of Canada, 2021) at para 2.4.3.1.
- 81** As confirmed by ADM(HR-Civ).
- 82** This team “supports departments and agencies before the Public Service Labour Relations and Employment Board for grievances referred to adjudication and on unfair labour practice complaints.” It also provides advice and guidance to departmental human resources advisors on the grievance process. Refer to the website of the Treasury Board of Canada Secretariat online: <[www.tbs-sct.canada.ca/lrco-rtor/err-rp/err-rp-eng.asp](http://www.tbs-sct.canada.ca/lrco-rtor/err-rp/err-rp-eng.asp)>
- 83** Treasury Board of Canada Secretariat, *Employer Representation in Recourse Team, Handbook on Grievances and Adjudication* (Ottawa: Treasury Board of Canada Secretariat, 2017). This document is available on the GCpedia intranet accessible by Government of Canada employees, but it is not available on the public internet.
- 84** As required by Labour Relations Regulations, *supra* note 6, s 67. However, all the collective agreements applicable to PS employees at the DND provide that a grievance shall not be deemed to be invalid by reason only of the fact that it is not in accordance with the form supplied by the Employer. Refer to articles 17.09 (Financial Management (FI), Comptrollership (CT)), 18.06 (Ships’ Officers (SO)), 18.09 (Program and Administrative Services (PA), Operational Services (SV), and Technical Services (TC)), 19.09 (Ship Repair – East (SR-E)), 20.09 (Ship Repair – West (SR-W)), 24.06 (Ship Repair Supervisors – East Coast Only (SR-C), Law Practitioner (LP)), 31.07 (University Teaching (UT)), 33.07 (Computer Systems (CS)), 34.06 (Aircraft Operations (AO)), 34.07 (Audit, Commerce and Purchasing (AV), Health Services (SH)), 35.07 (Applied Science & Patent Examination (SP), Research (RE), and Architecture, Engineering & Land Survey (NR)), 37.09 (Education and Library Science (EB)), 39.04 (Electronics (EL)), and 40.06 (Economics and Social Science Services (EC)).
- 85** Most collective agreements provide that the grievance may immediately proceed to higher levels on consent of the employer, the grievor and, where applicable, the relevant union, where it appears that the nature of the grievance is such that a decision cannot be given below a particular level of authority. Refer to articles 17.23 (CT, FI), 18.15 (SO), 18.23 (PA, TC, SV), 19.23 (SR-E), 20.23 (SR-W), 24.17 (LP, SR-C), 31.20 (UT), 33.20 (CS), 34.17 (AO), 34.20 (AV, SH), 35.20 (NR, RE, SP), 37.23 (EB), 40.17 (EC). The EL collective agreement is silent on this point.
- 86** Labour Relations Act, *supra* note 5, s 209(1) provides that an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee’s satisfaction may be referred to adjudication before the Labour Relations Board but only where the grievance is related to certain matters including the interpretation or application of a provision of a collective agreement, or a disciplinary action resulting in termination, demotion, or suspension. This process is administered by the Labour Relations Board and does not fall within the scope of this review.

- 87** For example, a first level grievance must be presented 25 days after the date the grievor is notified or first becomes aware of the action or circumstance giving rise to the grievance (articles 17.15 (CT, FI), 18.09 (SO), 18.15 (PA, SV, and TC), 19.15 (SR-E), 20.15(SR-W), 24.12(LP, SR-C), 31.12(UT), 33.12(CS), 34.12 (AV, SH), 35.12(NR, and SP), 37.15(EB), 40.12(EC) - but the EL collective agreement gives the grievor 30 days (article 39.04 (EL)). Collective agreements also set out deadlines to present grievances at the second and final levels.
- 88** The Labour Relations Act, *supra* note 5, s 207 requires the establishment of informal dispute resolution mechanisms. This requirement is amplified by Canada, Deputy Minister of National Defence, and the Chief of the Defence Staff, Defence Administrative Order and Directive DAOD 5046-0, Alternative Dispute Resolution (13 May 2005) [DAOD 5046-0].
- 89** Abeyance in the grievance process is where the processing of the grievance is paused or placed on hold on consent of both the employee and the employer. The Labour Relations Regulations, *supra* note 6, s 62 also provides for the suspension of any time counting towards deadlines in the grievance process if the parties avail themselves of an informal conflict resolution system (such as alternative dispute resolution).
- 90** Labour Relations Act, *supra* note 5, s 273(2).
- 91** Canada, Department of National Defence, Assistant Deputy Minister (Human Resources – Civilian), National Standardized Grievance Process, being part D of Grievance Tool Kit for HR Practitioners (Ottawa: Department of National Defence, 2012), and part D of Grievance Tool Kit for Managers (Ottawa: Department of National Defence, 2012). These documents are available on the Defence Wide Area Network [DWAN] in the HR-Civ intranet but are not available on the public internet. The requirement for a hearing is set out in the National Standardized Grievance Process [NSGP] at Level 1, step 8; and Level 2, step 9. While not set out in the NSGP, according to ADM(HR-Civ) there is also a hearing at Level 3.
- 92** Labour Relations Regulations, *supra* note 6, s 61.
- 93** Email from Director, Labour Relations Operations, ADM(HR-Civ) (17 November 2023).
- 94** Canada, Deputy Minister of National Defence, and the Chief of the Defence Staff, Defence Administrative Order and Directive 5026-0, Civilian Grievances (1 April 2005) [DAOD 5026-0]
- 95** *Ibid* at para 3.1.
- 96** Canada, Department of National Defence, Director General Workplace Management, Guidelines for Civilian Grievances, (Ottawa: Department of National Defence, 2006) [Grievance Guidelines]. This document is available on the DWAN in the HR-Civ intranet, but it is not available on the public internet.
- 97** NSGP, *supra* note 19.
- 98** Being section 1 of Canada, Deputy Minister of National Defence, Department of National Defence, Instrument of Delegation of Human Resources Authorities for Civilian Public Service Employees of National Defence (Ottawa: Department of National Defence, 2019) [Delegation Instrument]. The Delegation Instrument identifies decision-makers for individual grievances at all three levels of the grievance process and is available on the DWAN in the HR-Civ intranet but is not available on the public internet.
- 99** Collective agreements are published on the Treasury Board Secretariat's public website.
- 100** According to ADM(HR-Civ), most unrepresented employees who file a grievance follow the process set out in a collective agreement “assigned” to their unrepresented group by TBS. Executives do not have an assigned collective agreement – rather ADM(HR-Civ) advises that a standard grievance process would apply.
- 101** Grievance Guidelines, *supra* note 24 at 11. ADM(HR-Civ) advises that the phrase “Grievance Level Officer” is no longer used. The phrase “delegated manager” is currently used instead for decision-makers at levels 1 and 2 while “delegated authority” is used for the decision-maker at the final level.
- 102** Refer to articles 17.11 (CT, FI), 18.11 (PA, TC, SV), 19.11 (SR(E)), 20.11 (SR-W), and 37.11 (EB) which preclude an employer representative from hearing the same grievance at more than one level in the grievance procedure. Other collective agreements are silent on this specific point (LP, RE, AV, SO, SR-C, CS, SP, EC, UT, EL, NR, and SH).
- 103** Refer to articles 10.02 (harassment only) (UT), 16.02(a) & 17.02(a) (EB, EC), 19.02(a) & 20.02(a) (PA, SV), 33.02(a) & 35.02(a) (SR-W), 19.02(a) & 20.02(a) (TC), 35.02(a) & 36.02(a) (SR(E)), 42.02(a) (sexual harassment only) (CS), 42.02(a) & 43.02(a) (SH), 43.02(a) (sexual harassment only) (NR), 43.02(a) & 44.02(a) (RE, SP), 46.02(a) & 47.02(a) (CT, FI), 53.02(a) (sexual harassment only) (AO) and 61.02(a) (for both discrimination and sexual harassment) (EL). The AO, AV, CS and UT collective agreements make no mention regarding precluding a decision-maker from hearing a grievance if they are the subject of a complaint of discrimination. The NR collective agreement makes no mention precluding a decision-maker from hearing a grievance if they are the subject of a complaint of

harassment or sexual harassment. The LP collective agreement does not preclude a decision-maker from hearing a grievance if they are the subject of any complaint.

- 104** This is the starting point for determining the existence of a reasonable apprehension of bias – as set out in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, 68 DLR (3d) 716, De Grandpré J., cited with approval by the Supreme Court of Canada in *Wewaykum v Canada*, 2003 SCC 45, [2003] 2 SCR 259. The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly.
- 105** *Chow v Treasury Board (Statistics Canada)*, 2006 PSLRB 71.
- 106** Labour Relations Regulations, *supra* note 6, s 70.
- 107** Grievance Guidelines, *supra* note 24 at p 3.
- 108** Labour Relations Regulations, *supra* note 6, s. 65. The same provision provides that, with the approval of the Labour Relations Board, an alternative method may be used to communicate such information if it is more likely that the required information will then come to the attention of employees.
- 109** For receipt refer to articles 17.08(b)(FI, CT), 18.07(b)(SO), 18.08(b)(PA, SV, TC), 19.08(b)(SR(E)), 20.08(b) (SR-W), 24.07(b)(SR-C, LP), 31.06(b)(UT), 33.06(b)(CS), 34.06(b)(SH, AV), 34.07(b) (AO), 35.06(b) (SP, NR, RE), 37.08(b)(EB), 39.07(EL), and 40.07(b)(EC). For designated representative refer to articles 17.12(FI, CT), 18.12(PA, SV, TC), 18.23(SO), 19.12(SR(E)), 20.12(SR-W), 24.10(a)(SR-C, LP), 31.10 (UT), 33.10(CS), 34.10(SH, AV, AO), 35.10(NR, RE), 37.12(EB), 39.03(EL), and 40.10(a)(EC). For union assistance refer to articles 17.14(FI, CT), 18.03(SO), 18.14(PA, SV, TC), 19.14(SR(E)), 20.14(SR-W), 24.11(SR-C, LP), 31.11(UT), 33.11(CS), 34.11(AV, AO, SH), 35.11(SP, NR, RE), 37.14(EB), 39.05(EL), and 40.11(EC).
- 110** For example, for deadlines applicable to grievors at the first level refer to articles 17.15 (CT, FI), 18.09 (SO), 18.15 (PA, SV, TC), 19.15 (SR-E), 20.15 (SR-W), 24.12 (LP, SR-C), 31.12 (UT), 33.12 (CS), 34.12 (AO, AV, SH), 35.12 (NR, RE, SP), 37.15 (EB), 39.07 (EL), 40.12 (EC). For deadlines applicable to the employer at the first level refer to articles 17.17(CT, FI), 18.10(SO), 18.17(PA, SV, TC), 19.17(SR(E)), 20.17(SR-W), 24.14(LP, SR-C), 31.14(UT), 33.14(CS), 34.14(SH), 35.14(AO, AV, NR, RE, SP), 37.17(EB), 39.07(EL), and 40.14(EC).
- 111** Labour Relations Regulations, *supra* note 6 at s 67. However, all the collective agreements applicable to PS employees at the DND provide that a grievance shall not be deemed to be invalid by reason only of the fact that it is not in accordance with the form supplied by the Employer. Refer to *supra* note 12.
- 112** Labour Relations Regulations, *supra* note 6, s 72; Grievance Guidelines, *supra* note 24 at 10; NSGP, *supra* note 19 at, *inter alia*, Level 1, Step 2.
- 113** *Supra*, note 38.
- 114** Refer to, for instance, *Andrews v Canada (Attorney General)*, 2023 FCA 119.
- 115** The applicant would have to show the delay caused “prejudicial effects.” Refer to *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 320, 66 Admin LR (6th) 1 at para 62; *Uniboard Surfaces Inc v Kronotex Fussboden GmbH et Co KG*, 2006 FCA 398, 61 Admin LR (4th) 47 at para 24.
- 116** Email from Director, Labour Relations Operations, ADM(HR-Civ) (17 November 2023). We were advised that these statistics are not published and are not available on the DWAN.
- 117** Grievance Guidelines, *supra* note 24 at p14.
- 118** Handbook on Grievances and Adjudication, *supra*, note 11 at 13.
- 119** Labour Relations Regulations, *supra* note 6, s 70(a).
- 120** NSGP, *supra* note 19, Level 1, Step 1b.
- 121** *Supra*, note 37.
- 122** Labour Relations Act, *supra* note 5, s 207; DAOD 5046-0, *supra* note 16.
- 123** Grievance Guidelines, *supra* note 22 at 9; NSGP, *supra* note 19, Level 1, Steps 4 and 5; Level 2, Step 5; and Level 3 Step 11.
- 124** Grievance Tool Kit for HR Practitioners, *supra* note 19 at 5-6; Grievance Tool Kit for Managers, *supra* note 19 at 5-6.

**125** Refer to articles 17.07(CT, FI), 18.07(PA, SV, TC), 19.07(SR-E), 20.07(SR-W), 24.02(LP, SR-C), 31.05(c)(UT), 33.05(c)(CS), 34.02(AO), 34.05(c)(AV, SH), 35.05(a)(NR), 35.05(c)(RE, SP), 37.07(EB), 40.02(EC). article 39.06(EL) refers to “discussion” rather than “informal discussion”.

**126** DAOD 5026-0, supra note 22 at para 3.1.

**127** Delegation Instrument, supra note 26.

**128** For example, the course “Delegation of Authorities for Labour Relations” has a module dedicated to grievances.

**129** The Labour Relations Act, supra note 5, s 209, provides that an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee’s satisfaction may be referred to adjudication before the Labour Relations Board.

However, a referral to the Labour Relations Board is limited to where the grievance is related to certain matters including the interpretation or application of a provision of a collective agreement, or a disciplinary action resulting in termination, demotion, or suspension. This process is administered by the Labour Relations Board and does not fall within the scope of this review.

**130** Federal Courts Act, RSC 1985, c F-7, s 18.1.

**131** In 2015 ADM(HR-Civ) commissioned a study to review all three levels of the grievance system at DND and five other federal government departments or agencies for the purpose of determining where grievance files were held up and where the most elapsed time occurs in the grievance process.

In 2018, the DM requested an assessment of the civilian grievance process within DND to identify potential improvements to address concerns with the backlog at the third level, to increase the accountability of ADM/L1 organizations, and as a means of benchmarking with other organizations to leverage noteworthy practices.

**132** According to ADM(HR-Civ), these depersonalized statistics are not available publicly nor on the DWAN.

**133** Handbook on Grievances and Adjudication, supra, note 11.

**134** Online: <<http://hrciv-rhciv.mil.ca/en/e-labour-complaints-and-grievances.page>>

**135** Refer to, for example, the relevant information on the websites of the Union of National Defence Employees : <<https://unde-uedn.com/grievances>> and of the Association of Canadian Financial Officers <<https://www.acfo-acaf.com/services/grievances/>>

**136** As described supra, note 28.

**137** Email from Director, Labour Relations Operations, ADM(HR-Civ) (19 June 2023). This statistic may include those grievances which were resolved in HRMS which were then re-opened in the new WCMS.

**138** Email from Director, Labour Relations Operations, ADM(HR-Civ) (17 November 2023).

**139** Email from Director, Labour Relations Operations, ADM(HR-Civ) (18 August 2023).

**140** Labour Relations Act, supra note 5, s 208(2).

**141** Ibid, s 208(4).



## Ombudsman

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