

**LIBERTY**

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's briefing for Second Reading of  
the Armed Forces Bill in the House of  
Lords**

**January 2016**

## **About Liberty**

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## **Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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## Introduction

1. Launched in July 2013, Military Justice is Liberty's campaign to protect and uphold the human rights of those serving in our Armed Forces. We believe that the rights of service men and women are just as deserving of protection as those of civilians and we have been campaigning for changes to the military justice system to make it fair for all service personnel. Our work in this area has included public campaigning, policy development, and litigation on behalf of service men and women and their families. We represent the sisters of Anne-Marie Ellement, a member of the Royal Military Police who took her own life following her allegation that she had been raped by a RMP colleague who was dismissed without a proper investigation. Using the Human Rights Act we secured a second inquest into her death and a new investigation of her allegation that she had been raped. In October 2015, the Director of Service Prosecutions announced that following the fresh investigation two men have been formally charged with the rape of Anne-Marie. We also represent the families of Cheryl James, Sean Benton and James Collinson – three of the four trainee soldiers who died at the Deepcut Barracks from gunshot wounds between 1995 and 2001. We act also for the families of two British soldiers who died at Ballykinler barracks in Northern Ireland in 2012 and 2013 within 3 months of each other. There was a spate of 8 other serious self-harm incidents on the same barracks within the 6 month period within which the men died. Both had recently returned from active operations overseas and families are concerned about the quality of mental health and other support made available to them upon their return.

2. In June 2014 we published a report "*Military Justice: Proposals for a fair and independent justice system*", available on our [website](#). As part of the campaign we called for the creation of an ombudsman to add an independent element to the system of complaints about service life. In March 2014, shortly after the verdict of the inquest into the death of Anne-Marie Ellement, the Secretary of State for Defence announced the creation of a Service Complaints Ombudsman. We were delighted when the Government then accepted an amendment to the Armed Forces (Service Complaints and Financial Assistance) Act 2015 to grant the new Ombudsman the power to investigate the substance of service complaints rather than just processing claims of maladministration.

3. When the Armed Forces Bill was passing through the House of Commons at the end of 2015, the Government also accepted our recommendation for systematic annual production of statistics on sexual assault and rape in the armed forces. Minister Mark Lancaster stated: "*I am determined to make the data that we publish robust, consistent and*

*accessible. To that end, I am actively considering how best to publish the data as an official statistic.*<sup>1</sup>

4. However the other serious problems with the military justice system identified in our 2014 report remain unaddressed. Similarly, problems in particular with sexual harassment and worse continue. In its Sexual Harassment Report 2015, the Army recorded that 39% of servicewomen questioned had received unwelcome comments about their appearance, body or sexual activities compared to 22% of servicemen. 33% of servicewomen received unwelcome attempts to talk about sexual matters compared to 19% of men. 12% of women received unwanted attempts to be touched compared to 6% of men and 10% received unwelcome attempts to establish a sexual relationship despite discouragement compared to 2% of men. 4% of servicewomen were told that they would be treated better in return for a sexual relationship and 2% reported that they had been sexually assaulted.<sup>2</sup>

5. We hope that members of the House of Lords will take the opportunity presented by the Armed Forces Bill to question the Government on the outstanding defects in the military justice system.

### **Commanding Officer's discretion to investigate allegations of sexual assault**

6. When allegations are made that a member of the Armed Forces has violated service law, a Commanding Officer has broad discretion to decide whether to investigate the allegation themselves or whether to refer allegations to the relevant police force. However, for a list of criminal offences – contained in the Armed Forces Act 2006 Schedule 2 – this discretion is curtailed and the Commanding Officer is required by law to make a referral to the police. Offences in the Sexual Offences Act 2003 are listed among those which must be referred, however the legislation explicitly excludes sexual assault, voyeurism, and sexual activity in a public lavatory. This means that, if notified of an allegation of sexual assault, a Commanding Officer is not required to refer the matter to police.

7. However HMIC reports that *“An internal Army policy document issued in 2013 gives direction to commanding officers that all sexual offences must be reported to the RMP for investigation.”*<sup>3</sup> It is not known whether the other two services have such a policy in place.

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<sup>1</sup> Armed Forces Bill Debate, 16 December 2015, Hansard at column 1623 per Mark Lancaster MP.

<sup>2</sup> Sexual Harassment Report 2015, page 23, Table 7.

<sup>3</sup> HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, page 13.

8. In a note published by the House of Commons Library, it was explained that when Parliament debated the mandatory referrals process *“it seemed to have been accepted that the Government wanted to draw a line between those offences that are serious and those where the commanding officer should have some discretion.”*<sup>4</sup> However, the note made clear that neither the House of Commons nor the House of Lords engaged in debate about the exemption of sexual assault from the scope of the mandatory referral process. It is therefore not at all clear why certain sexual offences came to be exempted.

9. It is incredibly worrying that the legislation does not treat sexual assault as an inherently serious offence and make it subject to automatic referral. While it is the case that sexual assault can consist of a number of different types of behaviour, all those possible actions involve intentional touching of a sexual nature without consent and with the perpetrator not reasonably believing that there is consent. Sexual assault is a gross violation of an individual’s physical integrity and the repercussions for the victim can be huge. Failure to acknowledge this in law sends a terrible message to victims and perpetrators alike.

10. A further problem with leaving this discretion in law, in particular where there is policy to the contrary, is that it creates room for confusion and grants cover for those who do not wish to follow policy or best practice. The HMIC report records that *“we were concerned to hear from a small number of RMP staff of a few occasions when commanding officers had decided to deal with offences that, based upon the facts presented to us, should have been referred to the RMP. Examples given included...sexual assault.”*<sup>5</sup> It added that due to the failure of the services to maintain a crime register (as discussed above), there was no way for HMIC to corroborate this information. It concluded that *“Were this the case, it would be unacceptable as such action compromises the independence of any investigation, sharing of information and care for victims.”* This is clearly a concerning outcome for the individual concerned and goes against what both the Army and HMIC expect from the system. But for as long as the black letter of the law continues to grant Commanding Officers discretion in this area, it is only to be expected that in some cases they will use it.

11. When this issue was raised during Second Reading of the present Armed Forces Bill, the Minister stated that *“Sexual assault is absolutely unacceptable in wider society or in the armed forces...To move sexual assault to schedule 2 would make it a legal requirement for every allegation of sexual assault to be referred directly to the service police, whether or not*

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<sup>4</sup> Letter from House of Commons Library, 28 February 2013, to Madeleine Moon MP.

<sup>5</sup>HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, page 30.

*the victim wanted that to happen. We take the view that there are already processes and safeguards in place to ensure that victims of such offences are properly supported and any allegations properly investigated.”<sup>6</sup> He then added “However, I once again accept that that could be discussed in Committee.”*

12. However during the Select Committee consideration of the Bill, the Government stated *“The armed forces already have procedures in place to ensure that allegations of offences covered by the new clause, including sexual assault, are handled appropriately, and the commanding officer’s duties in that respect are clear.”* Disappointingly, the Government failed to address any of the substantive concerns with Commanding Officers retaining discretion for these cases. Nor did they address the problems of perception that exist when sexual assault is – for the purposes of legislation – not considered by Parliament to be inherently serious. The Government also stated that victims of sexual assault may bypass their Commanding Officer and go directly to a police force if they feel that their complaint has not been properly investigated. While this is factually correct, it completely misunderstands or ignores the reality that service women and men are trained from day one to operate within the institutional framework. For an individual to go above the head of their Commanding Officer will by many be considered a breach of loyalty which could have significant repercussions for their role in the services, on both a personal and professional level. In addition, victims of sexual assault are frequently traumatised by the effect of having their allegations disbelieved and by the process of having to repeat to others the details of their ordeal. For the Government to suggest that it is acceptable for victims of sexual assault to have to jump over hurdles until they find someone independent and experienced enough to handle their case is extremely disturbing.

13. We also remain unclear why – if the current legislation is adequate – the Army has itself instigated a process which mirrors that proposed in this clause. It seems that everyone other than the Government seems to accept that this discretion is inappropriate and can lead to injustice.

### **Civilian investigations and prosecutions relating to murder, sexual assault, and rape**

14. Rape is an incredibly serious crime, which can have life changing consequences for the victim. It is an act of power and aggression, constituting a complete violation of the

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<sup>6</sup> Hansard, Armed Forces Bill, Second Reading on 15 October 2015, Mr Mark Lancaster MP Parliamentary Under Secretary of State for Defence, at column 546.

victim's physical integrity and showing disdain for personal dignity and autonomy. It is imperative that victims have confidence in the police. They must know that if they report the crime they will be treated with care and respect, and that any investigation will be thorough, expert, and independent. Both the perception and actuality of competence and care from the police forces are essential if we are to tackle the pervasive problem of sexual violence in our society.

15. It is Liberty's concern that service police forces are institutionally unable to offer the necessary independence in cases involving allegations of serious sexual assault and rape. This is especially so in cases where both the victim and alleged perpetrator are service personnel. This is because there is a stark risk that the relevant service police force responsible for conducting an investigation will know, or will have heard of, the individuals involved – victim, perpetrator, their friends, or witnesses.

16. Equally, we are concerned that service police forces do not have the necessary level of expertise to investigate the most serious of offences. In the Report of the Independent Review into the Investigation and Prosecution of Rape in London by Dame Elish Angiolini DBE QC it was stated that *"Rape is one of the most serious but misunderstood crimes and presents investigators and prosecutors with unique challenges. In its variety and complexity rape often presents difficulties far in excess of those encountered in investigating other crimes, including homicide."*<sup>7</sup> The report goes on to say *"It is vitally important that those who investigate, prosecute and manage the processes for this crime type are properly selected, trained and resourced."*<sup>8</sup>

17. Members of the service police forces are required to perform the dual function of police officers and service personnel. In its report, HMIC reported that RMP members are seen as *"soldiers first, police officers second."*<sup>9</sup> It noted that the impact of this was that *"we found that soldiering duties took RMP staff away from investigations. In our judgment, RMP staff are unsure about how to balance these duties."*<sup>10</sup> The report also set out that *"The RMP is bound by the policy of the army that all personnel should move roles every two to three years... we found evidence that this sometimes leads to a loss of experience that creates*

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<sup>7</sup> Rt Hon Dame Elish Angiolini DBE QC, Report of the Independent Review into the Investigation and Prosecution of Rape in London, 20 April 2015, paragraph 3.

<sup>8</sup> Ibid paragraph 36.

<sup>9</sup> HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, page 4.

<sup>10</sup> Page 21.

*gaps in capability.*<sup>11</sup> The report adds that RMP does not seek accreditation for its staff from the College of Policing, unlike civilian police forces. The process of accreditation allows officers to ensure that their training is up to date and that their skills reach the required benchmark standards.

18. While the statistics gathered from FOIA requests and parliamentary questions are sometimes confusing, by way of example some statistics state that in 2013 the three service police forces referred 26 cases involving rape and 56 involving sexual assault to the Service Prosecutions Authority.<sup>12</sup> The recent Independent Review into the Investigation and Prosecution of Rape in London, it was found that each sexual offences investigative technique officer had a live workload of anywhere between 12 and 31 complaints at any given time.<sup>13</sup> There is clearly a significant difference in experience between civilian police forces and service police forces in investigating these offences, a gap that cannot be bridged even if the problems outlined at paragraph 19 were to be addressed.

19. As a result, Liberty considers that allegations of sexual assault and rape involving members of the Armed Forces should always be investigated by civilian, rather than service, police forces. In our 2014 report we identified evidence which suggested that the Government agreed with our assessment that although service police and local police forces technically have concurrent jurisdiction to investigate allegations of criminal behaviour which involve a member of the Armed Forces, it is the civilian police that ought to investigate allegations of serious criminal behaviour, not the service police. The text of a protocol (Circular 028/2008) between service police and civilian police forces asserts that civilian forces will have “primacy” to investigate in cases where there is concurrent jurisdiction. We noted that paragraph 14 of the Circular is entitled “*very serious crimes*”, and sets out that in any incident involving death or a serious injury, the service police would take only the action immediately necessary at the scene, and a civilian police force would lead the investigation. In addition, in a written Ministerial Statement, former Minister for Defence Mr Mark Francois stated “*the more serious the offence, the greater the likelihood is that jurisdiction will be retained by the civil force.*”<sup>14</sup> We recommended in our report that rape and sexual assaults should be added to this category of “*very serious crime*” to ensure consistency of approach.

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<sup>11</sup> Page 5.

<sup>12</sup> Military Justice: Proposals for a fair and independent military justice system, 2014, paragraph 26.

<sup>13</sup> Rt Hon Dame Elish Angiolini DBE QC, Report of the Independent Review into the Investigation and Prosecution of Rape in London, 20 April 2015, Para 308.

<sup>14</sup> Hansard, 25 April 2013, written answer from Mark Francois to Madeleine Moon, Column 1250W.



20. However in subsequent correspondence the Ministry of Defence has made clear that it does not support the position that sexual assault and rape should always be investigated by civilian forces and has revealed that there are – at best – conflicting “*principles*”, policies and procedures which are used to determine which police force will undertake serious criminal investigations, including those arising from a death.

21. The Ministry of Defence explained in writing that the reference to “*primacy*” in Circular 028/2008 should not be interpreted to mean primacy to investigate. Instead, it is intended to mean that “*if there is uncertainty about which authority should act, the civilian authorities will have the final say.*”

22. It was also explained that in a separate protocol between the Director of Service Prosecutions (DSP) and the Director of Public Prosecutions (DPP), other important principles are set out, namely that: the DSP should prosecute offences where both victim and alleged perpetrator are members of the Armed Forces; and, the DSP will normally only prosecute offences investigated by service police. Therefore in order to facilitate any eventual prosecution by the Director of Service Prosecutions (rather than by the Crown Prosecution Service), offences where the accused and victim are both members of the Armed Forces should be dealt with by service police. The Government explained that while the protocol between police forces was a practical rather than legal document, with decisions made on a “case by case” basis, the principles contained in the protocol between the DPP and the DSP were “fundamental”. It added that an updated police protocol was due to be signed by the relevant parties in autumn. In practice it appears that where an alleged offence involves military personnel only, investigation and prosecution will be conducted exclusively by service authorities.

23. We do not understand why in cases where – for example – a member of the Armed Forces alleges that she was raped by a colleague, the “principle” should be that the case is investigated and prosecuted by service police and prosecutors rather than civilian police and prosecutors. We are concerned that reliance on this “principle” will mean that a police investigation will be conducted by inexperienced and insufficiently independent service police, leading to injustice. We question also how it is possible for this “principle” to co-exist with position articulated in the police protocol and by Mr Francois concerning the investigation of serious crime. References to the apparent flexibility of arrangements for police investigations into matters of the most grave nature also gives us great cause for concern.

24. To complicate matters further, the HMIC report sets out that for the Army, there is now notification of all serious sexual offences to a civilian police force, a change which appears to have come about for “independence of investigations”.<sup>15</sup> The report does not set out what this “notification” process entails, nor whether it is mandatory. The report also states *“Protocols have been agreed by the RMP and Home Office police forces that allow the referral of any deaths on Ministry of Defence property to Home Office police forces to investigate. These protocols are recent, however RMP staff with whom we spoke knew of these arrangements.”*<sup>16</sup> The report does not state whether this process is a requirement or is simply an option open to service police. It is also unclear how this approach fits with the “principles” set out by Mr Lancaster in his letter to Liberty as described above. We are also not clear as to the relationship between these “recent” protocols (the report was published in July 2015) and the protocols referred to by the Minister in his letter.

25. Again, the Government’s response to this clause during the Select Committee consideration was partial. It stated simply that it thinks that the current position is the correct one, without making clear exactly what the current position is. It focused solely on the handling of allegations of rape and completely ignored the issue of death. At the very minimum, the Government must explain what policies it has in place for the investigation of deaths and rapes involving members of the armed forces and where these policies are set out so that the general public and members of the forces and their families can know what they are. Second, there must be much more genuine engagement with the question of the requisite levels of independence and expertise in order to investigate these offences. Simply stating that members of the service police are required to undergo training is absolutely no guarantee of the fact that they will have the skills and experience to undertake investigations. As to the question of independence, the Government continues to ignore the reality that service police forces are likely to know either the individuals involved, the witnesses or their colleagues in a manner that in institutional terms means that they cannot offer an independent investigation.

26. Earlier this year, the High Court ordered a second inquest into the death of Cheryl James, one of four trainee soldiers who died at Deepcut Barracks between 1995 and 2002. When Cheryl was found dead, Surrey Police immediately handed the matter over to the Army. The Royal Military Police (RMP) conducted a cursory investigation and concluded that the death had been suicidal. The RMP’s work then informed the first Coroner’s inquest. The

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<sup>15</sup> HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation Page 31.

<sup>16</sup> Ibid Page 33.

original inquest lasted just an hour, key witnesses weren't called, medical records went uninspected and important evidence was ignored. An "open" verdict was recorded. Next year, over twenty years later, a second inquest will finally be held. Cheryl's father, Mr James, has repeatedly been reassured that should the same situation arise again, the police investigation would be conducted by an external civilian police force. It is difficult to understand how this can be the case if the procedure set out in the police protocol is overridden by the "principle" that where a case involves only military personnel, investigation and prosecution will be by service authorities.

27. If Cheryl died today, it is far from clear that the approach would be any different. If it would not be different, the Government needs to explain why. If it would be different, the Government needs to explain why accepts that civilian investigation is required for death but not for rape.

### **Independent oversight of police complaints**

28. Police officers – military or civilian – occupy a unique position in society, with significant powers and duties to uphold the criminal law. This means that they will inevitably, at times, be placed in a position of dispute or conflict, leading to complaints. A number of these complaints may amount to allegations of criminal conduct by those who are charged with upholding the law. Conversely, the very seriousness of a complaint against a police officer leaves them vulnerable to the consequences of unfounded complaints.

29. In the civilian sphere, the IPCC is charged with adding independence to the oversight and handling of complaints. No such body exists to deal with complaints about service police forces. In its first inspection of the Royal Military Police, HMIC recommended that *"The RMP should have arrangements in place to ensure its investigations are reported to the public and that some external independent body provides oversight of investigations into RMP wrongdoing."*<sup>17</sup>

30. It is in the interests of victims, families, the police forces and the public that complaints against the police are seen to be subject to genuine scrutiny through investigation by an independent body. Lack of accountability of the police undermines the

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<sup>17</sup> HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, Page 8.

Rule of Law and ultimately makes it harder for the police to undertake their function of policing by consent.

**Sara Ogilvie**