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Military Justice: Proposals for a Fair and Independent Justice System

1. Background

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. This includes representing the sisters of Anne-Marie Ellement and three of the four families of those who died at the Deepcut Barracks. In June 2014 we published a report *"Military Justice: Proposals for a fair and independent justice system."*

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.

However the other serious issues with the military justice system identified in our 2014 report remain unaddressed.

We ask Members of Parliament to take the opportunity offered by the Armed Forces Bill to raise our recommendations with the Government.

2. Statistics on sexual assault and rape

There is a significant body of evidence to show that sexual harassment is a problem for those working in our armed forces, in particular for servicewomen. 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.[1]

However the evidence on the extent of allegations, prosecutions, and convictions for sexual assault and rape is scarce because the data is not comprehensively or reliably collected. Allegations of sexual assault can be investigated by a Commanding Officer, the relevant service police force, or a local police force; allegations of rape may be investigated by either service or local police forces. Evidence does not appear to be collected centrally by service authorities and evidence that is published – normally in response to a Parliamentary Question or a Freedom of Information Act process – appears contradictory. The relevant Home Office authorities are not required to record whether an alleged victim or perpetrator of a sexual assault or rape is a serving member of the armed forces, nor do their records for prosecution and conviction rates distinguish on this basis.

This means that the armed forces do not possess even basic evidence about the extent of sexual assault or rape within the services. In order to fix a problem, first of all it is necessary to understand the extent of it. And in terms of perception at the very least, this does not engender confidence that problems of this nature are taken at all seriously.

In its first investigation into the Royal Military Police which took place earlier this year, Her Majesty's Inspectorate of Constabulary recommended that the army should define and implement a set of standards for crime recording that ensures that there is an accurate record of crime committed and a clear framework for holding investigators to account for investigating crimes.[2]

Liberty Recommendation: Service police forces and local police forces should collect and publish annually anonymised statistics on the number of allegations of sexual assault and rape made by or against a member of the armed forces. The relevant prosecuting authority should provide corresponding information on the number of cases that were referred to them, how many were prosecuted, and how many convictions were secured.

3. Discretion of Commanding Officer to investigate allegations of sexual assault

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 long list of criminal offences 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.

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*

[1] Sexual Harassment Report 2015, page 23, Table 7.
[2] HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, July 2015, page 73.

the commanding officer should have some discretion."[3] 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 potentially serious sexual offences came to be exempted.

It is incredibly worrying that the legislation does not consider sexual assault to be 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 touching of a sexual nature without consent. Sexual assault is a gross violation of an individual's physical integrity and the repercussions for the victim can be huge.

The existence of this discretion also places a Commanding Officer in a very difficult position. It requires him or her to take a view on a criminal allegation by one member of staff against another. Commanding Officers do not have the necessary specialist training and resources required to investigate allegations of sexual abuse. This is a job for a specially trained police officer and prosecutor. In addition, anything less than a mandatory referral processes leaves the Commanding Officer open to accusations of bias or undue influence in making a decision as to whether or not to refer the case.

Liberty Recommendation: Parliament should amend Schedule 2 of the Armed Forces Act so that sexual assault, exposure and voyeurism are not excluded from the mandatory referrals process.

4. Investigation of serious offences, including allegations of sexual assault and rape

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 victim's physical integrity and showing distain 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 and independent. Both the perception and actuality of competence and care from the police forces are essential if society is to tackle the pervasive problem of sexual violence in our society.

It is Liberty's concern that service police forces are institutionally unable to offer the necessary independence and expertise 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 as there is a stark risk that the relevant service police force will know, or will have heard of, the individuals involved, their friends, or witnesses. 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 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, the Government agreed that it is the civilian police that ought to investigate allegations of serious criminal behaviour,

[3] House of Commons Library, 28 February 2013.

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."*[4] 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.

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.

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."*

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;[5] and, the DSP will normally only prosecute offences investigated by service police.[6] 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.

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

[4] Hansard, 25 April 2013, written answer from Mark Francois to Madeleine Moon, Column 1250W.
[5] Protocol on the exercise of criminal jurisdiction in England and Wales between the Director of Service Prosecutions, the Director of Public Prosecutions, and the Ministry of Defence, paragraph 2.2(b)
[6] Ibid paragraph 1.5(b)

police investigations into matters of the most grave nature also gives us great cause for concern.

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 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. 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. If Cheryl died today, it appears doubtful that the approach would be any different.

Liberty Recommendation: the Government should revisit policy in this area. Investigations involving death, rape and sexual assault should be conducted by civilian rather than service police.

5. Independent oversight of the service police

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.

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.

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

Liberty Recommendation: The three service police forces should be brought within the civilian system of police oversight.

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