

MILITARY JUSTICE

PROPOSALS FOR A FAIR

AND INDEPENDENT

MILITARY JUSTICE SYSTEM

SARA OGILVIE AND EMMA NORTON

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PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

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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.

As part of the campaign we called for the creation of an Armed Forces Ombudsman. In March 2014, shortly after the verdict of the inquest into the death of the sister of two of Liberty's clients, the Secretary of State for Defence announced the creation of a Service Complaints Ombudsman and at the time of writing the proposals are being considered by Parliament in the Armed Forces (Service Complaints and Financial Assistance) Bill.

Based on our practical experience, this document sets out Liberty's analysis of some of the remaining weaknesses in the military justice system. It contains six recommendations for ways in which processes and institutions can be improved to embed independence and fairness for members of the armed forces in the heart of the military justice system.

"It is one of the cardinal features of the law of England that a person does not, by enlisting in or entering the Armed Forces, thereby cease to be a citizen, so as to deprive him of his rights or to exempt him from his liabilities under the ordinary law of the land."

Chapter 303, Halsbury's Laws of England

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Executive summary

All credible justice systems are premised on independence. In a democracy, it is vitally important that bodies such as the police and the judiciary are free from executive and external pressures. It is only with independent institutions and processes that individuals can be sure that their case will be decided impartially, fairly and in accordance with law. Independence is important for justice in individual cases, but it is also necessary to secure and strengthen public confidence in justice systems and institutions.

Members of the armed forces deserve the same protection against criminal behaviour and poor treatment as civilians. Unfortunately, the system of military justice does not currently contain the procedural safeguards necessary to ensure that allegations made by or about members of the armed forces are investigated in an independent and impartial manner. This causes injustice for those who have made significant sacrifices to serve their nation, creates an environment where harassment and abusive and criminal behaviour is able to flourish, and undermines confidence in the military justice system. Legal processes must both be adequate to the task in hand and send the message that allegations of criminal or improper behaviour will be taken seriously by the armed forces.

Through our legal work, we have identified a number of particular problems with the investigation of sexual assault and rape in the armed forces. It is extremely concerning that comprehensive and reliable statistics on the number of allegations of sexual assault and rape made by and against service personnel are not available. While there are many other indications that the armed forces do not have in place the appropriate processes for dealing with these types of allegation, it is difficult to respond to the problem and to send a clear signal

that this type of behaviour is unacceptable if it does not appear that the armed forces know the extent of the problem.

Our concerns with the response of the armed forces to rape and sexual assault go much further than the simple lack of data. A number of mechanisms that should ensure that serious crimes are reported to independent police services for investigation, rather than dealt with by the armed forces or the service police, do not apply when it comes to sexual assault and rape. It is extremely difficult to see why rape and sexual assault is treated as anything other than very serious.

There is also no external oversight of complaints against the service police. This lack of independence is puzzling. The principle that oversight of complaints must contain an independent element is well established in the civilian police system. In addition, the civilian oversight system already extends to a broad number of organisations other than local police forces, including the Ministry of Defence police. It is unclear why the service police should be excluded.

Abusive treatment or harassment will not always equate to criminal behaviour, but can still have very detrimental effects on morale and the health of service men and women. For these reasons, it is fundamentally important that complaints about service life are taken seriously. Unfortunately, evidence suggests that the current systems for complaints are severely lacking and, without adequate resources and powers, we have no confidence that the forthcoming creation of an armed forces ombudsman will address these problems.

Our recommendations, set out below, address the practical problems that we have encountered in our legal work, and largely concern military life away from the combat zone. But we are aware that the toxic debate about human rights in the field of war may distract from the importance of providing a fair and human rights

compliant military justice system. Despite commentary to the contrary, the recent judgment of the Supreme Court in *Smith* was cautious and made explicitly clear that courts must not impose disproportionate human rights requirements on the armed forces. Concerns expressed that human rights law is encroaching on the battlefield are misplaced and misleading.

More generally, we challenge the assertion that human rights have no place in the armed forces. Obligations placed on the state must of course be tempered by proportionality and reflect the circumstances and purpose of the armed forces, but are we really supposed to accept that this means the armed forces owe no duties to those who serve?

Liberty recognises that military life is different. That is precisely why it is important to get this right.

Recommendations

Recommendation 1:

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.

Recommendation 2:

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

Recommendation 3:

The parties to Circular 028/2008 should amend the protocol by adding rape and sexual assault to the category of "Very Serious Crimes" which must always be investigated by local police forces rather than service police forces.

Recommendation 4:

Arrangements for the investigation of serious crimes committed abroad should be revisited so as to reflect the principle that an independent police force rather than the service police force should investigate them.

Recommendation 5:

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

Recommendation 6:

The service complaints ombudsman should be strengthened to give the ombudsman's office powers to investigate the merits of a complaint as well as claims of maladministration. The office must also retain absolute discretion as to whether to investigate a complaint. The ombudsman's recommendations must be final and binding, with sanctions for non-compliance.

Liberty's experience of the military justice system

1. The recommendations contained in this document are Liberty's response to real problems that we have discovered through our significant legal work in this area. We represent the sisters of Anne Marie Ellement. In 2009, Royal Military Police officer Anne-Marie alleged that she had been raped by two colleagues, also Royal Military Police officers. An investigation was conducted by the Royal Military Police (RMP) themselves, following which a decision was made that no charges should be brought. Anne-Marie committed suicide in October 2011. A very brief inquest was held which did not examine any of the matters in any depth. Following a judicial review we brought acting for Anne-Marie's sisters, a fresh inquest was ordered and took place in February 2014. The inquest found that the lingering effects of an act of alleged rape, work related despair and bullying (including rape-related bullying) contributed to Anne-Marie's death.

2. We also asked that the rape investigation be re-opened because the first investigation had been severely lacking in many ways. Important forensic tests had not been conducted, medical evidence had been overlooked and there was an alarming lack of expertise. Most fundamentally of all, the investigation was not independent – it was the RMP investigating the RMP. Article 3 of the Human Rights Act (no inhuman or degrading treatment) requires a competent and independent investigation. The investigation fell very far short of those standards. We demanded that a fresh investigation be conducted with service police from another branch of the military in conjunction with civilian police specialising in sex crime. Following threat of judicial review, the Ministry of Defence (MoD) agreed to refer the matter to the RAF Police, who initiated

a fresh investigation into the allegation of rape. They are working alongside civilian police from Bedfordshire Police in what has been described as the first joint criminal investigation of its kind.

3. Between 1995 and 2001 four young trainee recruits to the British Army were undergoing their initial training at the Princess Royal Barracks in Deepcut, Surrey. They all died of gunshot wounds. Very serious questions about their deaths remain unanswered. Liberty is representing the families of three of the recruits. We have some serious concerns regarding the circumstances surrounding their deaths and how they were investigated. The Attorney General has granted permission for us to seek a new inquest into the death of Cheryl James and we have lodged our request for a new inquest with the court. We will seek to do the same for our other clients.

4. In addition, we continue to receive a great many requests for advice and assistance from other serving or former serving members of the armed forces on a very wide range of subjects – including rape and historic allegations of abuse and ill-treatment.

5. Important lessons can be learned from our practical experience, with the common thread uniting our proposals the need for independence in the military justice system. Our range of recommendations would make the justice system fairer not just for our clients but for all serving men and women.

Legal framework for the military justice system

6. The British Armed Forces – the British Army, the Royal Navy and the Royal Air Force – are made up of over 150,000 troops.¹ These service men and women are stationed in military bases at home and abroad – for example in Cyprus, Germany, Gibraltar and the Falkland Islands. They are also deployed on operations overseas, to locations such as Afghanistan and Iraq. Contrary to popular perception, even when stationed abroad members of the armed forces spend a significant amount of time away from the battlefield. For example, they may be undertaking training for operations, taking part in education or apprenticeship programmes, on peacekeeping duties or helping with humanitarian aid. Service men and women do still have to deal with many of the same day-to-day tasks as civilians – eating, socialising and handling personal relationships. The legal framework governing the behaviour of members of the armed forces has to reflect both the mundane and the distinct elements of service life.

7. In England and Wales, a range of statutes set out the criminal law. Local police forces investigate allegations of criminal behaviour by civilians and the Crown Prosecution Service (CPS) decides whether to prosecute. For indictable criminal offences, the crown court will have jurisdiction with a jury deciding whether the individual was guilty and a judge setting the punishment. For summary offences, both these functions will be undertaken by a magistrate. However, the military justice system is different. It places a larger set of legal obligations on members of the armed forces and uses different

¹ Ministry of Defence, UK Armed Forces Monthly Personnel Report, 1 April 2014 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310254/MPR_April2014.pdf.

mechanisms for investigating, prosecuting and trying both criminal and military offences. It responds to the fact that members of the armed forces will not always be stationed within British territory.

8. Members of the armed forces are subject to service law, which is set out in the Armed Forces Act 2006 (AFA). The AFA imposes on those subject to service law the usual obligations of the criminal law of England and Wales (section 42 AFA), but also creates specific offences for those in the armed forces, such as misconduct or communicating with the enemy. These are all listed in Part 1 of the AFA. Ordinarily, an individual will only be subject to the criminal law of England and Wales while within the territory of England and Wales. However, under section 367 AFA, every member of the regular forces is subject to service law at all times. This means that members of the armed forces are subject to service law – which includes domestic criminal law – both at home and when overseas. The AFA also sets out when members of the reserve forces and civilians will be subject to service law.

9. Each branch of the armed forces has its own police force – the Royal Military Police for the British Army; the Royal Navy Police for the Royal Navy and the RAF Police for the Royal Air Force. The Ministry of Defence Police is a civilian police force which protects defence assets. The service police all have similar powers to those of local police forces – powers of arrest, stop and search, etc. In broad terms, both the service police and local police forces have jurisdiction to investigate criminal conduct by members of the armed forces, whereas only service police have jurisdiction to investigate alleged military offences. The way in which matters of concurrent jurisdiction to investigate criminal offences operate in practice is set out in protocols, but there is a presumption that local police forces have primacy. The Commanding Officer also has broad powers of investigation and can decide whether to investigate a matter him or herself or whether to refer it to a police force. There

is a single service prosecuting authority (the SPA) for all three services, which performs a similar role to that of the CPS. Both the CPS and the SPA have jurisdiction to prosecute criminal offences. A Court Martial has jurisdiction to try offences listed in the AFA, including criminal offences, and a Commanding Officer can hear summary offences, again, including criminal offences, much like a magistrate. Section 366 of the AFA also creates the role of Service Complaints Commissioner. The Commissioner oversees and reports on the complaints systems of the three armed forces.

10. In this briefing we recommend a number of structural and procedural changes to improve the military's justice system. Many of our recommendations focus on the investigation of criminal behaviour that affects members of the armed forces including the most serious types of mistreatment, such as rape. But it is also important that lower level behaviour serving to create an environment where individuals are not respected is not to be tolerated, and our proposals relate to the whole range of levels at which human rights can be promoted and better protected in the military justice system.

11. Over recent months there has been a spate of very confused reports about the interaction between human rights and the armed forces. While the focus of criticism has been the application of human rights to combat and conflict zones rather than this broader legal framework of the military justice system, the toxic and misinformed nature of the debate threatens to infect the discussion about the protections afforded to members of the armed forces. So while it is unlikely that the proposals in this report would have an impact on operational combat decisions, towards the end of this document we set out briefly why these concerns are misplaced.

Independence and military justice

12. Independence and impartiality is a core feature of all credible justice systems. In a democracy, it is vitally important that bodies such as the police and the composite elements of a tribunal – such as judge and jury – are free from executive and external pressures. They must be able to decide a case on the basis of the relevant law and facts, free from intentional or unintentional bias, disregarding any extraneous factors. It is only in this way that individuals can be sure that their case will be decided fairly and in accordance with law. In the past, when recommendations have been made to increase the independence of armed forces oversight the refrain has been “that’s not the military’s way”. It is explained that in the military, it is essential for discipline and morale that the chain of command is respected and is seen to have complete control over the troops. The argument is made that because the armed forces are different, it is important that justice is meted out among peers from within the services rather than the population at large. It is suggested that increasing independence in the military justice system will undermine the chain of command and therefore risk the effectiveness of the forces and even endanger the lives of the troops. This is an assumption that we think it is essential to challenge.

13. Liberty recognises that the armed forces are different. For those who serve, the armed forces are employer, landlord, friend, social worker, doctor and teacher. For many, this is the case for their partner and children, too. More often than not, the military will also act as judge and jury. The armed forces and the lives of those who serve are completely intertwined, with every aspect of the lives of service men, service women and their families under the control of their superiors. Colleagues are also friends and

room-mates. For many, the kinship and support of such a close-knit community is one of the huge draws of service. But the pressure of responsibility and the weight of sacrifices made can also be overwhelming. It is undeniable that such a situation can be intense and pressurised. Loyalties can be divided. If an individual experiences problems at work, these difficulties will follow them home, and can have significant repercussions. This not only creates much greater potential for things to go wrong, but can also lead to increased trauma and vulnerability when they do.

14. In a recent inquest into the death of a member of the armed forces, HM Coroner remarked:

“During the course of the inquest the atmosphere at 158 Company was described as a hothouse atmosphere. That metaphor is likely to be applicable to any army company where male and female soldiers are thrown into each other’s company day and night both in work and at leisure. The possibility of an allegation of serious sexual assault at some stage in these circumstances is not just foreseeable, it is inevitable ... Month in month out, soldiers were forced into each other’s company. Work pressures were great and leisure activities centring at times around the mess would see the same faces, with or without the disinhibiting effects of alcohol. It would have been extraordinary had there not been rows and name calling in such circumstances.”²

15. Similarly, in a report on equality and diversity in the armed forces, it was remarked:

“the unique nature of the Armed Forces must not be overlooked; in particular the fact that Service personnel often live and work together. The blurring of professional and

² Narrative verdict, Inquest into the death of Corporal Anne-Marie Ellement, 3 March 2014.

personal relationships resulting from the close proximity of military life is likely to increase both the prevalence and subsequent psychological costs of sexual harassment.”³

16. It is because of this otherwise all-encompassing nature of service life that Liberty considers that independence in the military justice system is both essential and long-overdue. In this unique and pressurised way of living, it is imperative that individuals and their families can have confidence that if something happens to them, asking for an investigation will not have consequences for every aspect of their lives. They have to know that if they are bullied, harassed, assaulted or raped, they can turn to an individual or organisation with no links to the alleged perpetrator, no conflicting loyalties and no vested interest in the outcome. Without independent mechanisms for investigating complaints, there is no way to guarantee impartiality.

17. No evidence has been presented to suggest that introducing independent elements into the military justice system will undermine the chain of command. In the civilian world, independent systems are seen as essential in order to generate confidence. For example, the independence of the police is necessary so that individuals trust them to prevent and investigate crime. Individuals must be confident that the police are neutral and unbiased to allow for policing by consent. But the independence of the police does not just lead to confidence in the police, it leads to a wider confidence in the state and democracy too. It is unclear why this should be different in the military. Surely a willingness to place faith in an open and obviously unbiased system should reinforce confidence in the chain of command and the military, signalling that the armed forces take the wellbeing of troops seriously. Instead, resistance to independence in the military justice

³ Sexual Harassment – Service women and Servicemen’s Views 2009, paragraph 19.1.

system sends the wrong message, both to those in the services and to the public at large. It suggests that the military is scared of transparency and accountability. It suggests that the military will close ranks to put its own reputation ahead of the interests of those who are willing to give their lives to serve in it. On the issue of independence, the Deepcut Review observed:

“It will be difficult for the Armed Forces to satisfy the public that they have nothing to hide in the running of their discipline and complaints system if there is a perception of unwillingness to accept meaningful independent oversight, which is increasingly seen as a necessary counterweight to the powers and prerogatives of military life.”^{4 5}

18. This observation can be applied to many other aspect of service life. The military is different; that is why it is even more important that it takes steps to get these issues right.

19. It is also worth noting that the proposals in this document are far from radical. Many of them require only a clarification of the law, an extension of current practice to another set of circumstances, or constitute a request for better recording and data collection. Where procedures and processes are already in place, albeit in a more limited way, they hardly represent a significant departure from the accepted way of doing things. It is therefore difficult to see how the proposals would undermine the chain of command.

⁴ Nicholas Blake QC, The Deepcut Review: A review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002, paragraph 12.99.

⁵ Liberty now represents 3 of the 4 Deepcut families (the families of Sean Benton, Cheryl James and James Collinson), whose children died while in training at the Princess Royal Barracks in Deepcut, Surrey. Serious unanswered questions remain about the deaths, all of which questions essentially arise from the lack of independent investigation and oversight at the outset.

Women and sexual assault in the armed forces

Recommendation 1: 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.

20. Women in the armed forces occupy a unique and sometimes precarious position. Service women make up around 10% of the armed forces⁶ whereas they represent 51% of the wider population.⁷ It is undeniable that this is an unusual environment in which women constitute a stark minority. In addition, in the army only 67% of jobs are available to women, with 96% of jobs open to women in the RAF and 71% in the navy.⁸ Without commenting more broadly on the merits of that policy, it does mean that women in the armed forces are in a different position from men. All across society, it is acknowledged that minority groups or those who can be distinguished or separated out from the majority are particularly susceptible to victimisation and discrimination. Where that minority group is women, this often manifests itself as sexual harassment. In this sense, the services are no different.

21. In 2003, the Equal Opportunity Commission noted concerns about the number of complaints it received about sexual harassment in the armed forces and in 2005 it informed the MoD that it intended to launch a formal investigation under the Sex Discrimination Act 1975. However, the Equal Opportunity Commission reached an agreement with the MoD that it would

⁶ See, for example, House of Commons note on Defence Personnel Statistics, September 2013.

⁷ 2011 UK Census Population Estimates for the United Kingdom, 27 March 2011.

⁸ See <http://news.sky.com/story/1177323/british-armed-forces-could-be-run-by-a-woman>.

not pursue its formal investigation on the basis that the armed forces participate in a series of three empirical studies about sexual harassment in the armed forces. In 2009, the final study was published, setting out the results of the final survey and also evaluating progress made since 2005. The 2009 report surveyed both service men and women, and asked about their experience of sexual behaviours.⁹ It found that of those who responded to the survey:

- there remained a few people who believed that sexual assault is sometimes or always acceptable¹⁰
- 71% had experienced someone making comments about their appearance, body, or sexual experience¹¹
- 63% had been talked to about sexual matters, i.e. asked about sex life, told sexual jokes or stories despite discouragement¹²
- 42% were sent sexually explicit material, e.g. pornographic photos or other objects of a sexual nature¹³
- 42% had been subject to gestures or used body language of a sexual nature¹⁴
- 2% had been sexually assaulted.¹⁵

22. Beyond these figures, the survey demonstrates the difference in experience and attitude of service men and women. 8% of service women compared to 2% of service men reported that they

⁹ Antonia Dietmann, Julia Edwards and Matthew Whitfield, *Sexual Harassment – Service women and Servicemen’s Views 2009*, paragraph 15.1.

¹⁰ *Ibid* paragraph 15.1.

¹¹ *Ibid* Table 14.

¹² *Ibid* Table 14.

¹³ *Ibid* Table 14.

¹⁴ *Ibid* Table 14.

¹⁵ *Ibid* Table 14.

had experienced a “particularly upsetting” sexual experience¹⁶ and – reflecting the evidence from the Continuous Attitudinal Survey reported at paragraph 57 below – only 2% of those who suffered such an experience reported it to authorities, with one reason given for this being that those individuals did not want to be named as trouble makers.¹⁷ The 2009 report also found that there was a discrepancy between when service men and women found sexualised behaviours acceptable, with service men finding the less severe sexual behaviours (such as making comments or telling jokes) more acceptable.¹⁸ The report commented that this was despite the fact that “*it is often the repeated occurrence of low level behaviours that is very damaging to an individual.*” Similarly, the report found that service men and women differed in their views as to what counts as sexual harassment, with 26% of service women believing that there is a problem with sexual harassment as compared to only 12% of service men.¹⁹

23. Things have not improved. In 2012, Major John Lorimer conducted an equality and diversity assessment in which he and his staff spoke to 6000 troops, 400 of which were women. In a leaked letter, he reported that: “*Every female officer or OR (Other Rank) that my Comd Sgt Maj has spoken to claims to have been the subject of unwanted sexual attention. This is an unacceptable situation.*” Major Lorimer also reported that “*There is still evidence from some that bullying – in all its manifestations – is perceived as acceptable. Some personnel have experienced physical bullying and have been involved in or witnessed this behaviour.*”

24. In April 2014, a report on the sexist culture within the armed forces featured on the Today programme on Radio 4. Serving and

¹⁶ *Ibid* paragraph 19.4.

¹⁷ *Ibid* paragraph 16.9.

¹⁸ *Ibid* paragraph 19.1.

¹⁹ *Ibid* paragraph 19.4.

former personnel commented that a woman is “*treated as a second class citizen*” and that bullying “*makes you feel worthless*”. Another remarked that “*discrimination is embedded in the culture and they just don’t see it.*” The report also featured a former female officer who did not feel that women were at a disadvantage in the armed forces, but even her statement was hardly reassuring that the armed forces constitute a healthy and respectful environment for women, stating: “*It was just banter. I would give it back as good as I got and I have a reasonably hard character. If you want to play their game and fit in, you just have to get on with it.*”²⁰

25. This all serves to paint a disturbing picture, showing that the armed forces constitute an environment in which women are particularly susceptible to disrespectful and sometimes illegal treatment. It has been made clear that low level harassment can have serious consequences for those involved. But additionally, it requires no great imagination to see that an environment in which this low level sexual harassment exists or is even tolerated can lead to a culture whereby individuals find the confidence to sexually assault or even rape their fellow soldiers.

26. Hard evidence about the extent of sexual assault and rape within the armed forces is scarce because the data is not being comprehensively or reliably collected. As discussed later in this document, allegations of rape about a serving member of the armed forces (whether made either in the UK or abroad) may be investigated by either the relevant service police or local police forces. In a Freedom of Information Act response dated 13 June 2014, the MoD appeared to report that for the years 2012, 2013 and up to 2 April 2014, there had not been a single rape conviction in the military justice system. In response to a written parliamentary question, the Parliamentary Under Secretary for Defence, Anna Soubry MP,

²⁰ Today Programme, Radio 4, 15 April 2014.

produced a different set of statistics. She set out the number of referrals by the service police to the service prosecuting authority (i.e. cases that had been investigated by service (not civilian) police and sent to the service prosecutor for a decision on whether or not to charge).²¹ She reported that in 2012 there were 27 referrals for rape, 50 for sexual assault (under s2 and s3 of the Sexual Offences Act 2003 (SOA)) and none for sexual themed harassment (under the Protection from Harassment Act 1997). All those alleged incidents were perpetrated by males. Out of these cases, so far there have been 4 convictions for rape (out of 10 trials held so far) and 9 for sexual assault (out of 18 trials). She also reported that in 2013, there were 26 rape referrals, 56 sexual assault referrals and 3 sexual harassment referrals. Of these, only one involved an alleged female perpetrator – one case of sexual assault. 9 of the cases involving rape have been directed for trial with one conviction to date out of two trials. But separately, in a Written Answer dated 25 April 2013, then Minister of Defence for Personnel, Welfare and Veterans Mark Francois stated that in 2012 there was a total of just 40 allegations of sexual assault recorded by the service or MoD police. On the same date Minister of State for the Armed Forces Mr Robathan stated that there had been in 2012, 13 allegations of rape and 35 allegations of sexual assault recorded by service police.²² On this analysis there were fewer allegations than referrals, when self-evidently this cannot be the case. While there may well be an explanation for the differences in reported figures it is deeply unhelpful that this information cannot be presented in a consistent manner and we have grave concerns about the integrity of the MoD’s recording and reporting of relevant data in this area.

27. This evidence paints a grim enough picture. But what is more worrying is that the picture is so incomplete and contradictory that

²¹ Hansard, Written Answer, Armed Forces: Sexual Offences, 10 March 2014.

²² <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130425/text/130425w0009.htm>.

we simply do not know the scale of the problem. In order to fix a problem, first of all it is necessary to understand the extent of it. In terms of incidents investigated by the service police, the information above does not tell us accurately or reliably how many allegations of rape or sexual assault are made or referred. And in relation to rapes investigated by local police, we have absolutely no idea as to the number of allegations, how many are referred, how many prosecuted and how many convictions secured. While blame for the lack of data from local police forces cannot be attributed to the armed forces, it remains the fact that the armed forces do not possess even basic evidence about the extent of sexual assault or rape within the services. In terms of perception at the very least, this does not engender confidence that problems of this nature are taken at all seriously.

28. Our first recommendation is that both the service police and the local police forces improve collection of data about the extent to which members of the armed forces are victims and perpetrators of sexual assault and rape. The service police should record and publish how many allegations of rape or sexual assault are made in addition to recording the number of referrals they make. The local police forces should record and report annually on the number of rapes and sexual assaults reported to them where the victim or alleged perpetrator is a member of the armed forces. This is not a suggestion that the local police forces have to inform as a matter of course the relevant armed forces of the names or details of all those concerned in all cases. Rather, that anonymised data should be collected centrally to provide reliable statistics as to the extent of sexual assault within the armed forces.

29. We recognise of course that not every woman in the armed forces will have a negative experience and we recognise too that there are now a number of service women in the high ranks of the armed forces. However these do not provide reasons not to act or

to fail to address structural and procedural defects that allow a sexist, bullying and even criminal culture to exist, be it for the many or the few. Similarly, we welcome the fact that both the MoD and all branches of the armed forces state that they have a “zero tolerance” approach to sexist and discriminatory behaviour. In a 2013 written statement from the Minister of State for Defence, Mark Francois, he stated:

“I can assure you that the Ministry of Defence is committed to tackling all types of harassment, including sexual harassment. The Ministry of Defence is determined to create an inclusive working environment that delivers opportunity for all, recognises and values difference, and eradicates bullying, harassment and discrimination. We have developed policies to ensure that individuals are treated fairly, and with respect. This commitment runs throughout the organisation.”²³

30. While welcoming this statement, we cannot help but contrast it with the recent statement from Lt Gen David Morrison, the head of the Australian Army, in response to serious allegations of abusive treatment of women in his Army. In a powerful YouTube video, he stated:

“... the Army has to be an inclusive organisation in which every soldier – man and woman – is able to reach their full potential and is encouraged to do so. Those who think that it is okay to behave in a way that demeans or exploits their colleagues have no place in this Army ... if that does not suit you, then get out.”²⁴

²³ Hansard, 25 April 2013, written answer from Mark Francois to Madeleine Moon, Column 1250W.

²⁴ <http://www.youtube.com/watch?v=QaqpoeVgr8U>.

There has been no similarly powerful statement from the head of the British Army in response to these continuing reports of sexual assault and harassment or to the case of Anne-Marie Ellement. It is evident that the problem prevails and repeated assertions by ministers that sexual harassment or worse is unacceptable do not appear to be sufficient to effect the necessary change.

Armed Forces Act Schedule 2: referral of sexual assault

Recommendation 2: 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.

31. The Commanding Officer plays a central role in the military justice system and has a broad range of powers. The Commanding Officer can hear summary offences, but he or she also has broad powers of investigation. Under section 115 AFA, when a Commanding Officer becomes aware that an offence in Part 1 of the AFA may have been committed, he or she is required to (a) ensure that the matter is investigated in such way and to such extent as is appropriate; or (b) ensure, as soon as is reasonably practicable, that a service police force is aware of the matter. This means that the Commanding Officer has a broad discretion to decide whether to investigate a matter themselves or to refer the matter to the service police for their investigation. This discretion is limited by section 113, which requires that when a Commanding Officer is made aware of allegation or circumstances listed in Schedule 2 to the AFA, he or she must as soon as is reasonably practicable ensure that a service police force is aware of the matter.

32. Schedule 2 to the AFA lists a number of service-specific offences, such as mutiny. But it also includes a long list of references to criminal offences contained in other pieces of legislation. For example, it lists murder, causing grievous bodily harm, causing death by dangerous driving and tax evasion. The Schedule also lists “any offence under Part 1 of the Sexual Offences Act 2003, except one under section 3, 66, 67 or 71”. Part 1 section 1 of the SOA is rape, and so this is one of the offences which must be notified to

the police. However, section 3 is sexual assault, and is therefore exempted from the referral process. Sections 66, 67 and 71 are exposure, voyeurism and sexual activity in a public lavatory respectively and these are also exempted from the process.

33. In a note published by the House of Commons Library, it was explained that during the passage of the AFA through Parliament, in discussion about Schedule 2, *“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.”*²⁵ Reference was made to Schedule 2 offences as being *“inherently serious”*. However, the note made clear that neither the House of Commons nor the House of Lords engaged in debate about the exemption of sections 3, 66, 67 and 71 from the scope of the mandatory referral process. It is therefore not at all clear how these serious sexual offences came to be exempted from Schedule 2.

34. 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. In the first ever *Overview of Sexual Offending in England and Wales* report published jointly by the Ministry of Justice, the Home Office and the Office of National Statistics, sexual assault was placed in the group classified as the *“most serious sexual offences.”*²⁶ It is incomprehensible that sexual assault can be viewed as anything other than *“inherently serious”* for the purposes of Schedule 2. The

²⁵ House of Commons Library, 28 February 2013.

²⁶ Ministry of Justice, Home Office and ONS, *An Overview of Sexual Offending in England and Wales*, January 2013, page 5.

nature of the very specific yet completely unjustified exemption is also incredibly puzzling. It is wholly unclear why it was deemed necessary or appropriate to make such a limited exemption when the rest of Part 1 SOA is included in the mandatory process. On the one hand, it is difficult to dismiss such specificity as a mistake, but – given that the provision is buried in the detail of the Act and was not explicitly debated – on the other hand it is far from clear that Parliament realised that this is what it was legislating for.

35. Liberty recognises that a service woman or man who is a victim of sexual assault can approach the police independently of her or his Commanding Officer. Liberty also recognises that a Commanding Officer is not prevented from referring an allegation of sexual assault to the police notwithstanding the fact that the mandatory referral process does not apply. However, as discussed above, sexual harassment and worse remains a considerable problem within the armed forces and any cultural change must start at the top. It is hardly surprising that service men and women have differing views as to what constitutes inappropriate sexual behaviour when even the legislation concerned does not recognise the grave nature of sexual assault and the absolute necessity of ensuring that any allegations of sexual assault are dealt with by independent and trained police officers rather than military staff. It sends the worst possible message to victims, perpetrators and the public at large, suggesting that sexual assault is not worthy of serious attention. 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. It is clear that 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 process 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.

36. The AFA states that Schedule 2 may be amended by order of the Secretary of State. Our second recommendation is that a relatively quick and straightforward way of demonstrating that the government, parliamentarians and the armed forces are committed to protecting the rights of service men and women would be to amend Schedule 2 so that sexual assault, exposure and voyeurism are not excluded from the mandatory referrals process.

Investigation of allegations of rape and sexual assault

Recommendation 3: The parties to Circular 028/2008 should amend the protocol by adding rape and sexual assault to the category of “Very Serious Crimes” which must always be investigated by local police forces rather than service police forces.

Recommendation 4: Arrangements for the investigation of serious crimes committed abroad should be revisited so as to reflect the principle that civilian police forces should investigate them.

37. 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 disdain for personal dignity and autonomy. As noted above, statistics on rape within the armed forces are limited. But it is worth noting that evidence from national statistics suggests that only 15% of victims of rape or serious sexual assault report the crime to the police, with 90% of victims knowing the perpetrator.²⁷ It is clear that there remains a significant problem with rape and sexual assault across society, with an estimated 85,000 rapes committed per year, and there is no reason to consider that the armed forces are any better.²⁸ If we want to see improvement, with these crimes reported and the perpetrators convicted, it is imperative that victims have confidence in the police. They must know that they will be treated with care and respect and that any investigation will be thorough and independent. Both the perception and actuality of competence

²⁷ Ibid page 6.

²⁸ Ibid page 6.

and care from the police forces are essential if society is to tackle this pervasive problem of sexual violence.

38. As set out at paragraph 4, the civilian police and service police have concurrent jurisdiction to investigate criminal behaviour by members of the armed forces. Until 2006, service police were barred from investigating murder, manslaughter and rape, but the statutory bar was removed by the AFA. Home Office circular 028/2008 is a protocol between local police forces, the MoD Police and the Service Police setting out, among other things, a shared understanding of the roles, responsibilities and jurisdiction of the different police authorities. Similarly, the Protocol on the Exercise of Criminal Jurisdiction in England and Wales between the Director of Service Prosecutions, the Director of Public Prosecutions and the MoD is an agreement between those parties as to how each one exercises jurisdiction.

39. Circular 028/2008 (the circular) sets out that *“general responsibility for the maintenance and enforcement of the criminal law throughout England and Wales (and associated territorial waters) rests with the local police forces.”* This seems clear and appears to create a presumption that, in the investigation of crime in England and Wales, whether on barracks or beyond, it is the civilian police that will have jurisdiction. However, the circular goes on to create a number of rather vague exceptions to the general rule. The circular directs that if Service Police or MoD Police are first on the scene at an incident where they do not have or do not exercise jurisdiction, they will do what is immediately necessary but no more. Similarly, the circular directs that guidance on initial action to be provided to non-police staff makes clear that the local police force is responsible for the investigation of any crime, unless the MoD Police or Service Police *“agree that it lies within their respective jurisdiction and criteria for criminal investigation”*. There is no definition of what this *“criteria for criminal investigation”* is, although there are somewhat woolly

assertions that *“in some cases it will be more appropriate for MDP or Service police to deal with defence-related crime”* and *“a flexible approach, based on consultation and agreement at a local level, in encouraged, where the respective police forces discuss who is best placed to take action based on availability of resources, jurisdiction and public interest”*. Separately, the protocol between prosecutors asserts that *“offences alleged only against persons subject to service law which do not affect the person or property of civilians should normally be dealt with in service proceedings and not by a civilian court.”*

40. The circular has a particularly explicit section entitled *“Very Serious Crimes”*, which states that:

“At any incident involving death or serious injury likely to lead to death or the investigation of murder or manslaughter in the UK and National Security cases, the MDP and the Service Police will take immediate action necessary at the scene only. They will simultaneously inform the local HOPF who will lead the investigation.”

41. In a written ministerial statement of 2013, it was explained that:

“Home Office Circular 028/2008 sets out the protocol between the Ministry of Defence Police, the Service Police and the Home Office Police Forces, and defines investigative jurisdiction. In short, primacy rests with the civilian police, although the RMP may take the lead in an investigation if both the suspect and the victim in a particular case are serving members of the Armed Forces. However, the more serious the offence, the greater the likelihood is that jurisdiction will be retained by the civil force.”²⁹

²⁹ Hansard, 25 April 2013, written answer from Mark Francois to Madeleine Moon, Column 1250W.

42. Liberty very much agrees that civilian police forces should be responsible for the investigation of crime in the UK, but the approach set out above gives cause for concern on a number of fronts. We find the reference in the ministerial statement to service police taking the lead in an investigation if both the suspect and the victim are serving members of the armed forces very concerning indeed, given that no mention of this is made in circular and given that this is not provided for in any legislation. Is this what the circular means when it refers to, but does not specify, “criteria”? Is there another document setting out this criteria? If so, this should be published and reviewed urgently. As noted earlier in this document, independent processes are imperative for the integrity of the justice system, and this is especially so in the context of the armed forces where lives are so intertwined. While the service police are notionally separate from the Commanding Officer of the particular base they work on, in practice, in a situation where both victim and perpetrator of a crime are service personnel, this significantly increases the chances that one or both will be known – in an employment, social or other context – to the investigating service police. This fundamentally undermines the capacity of the service police to be seen to be acting impartially, and in some circumstances it seems inevitable that abuse will slip in. In those cases, where both suspect and victim are members of the armed forces, there is surely more rather than less need for independence and it is perverse to have apparently unwritten criteria advocating the reverse. Even worse is the situation where a member of the relevant service police is either victim or alleged perpetrator, or even both, and a criminal case is investigated by friends or colleagues.³⁰

³⁰ As was the case in the service police criminal investigation into the allegation of rape of Anne-Marie Ellement.

43. Liberty is also concerned by the reference in the circular to “flexible” arrangements when determining which police force should exercise jurisdiction. Rape or sexual assault is a hugely traumatic experience for the victim and allegations must be dealt with by trained and experienced officers rather than just by whichever force happens to be less busy. There is significant scope for improvement in the investigation and prosecution of rape in both civilian and service life, however statistics demonstrate that the extent of specialist training in the service police is particularly limited. In a written statement from 1 April 2014, it was stated that in addition to their other training, service police attend training designed primarily to cover the investigation of sexual offences. In the Royal Military Police, out of 1,970 police, including 170 members of the Special Investigations Branch (SIB), only 30 had attended Sexual Offences Investigation Training (SOIT) and only 25 had attended Achieving Best Evidence (ABE) training.³¹ In the Royal Navy Police, out of a total of 290 police and 30 SIB, 20 had attended SOIT and 40 ABE. In the RAF Police, out of 1140 police and 70 SIB, 10 had attended SOIT and 10 ABE. This does not suggest that the service police are particularly well equipped to investigate cases of serious sexual violence.³²

44. If a rape case is prosecuted by the Service Prosecution Authority, there can be no reason for the matter not to be handled by a prosecutor who has completed the specialist rape and sexual assault training (Rape and Serious Sexual Offences (RASSO) training) that all CPS prosecutors have to undergo before they are permitted to handle such cases.³³ In our view such cases ought not

³¹ This is the training in “Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures” – training in best practice for interviewing victims and preparing them to give evidence in court.

³² House of Commons Hansard, 1 April 2014, Column 623W per Anna Soubry.

³³ http://www.cps.gov.uk/publications/docs/rape_policy_2012.pdf at para 3.6.

to be handled 'in-house' and suitably trained and experienced external prosecuting counsel ought always to be instructed.

45. We are further concerned that "flexible" working arrangements may lead to the possibility that a member of the armed forces may make the decision to approach a local police force to make an allegation of rape or sexual assault against another member of the armed forces, only to find that the force they complain to hands the case over to the service police. As noted above, it is essential that victims can be confident that if they find the courage to tell the police they have been raped or sexually assaulted that they will be treated properly and their concerns will be taken seriously. It would constitute a grave and possibly irreparable breach of trust if an individual were to seek the help of an independent police force only for the investigation to be returned to the armed forces. This could do considerable damage to the victim in the particular case, but will also do nothing to encourage more victims to come forward.

46. The written ministerial statement was explicit about the fact that the more serious a crime, the more likely it is that it will be investigated by a civilian police force. This is surely a reflection of our own concerns about the importance of independence and expertise in the investigation of serious crime. As stated repeatedly elsewhere in this document, rape constitutes an especially serious crime and therefore it should only be in wholly exceptional cases that service police investigate rape allegations at all. Unfortunately, both anecdotal and limited statistical data suggest that this is not the case. In paragraph 16 we set out that in 2013, service police referred 26 rape allegations to the DSP. So at the very least, the service police investigated 26 rape allegations, probably even more as there are likely to be some cases that they did not choose to refer. It is difficult to understand how 26 cases could be so exceptional that they were dealt with by the service police rather than civilian

police, even without knowing the total number of rape allegations made against or by service personnel each year.

47. Our third recommendation is that a simple way to achieve clarity and to ensure that civilian police rather than service police deal with rape and sexual assault allegations would be to amend circular 028/2008 by adding rape and sexual assault to the category of "Very Serious Crimes" which must always be investigated by local police forces. Not only would this secure the necessary independence and experience in the investigation of rape, but it would again send the important signal that rape and sexual assaults are not casual crimes. It is difficult to see why they are not already listed in that category.

48. Liberty takes the view that the principle that civilian rather than military police should investigate these offences applies both at home and abroad. We appreciate that developing solutions to work abroad will involve a number of practical obstacles and may require different approaches in different locations, but given the imperatives of independence and expertise in the investigation of rape and sexual assault it is difficult to justify a different approach.³⁴ Our fourth recommendation is that the current system for investigating serious crimes committed abroad, such as rape, be reviewed and brought into line with the principle that civilian police should investigate.

³⁴ In the case of Anne-Marie Ellement, the deceased reported an allegation of rape against two fellow Royal Military Police (RMP) officers, which was investigated by the RMP (Special Investigations Branch). Liberty had to threaten judicial review proceedings before the matter was remitted for a fresh investigation under the auspices of both the RAF Police and civilian police. This kind of co-working between service and civilian police may present an interesting model for a way forward in investigating offences against serving personnel abroad. The investigation is ongoing at the time of writing.

Independent oversight of the service police

Recommendation 5: The three service police forces should be brought within the civilian system of police oversight.

49. Police officers – military or civilian – occupy a unique position in society, with significant power to interfere in the lives of others in order 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. 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.

50. The force of the arguments made by Liberty and others in favour of independent investigation of police complaints led, in the civilian sphere, to the creation of the Independent Police Complaints Commission in April 2004. Unfortunately, in more recent years that office has struggled to live up the standards of independent investigation required of it and there are a number of improvements that must be made to increase public confidence in the civilian oversight of police complaints.

51. However, criticism of the civilian system for investigating police complaints highlights three things. First, it underlines the

fundamental public interest in effective investigation of police complaints. While individual investigations may have been criticised, it has always been clear that an independent scheme for dealing with complaints is essential. It is only necessary to look at the criticisms of the IPCC to see how important it is to victims, Parliament and the public that investigation of police complaints is done correctly. Second, it demonstrates the importance of ensuring that the powers and funding of any investigator are adequate to the task in hand. It is pointless to create a body if it is not able to discharge its designated function adequately. Third, it throws into sharp relief the lack of a similar mechanism for the service police.

52. As outlined in the previous section, Liberty has a number of concerns about the role of service police in investigating allegations of serious criminal behaviour, as we do not think the current approach guarantees the required independence and impartiality. These concerns are only compounded by the fact that following an investigation, an individual with a complaint has no independent voice to turn to. Even in the very best of organisations, mistakes can happen and go unnoticed. Both intentionally and unintentionally, bias or prejudice can creep in and blinkers can prevent the truth from being seen as it really is. Even if no mistakes were made, without external scrutiny many will not believe that to be the case. This means that errors or corruption cannot be addressed and that honest officers cannot be validated.

53. Our fifth recommendation is that it would be entirely appropriate for a suitably empowered and funded civilian complaints body to have jurisdiction over complaints about service police, covering both criminal and service law work. This approach would both spare the expense of setting up a completely separate organisation to oversee complaints about service police, and would have the advantage of having trained and demonstrably independent staff.

54. The Service Complaints Commissioner has criticised the omission of the service police – that is the Royal Military Police, the Royal Navy Police and the RAF Police – from the civilian system of oversight.³⁵ The exclusion of the service police appears even stranger given the range of other bodies that currently fall within the IPCC scheme: the National Crime Agency, the British Transport Police, the Ministry of Defence Police, the UK Border Agency, Police and Crime Commissioners, the Mayor’s Office for Policing and Crime and Her Majesty’s Revenue and Customs. It is especially difficult to understand why the Ministry of Defence Police come within the complaints system but service police do not.

³⁵ See, for example, Service Complaint Commissioner, Annual Report 2013, paragraph 22.

Armed forces ombudsman

Recommendation 6: The Service Complaints Ombudsman should be strengthened to give the ombudsman’s office powers to investigate the merits of a complaint as well as claims of maladministration. The office must also retain absolute discretion as to whether to investigate a complaint. The ombudsman’s decisions and recommendations must be final and binding, with sanctions for non-compliance.

55. Outside the sphere of criminal justice, in the armed forces there are a considerable number of areas where disputes can arise: employment grievances, accommodation problems, medical treatment, discrimination, harassment and bullying to name but a few. It is in everyone’s interest that such disputes are resolved in a timely and appropriate manner. Disputes left unresolved or inadequately addressed are unfair for the individual involved and can have a range of additional detrimental effects, such as creating poor morale. In the wake of the deaths of four soldiers at the Deepcut Barracks, it was reported by a public inquiry that the spectre of poor complaint-handling had even had an adverse effect on army recruitment, with young individuals and their families having “*understandable concerns as to how the welfare of their children is and will be protected in practice.*”³⁶

56. The Armed Forces Covenant sets out, under the heading of “Responsibility of Care” that:

“The Government, working with the Chain of Command, has a particular responsibility of care towards members of the Armed Forces. This includes a responsibility to maintain an organisation which treats every individual

³⁶ The Blake Review 2006, paragraph 12.98.

fairly, with dignity and respect, and an environment which is free from bullying, harassment and discrimination.”³⁷

57. Unfortunately there is evidence to suggest that, despite this promise, bullying remains a problem within the armed forces. The 2013 Armed Forces Continuous Attitude Survey reported that 10% of service personnel felt that they had been the subject of discrimination, harassment or bullying in the service environment in the previous twelve months.³⁸ This was an increase from the previous year and it is not clear what proportion of the complaints related to alleged sexual harassment because complaints are not appropriately categorised. Only 8% of the total of those subject to this behaviour made a formal written complaint. While two thirds of personnel felt that they are treated fairly by the services, this still leaves a significant problem. The most recent annual report of the Service Complaints Commissioner supports this view. She reported that Service complaints about bullying, harassment and discrimination account for 43% of all Army allegations, compared to 9% of all allegations made in the Navy and 38% in the RAF.³⁹

58. In general, it is of course important and useful that the armed forces themselves are given the opportunity to resolve a complaint. Not only does this give the service in question the opportunity to put things right quickly, but it also – in theory – allows the service to identify any wider systemic changes that should be made. However, there is plenty of scope for internal complaint processes to be subject to unacceptable delay and given the interlinked nature of all aspects of military life, for decision-makers to be influenced by a range of extraneous factors. There is also evidence to suggest that individuals are reluctant to pursue internal redress mechanisms.

³⁷ The Armed Forces Covenant, page 7.

³⁸ 2013 Armed Forces Continuous Attitude Survey, page 4.

³⁹ Service Commissioner for the Armed Forces, Annual Report 2013, page 7.

In its 2013 report on the work of the Service Complaints Commissioner for the Armed Forces, the Defence Select Committee expressed concern that service personnel do not always have confidence to pursue a complaint through the chain of command.⁴⁰ The Committee also noted reports that individuals are deterred from raising complaints due to a fear of redundancy and concerns that complaining will have a detrimental impact on their career.⁴¹

59. The Service Complaints Commissioner has repeatedly reported that the internal complaints systems within the armed forces are not working. In her most recent report, the Commissioner stated:

“For the sixth year I am unable to give you and Parliament an assurance that the Service complaints system is working efficiently, effectively or fairly. I am concerned that the goals I set for the end of 2013 have not been achieved, despite additional resources being deployed by the Services. As I have reported previously, the current system is not efficient or sustainable. Nor do I believe that it is working effectively.”⁴²

60. This is Liberty’s experience, too. In a recent case of ours, a soldier alleged that she had been raped by a colleague. Having reported the matter to civilian police, she decided that she wished to complain to the Army about the conduct of individuals within her chain of command who had, she alleged, bullied and undermined her after she had made her allegation. Because the subjects of her complaint were within her chain of command, she complained directly to the Service Complaints Commissioner who directed that a Senior Officer (i.e. someone outside of her chain of command) be

⁴⁰ House of Commons Defence Committee, The work of the Service Complaints Commissioner for the Armed Forces, Eight Report of Session 2012-13, paragraph 8.

⁴¹ Ibid paragraph 2.

⁴² Armed Forces Services Complaints Commissioner, Annual Report 2013, page 4.

appointed to investigate. Upon receiving this direction, the Army simply ignored it – referring the complaint and all the detailed documentation in support of it directly back to the unit containing those about whom the complaint was lodged. A formal apology was received after the Service Complaints Commissioner intervened but of course, by then the damage was likely to have been done.

61. It is completely unacceptable that service men and women feel deterred from making complaints about their life in the services and that those complaints that are made are not dealt with properly. It is therefore important that there is an effective independent tier to the complaints process. This tier should exist to ensure that service men and women can be confident that if something goes wrong in the investigation of their complaint – such as delay or bias – they will be able to get an external view. This mechanism should also mean that individuals can be confident that any action taken in response to their complaint is sufficient and appropriate, and it should be guaranteed that any findings or recommendations be accepted and implemented.

62. In 2004, following a year-long inquiry, the Defence Select Committee recommended that there be a military ombudsman with full investigative powers and with authority to make binding adjudications. The Committee did not consider that this would constitute an obstacle to the chain of command. The call for an armed forces ombudsman was reiterated in the 2006 Blake Review into the deaths of four young soldiers at Deepcut Barracks, stating:

*“it is essential that soldiers and their families have access to an established authority figure who understands the military and its way or working, but stands outside of the chain of command, and beyond its influence, in order to ensure that best practice is adhered to.”*⁴³

⁴³ Blake Review, paragraph 12.100.

63. In response to the Blake Review and the Deepcut tragedies, the Ministry of Defence created via the AFA the position of Service Complaints Commissioner (SCC). This role is very far removed from that of an effective ombudsman. The SCC can receive complaints but cannot investigate them. She has a discretion to pass the complaint to a Commanding Officer or higher up the chain of the command if the complaint is about the Commanding Officer. If the complaint made to the SCC involves allegations of improper behaviour, she can refer the allegations under her statutory powers, which imposes a legal obligation on the chain of command to keep her informed on the handling of the complaint. The SCC is purely an oversight mechanism, with no powers of investigation, no powers to make recommendations and no powers to mandate outcomes.

64. The current SCC has herself long complained that her powers were inadequate and successive Defence Select Committees commented that the Service Complaints Commissioner’s role *“falls far short of that envisaged”* by them.⁴⁴ Until recently, the Ministry of Defence strongly refuted these claims and resisted attempts to change the SCC into an ombudsman. In its initial response to the Blake Review, the Government stated:

*“The ability to intervene in the handling of a complaint or to supervise the investigations of or response to a complaint are not appropriate for an independent commissioner and would risk undermining the chain of command and its overall responsibilities for the welfare of those under command.”*⁴⁵

65. Since 2006, the SCC and MoD have negotiated small changes to the powers of the SCC, but the MoD consistently resisted calls

⁴⁴ House of Commons Defence Committee, The work of the Service Complaints Commissioner for the Armed Forces, Eight Report of Session 2012-13, paragraph 16

⁴⁵ Ministry of Defence, The Government’s Response to the Deepcut Review, June 2006, page 14.

for development of the role into an ombudsman. For example, the SCC's 2010 proposals for the creation of an ombudsman were reviewed by the MoD. The MoD rejected the SCC's proposal, asserting that *"there was more benefit to be gained for improving timeliness and tackling undue delay if the SCC were engaged whilst complaints were still live rather than her post becoming an ombudsman acting after the event."*⁴⁶ In her evidence to the Defence Select Committee in 2012, the SCC observed: *"Some of the Service Chiefs said they didn't quite understand what an ombudsman did, but they were sure they didn't want one."*⁴⁷

66. In March 2014, the Secretary of State for Defence, Phillip Hammond MP, announced that the SCC would be renamed the Service Complaints Ombudsman and that the new ombudsman would have an increased range of powers, including the power to consider whether a service complaint has been handled properly.⁴⁸ If the ombudsman makes a finding of maladministration in the handling of the complaint, he or she may make a recommendation to the Defence Council. The Defence Council will remain responsible for deciding how to respond. In the Queen's Speech in June 2014, an Armed Forces (Service Complaints and Financial Assistance) Bill was announced.

67. At the time of writing the Bill had just been published. Some features of the proposed legislation are welcome. In particular the Bill provides that the final decision as to admissibility of a complaint will rest with the ombudsman and that the ombudsman will have powers to require individuals to provide documents or information for the purpose of an investigation. It is also significant

⁴⁶ Armed Forces Covenant Annual Review 2012, page 23.

⁴⁷ House of Commons Defence Committee, The work of the Service Complaints Commissioner for the Armed Forces, Eight Report of Session 2012-13, paragraph 60.

⁴⁸ HC Deb, 13 March 2014, c34WS

that if the ombudsman makes a finding of maladministration he or she will be entitled to make a broad range of recommendations for the purpose of remedying the maladministration and any injustice arising from the maladministration, rather than simply being permitted to recommend either that an investigation is reopened or remains closed.

68. However the ombudsman's powers will be limited to investigating and making recommendations about maladministration and any injustice arising from that maladministration. The ombudsman will not have powers to investigate or make recommendations about the merits of the complaint, a power accorded to offices such as the Prisons Ombudsman. The new system will therefore be unable to guarantee an effective and independent right to redress for members of the armed forces. Individuals who are treated unfairly in the first instance but whose complaint was handled in a procedurally correct manner will not be able to benefit from an independent investigation and judgment. Failure to accord necessary powers to the new ombudsman will significantly tie her hands and weaken her efficacy.

69. We also believe that the ombudsman must have the power to investigate complaints even where the person is deceased. If, for example, a soldier commits suicide and disclosed to his family that he had been bullied before his death, the ombudsman ought to have the power to investigate on receiving a complaint from the family. The Bill currently contains no provision for this. We are particularly disheartened by the proposal that recommendations made by the ombudsman will not be binding and that ultimately the Defence Council will have the final say on whether to accept the Ombudsman's recommendations.

70. Under the heading of "Implementation of Decisions", the Ombudsman Association criteria states that:

“Either (i) Those investigated should be bound by the decisions or recommendations of the Ombudsman; or (ii) There should be a reasonable expectation that the Ombudsman’s decisions or recommendations will be complied with ...”

71. We are far from convinced that there can be any reasonable expectation that even the ombudsman’s limited recommendations will be complied with. For at least the past decade, the MoD has resisted the calls of Parliament, independent public inquiries into the deaths of young soldiers and the SCC to create an ombudsman, claiming that to do so would undermine the chain of command and promising there were better ways to improve the handling of complaints. The MoD has been consistently proven wrong on these matters and has been forced to make piecemeal changes to the system in the face of continued complaints, fresh tragedies and reports that confidence in the chain of command is decreasing rather than being reinforced. The most recent concession, the creation of this ombudsman, came only weeks after the damning verdict of the Coroner in the inquest into the suicide of Corporal Anne-Marie Ellement in March 2014, which was brought about only after significant legal work on behalf of Anne-Marie’s family and which identified the effects of an act of alleged rape, bullying and work-related despair as factors contributing to her death. Given the persistent reluctance to admit an effective independent element into the complaints process and with concessions made only at the point of crisis, what evidence is there to suggest that, once installed, the armed forces will be at all willing to accept the recommendations of the ombudsman?

72. When announcing the new powers, the Secretary of State asserted that the proposals were *“thus maintaining the authority of the chain of command”*. But what does this mean in practice? Liberty does not accept that the chain of command is undermined

by admitting external elements to review processes, but the logic of planned reform does not make sense. On the one hand, if the armed forces are going to take the ombudsman seriously and accept her recommendations, will it really make a difference to perception of the authority of the chain of command whether they are nominally required to make the decision to reopen a case or whether it is automatic? Surely once the armed forces admit the need for external oversight of complaint-handling, the details of the process don’t really impact on this perception? On the other hand, if the armed forces wish to assert their authority and choose to reject recommendations, what’s the point in a pretence of independent review? Either way, from the perspective of reassuring service men and women that they can be confident in making a complaint, the argument of independence is fatally undermined if the ultimate decision rests back with the forces about which they are complaining.

73. It is not enough to wait for the next tragedy until we see the next piece of gradual reform. As our sixth recommendation we urge that the MoD must equip the armed forces ombudsman with the necessary powers to be effective. An independent and effective ombudsman will be supported by independent and lay staff. Appointed by a public appointments process and accountable to Parliament, the ombudsman must have powers to investigate claims of maladministration as well as the merits of a complaint and must retain absolute discretion as to whether to investigate. The ombudsman’s decisions and recommendations must be final and binding, with sanctions for non-compliance. The armed forces have nothing to fear from a complaints system that commands confidence, transparency and justice.

Human rights and the military

74. Liberty believes that human rights apply equally to all – soldier or civilian. And this belief is supported by our laws. In 1998 the Human Rights Act (HRA) incorporated into UK law the rights protected by the European Convention on Human Rights (ECHR or the “Convention”). Quite rightly, nothing in the HRA or the ECHR limits the application of human rights to civilians. It is the purpose of human rights that they protect all of us, regardless of status. As a result, individuals – including members of the military – can enforce their human rights in the courts of the UK. But just as importantly, Section 6 of the Act requires public bodies – including the police and the armed forces – to act in a manner compliant with the Convention rights.

75. Convention rights translate into different types of obligations on public bodies. For example, Article 2 of the ECHR protects the right to life. The article provides that:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The article provides a clearly limited requirement on the state to protect the right to life of individuals. The obligation placed on the state to protect the right to life is further limited by article 15 of the ECHR, which allows a state to derogate from its obligation in times of war. However, on those occasions when the article is in play and where life is taken, Article 2 does require the state to conduct an independent, prompt and open investigation. Article 3 of the ECHR prohibits torture and inhuman or degrading treatment. Similarly, this means that while the state must not – for example – commit torture, it also requires the state to investigate

allegations of inhuman and degrading treatment, such as rape and sexual assault. Both the ECHR and the HRA recognise that it is important not to place an impossible burden on public bodies. Therefore, the requirements placed on a state to protect a right or to investigate a possible violation are tempered by an assessment of what is proportionate. In practice, if an individual member of the armed forces dies or is subject to rape, they are entitled to a full, independent and transparent investigation in exactly the same way as anybody else.

76. Human rights have already made important changes to service life, creating fairer and safer conditions for members of the armed forces. For example, in September 1999 the ECHR declared that a ban on homosexuals serving in the armed forces was incompatible with human rights, and in January 2000 the British armed forces lifted their ban. Decisions from the ECHR have also served to strengthen the procedural guarantees in the Court Martial process, for example requiring that when the Court Martial imposes a deprivation of liberty as a sentence, the stronger elements of article 6 – the right to a fair trial – apply. This is proportionate, fair, and no less than service men and women – as humans – should be able to expect.

Human rights and the field of war

77. In June 2013, the Supreme Court gave its judgment in the cases of *Smith and Others v The Ministry of Defence*; *Ellis v The Ministry of Defence*; and *Allbutt and others v The Ministry of Defence*. The cases had been brought by the families of a number of British soldiers who were killed on duty in Iraq when, on separate occasions, their vehicles – Challenger II tanks and Snatch Land Rovers respectively – exploded following shell fire or detonation of an Improvised Explosive Device (IED).⁴⁹ The claims made by the families of those killed in the vehicles – sometimes referred to by those in the armed forces as “mobile coffins” – included claims in negligence and claims that the MoD breached its obligations under the ECHR to protect the right to life of the soldiers. The families made a series of different claims, including:

*“The claims are about alleged failures in training, including pre-deployment and in-theatre training, and the provision of technology and equipment. They are directed to things that the claimant say should have been done long before the soldiers crossed the start line at the commencement of hostilities.”*⁵⁰

⁴⁹ The families made a range of claims against the Army. In the first set of claims, the soldiers died when their Challenger II tank exploded due to shell fire from a nearby Battalion which mistook the soldiers for enemy personnel. In this case, the families brought claims in negligence and common law only. The “Snatch Land Rover” cases involved two separate incidents. In the first, three Snatch Land Rovers were on patrol in a town. When the soldiers manning the vehicles went to investigate an explosion, an IED detonated and the explosion killed or seriously injured all the soldiers. The second incident occurred some eight months later and followed a decision to reintroduce the use of Snatch Land Rovers after a period of suspension following the earlier deaths. Once again, following the detonation of an IED, the soldiers in the vehicle were killed or injured.

⁵⁰ *Smith v Others*, paragraph 91.

78. The MoD asked the court to “strike out” the claims. It argued that: (a) the ECHR only binds a member state “within their jurisdiction” and because the events took place outside of the UK’s territory the ECHR does not apply; (b) that the MoD did not owe the soldiers a duty under Article 2 of the ECHR at the time of their death; (c) that the claims in negligence and common law could not proceed because the principle of combat immunity applied and, (d) it would not be fair, just or reasonable to impose a duty of care in the circumstances of the case. The court did not decide the outcomes of the cases, rather it reached a conclusion as to whether or not the claims had a legal basis and could proceed.

79. In relation to the human rights claims, the court decided that the ECHR could bind the UK government outside of UK territory. It held that while a state’s jurisdiction will normally only be considered to cover its own territory, there are cases where jurisdiction applies extra-territorially. The court noted that jurisdiction can exist when a state through its agents exercises authority and control over an individual. In the context of the cases, it was decided that British service men and women are under the complete control of the UK authorities, having relinquished almost total control over their lives to the state. This was therefore one of those circumstances in which the state has jurisdiction over an individual outside its territory. As the court highlighted – certainly no other state was claiming jurisdiction over the soldiers.

80. On the matter of whether the MoD owed the soldiers a duty under Article 2 of the ECHR, the court proceeded with care, warning:

*“This, then, is a field of human activity which the law should enter into with caution.”*⁵¹

⁵¹ *Smith v Others*, paragraph 66.

81. However, the court did not consider that the need for caution meant that there was no duty at all. Rather, it concluded that in some circumstances there would be no duty, but in others there might be one – the facts would be central. The court was absolutely clear, for example, that the simple fact of sending soldiers into battle with the risk that they might lose their lives did not itself contravene the right to life. It explained:

*“the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations of armed conflict which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article.”*⁵²

82. The court agreed to allow the human rights claims to proceed because until further facts were uncovered and explored, it would not be possible to know whether the situations in which the soldiers died involved a duty under Article 2 or not. The court absolutely did not say that either a duty existed or that such a duty had been breached, and warned:

“The claimants are, however, on notice that the trial judge will be expected to follow the guidance set out in this judgment as to the very wide measure of discretion which must be accorded to those who were responsible on the ground for the planning and conduct of the operations during which these soldiers lost their lives and also to the way issues as to procurement too should be approached. It is far from clear that they will be able to show that the implied positive obligation under article 2(1) of the

⁵² *Smith v Others*, paragraph 76.

*Convention to take preventative operational measures was breached in either case.”*⁵³

83. So far as the claims in negligence and common law might be made out, the MoD argued that the doctrine of “combat immunity” should apply. The court was clear that the doctrine itself “is not in doubt”,⁵⁴ but questioned the extent of the immunity. After analysing the case law, the court concluded that the MoD was trying to apply the doctrine to a broader set of circumstances than had previously been within the definition:

*“to apply the doctrine of combat immunity to these claims would involve an extension of that doctrine beyond the cases to which it had previously been applied. That in itself suggests that it should not be permitted. I can find nothing in these cases to suggest that the doctrine extends that far.”*⁵⁵

84. In a report published in October 2013, the think tank Policy Exchange claimed that the decision in *Smith* was “the apogee of judicial encroachment” and “undermines the very ability of the British armed forces to operate as a professional body.” The role of human rights law came in for particular criticism. Similarly, a recent report of the Defence Select Committee expressed concern about the decision in *Smith*.

85. These concerns and criticisms are strong and trenchant, but appear to be based on a misunderstanding of the judgment in the case. In summary, the court made the very limited and rather uncontroversial findings that:

⁵³ *Smith v Others*, paragraph 81.

⁵⁴ *Smith v Others*, paragraph 89.

⁵⁵ *Smith v Others*, paragraph 92.

- the ECHR did apply to the relationship between the British army and its soldiers in Iraq;
- the existence and extent of a duty to protect the right to life of soldiers would depend on the circumstances, based on whether it was reasonable and proportionate to impose an obligation on the state; and
- the doctrine of combat immunity was cited with approval but the MoD had attempted to invoke combat immunity to cover situations which had not been covered previously.

86. The judgment in *Smith* was considered and cautious and does not justify claims of judicial encroachment. The court set out what law should apply, and warned that determinations would be highly fact-dependant and that wide measure of discretion should be afforded to the armed forces.

87. However, in light of the heavy criticism it is important to address the underlying critique that human rights should not apply to soldiers. It is difficult to understand why the UK should not be required to comply with its human rights obligations towards a soldier simply because he or she – who is of course under the total control of the British state authorities – has been stationed abroad rather than at home. It is especially odd when the court is so clear as to the restricted way in which any human rights obligations might ultimately apply. The fact of sending a soldier to fight who subsequently dies does not mean that there has been a violation of the right to life, but does this really mean that the army owes no duty to its soldiers to take reasonable steps to protect them, for example by giving them adequate equipment?

88. In response to a Parliamentary question, the Secretary of State for Defence, Phillip Hammond MP, made the following statement:

“There are issues about the encroachment of judicial processes into the operation of the armed forces. A number

of cases currently before the courts, or pending, could have a significant impact, and we are watching them closely. We are clear that once we commit our armed forces to combat, they must be able to carry out operations without fear of constant review in the civil courts. If we find that the current cases develop in a way that makes that difficult, we will come back to the House with proposals to remedy the situation.”⁵⁶

89. It is unprincipled, irresponsible and unnecessary for a Government Minister to make even oblique suggestions about the implications of as yet undecided cases in the courts, especially when these implications could be an alteration of our international human rights obligations. There is no justification for arguing that members of our armed forces should not be protected by the HRA, especially when it has been made clear that obligations placed on the state will be proportionate to the circumstances. And any suggestion that service men and women are not capable of understanding, respecting and acting in accordance with the law that governs their actions is offensive. All service men and women should know the law and feel empowered to act within its boundaries. If individuals are not confident in this, then that is certainly something that must be resolved through education and training, but the solution is not simply to abolish the governing legal framework. For this sensitive area of public policy to be turned into a politically-driven attack on human rights legislation is deeply cynical, not worthy of the service men and women who are willing to give their lives to protect this country.

⁵⁶ HC Deb, 17 March 2014, c554.

Conclusion

90. The proposals in this document largely call for structural and procedural changes to the military justice system. Liberty considers that these proposals will make it easier for members of the armed forces to enforce their rights, by ensuring that the state has adequate mechanisms in place to prevent, investigate and punish poor or criminal behaviour. But our reforms would go further than that. They would send a signal that the Government takes the human rights of service men and women seriously. It would act as a warning to those who violate the dignity, equality and human rights of their fellow service men and women that this behaviour will not be tolerated. The problems highlighted above suggest that a significant degree of cultural change is necessary. While structural changes alone cannot lead to this change, the reforms would help to create a virtuous circle, whereby individuals see that proper action is taken, hopefully leading to fewer incidents of poor behaviour as perpetrators understand that it will no longer be tolerated. In the context of rights of women in the forces, it is also to be hoped that evidence of greater respect for women would encourage more women to join the services, making them less of a minority and a target.

Sara Ogilvie and Emma Norton

Liberty believes that members of the armed forces deserve the same protection against criminal behaviour and poor treatment as civilians. Unfortunately, the current system of military justice is failing our service personnel.

A serious lack of procedural safeguards to ensure that allegations made by or about members of the armed forces are investigated independently and impartially means that the system not only fails to provide justice for service personnel and their families, but also leads to an environment where harassment, abusive and criminal behaviour is able to flourish.

This report makes six recommendations for reform in order to ensure legal processes are adequate to the task in hand. If accepted, these would send the message that allegations of criminal or improper behaviour will be taken seriously in-and-by the armed forces.

We also challenge the notion that human rights have no place protecting those who take such risks and make such sacrifices to serve their nation.

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This Report is dedicated to Corporal Anne-Marie Ellement, her family and all the families of service personnel whose loved ones have been let down by an inadequate military justice system.

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