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**Liberty's briefing on the Armed Forces  
(Service Complaints and Financial  
Assistance) Bill for Second Reading in  
the House of Commons**

**January 2015**

## **About Liberty**

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

## **Liberty Policy**

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

Liberty's policy papers are available at  
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## Introduction

1. Liberty welcomes the opportunity to brief Parliamentarians on the Armed Forces (Service Complaints and Financial Assistance) Bill. The Bill was announced in the Queen's Speech of June 2014 and was introduced in the House of Lords on 5 June 2014. It had its first reading in the House of Commons on 21 November 2014 and Second Reading will take place on 2 February 2015. The Bill makes provision for the reform of the internal complaints systems of the armed forces and would establish a Service Complaints Ombudsman, as announced by the Ministry of Defence in March 2014. It also makes provision for financial assistance for the benefit of the armed forces community.

2. Liberty launched its Military Justice campaign in July 2013 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 – including service complaints – to make it fair for all service personnel. Our work in this area has included considerable litigation on behalf of service men and women and their families. We represent the sisters of Anne-Marie Ellement, the families of three of the four soldiers who died at Princess Royal Barracks in Deepcut, Surrey and are regularly approached for advice from many other serving or former members of the services. We have met with senior members of the armed forces, politicians with an interest in defence and the current Service Complaints Ombudsman. As part of this campaign, Liberty has called for the creation of an armed forces ombudsman.

3. We therefore very much welcome the decision of the Government to replace the Service Complaints Commissioner with the office of Service Complaints Ombudsman (the ombudsman) and support many of the powers accorded to the ombudsman in the Bill. However in a number of respects the Bill is vague and leaves detail to regulations. We are concerned that without greater clarity in the Bill, these regulations could be used to tie the hands of the ombudsman. In addition, the Bill contains some significant limitations on the matters the ombudsman can investigate and limits the effects of her recommendations, which may undermine the powers that the Bill proposes to give to the ombudsman. We are concerned that this will reduce confidence in the proposed system, which will in turn render it less effective than it needs to be in order to deliver fairness to those who serve. In its recent report on the Bill, the Defence Select Committee expressed similar concerns. This briefing

summarises the proposals relating to the Service Complaints Ombudsman and sets out where we consider that the protection offered to members of the armed forces can be strengthened.

## **Background**

4. Part 14 of the Armed Forces Act 2006 sets out that any person who is subject to service law and who thinks him or herself ‘wronged’ in relation to any aspect of their service life can make a complaint about it. Each of the three services – the British Army, the British Royal Navy and the British Royal Air Force – has its own internal complaints system, with the Armed Forces Act and regulations setting out the framework for these systems.

5. The Armed Forces Covenant sets out that the armed forces have a responsibility to maintain an organisation which treats every individual fairly, with dignity and respect, in an environment which is free from bullying, harassment and discrimination.<sup>1</sup> The Covenant also sets out that individuals must have a means of recourse open to them if they believe that they are not being treated in a fair and appropriate way.<sup>2</sup> A trusted and effective complaints system is essential to meet these commitments.

6. In civilian workplaces, when an individual thinks they have been treated unfairly – be it holiday allowance, pay, dismissal – it is open to them to make a claim to an employment tribunal. The employer-employee relationship in the military is different in a number of ways. Commanding Officers have a huge amount of control over the lives of those under their command, much more than that of civilian employers. They are responsible for maintaining discipline and have significant powers to sanction individuals, even having jurisdiction to take a view on criminal allegations made against an individual. But unlike their civilian counterparts, service men and women are not entitled to make a claim to an employment tribunal, with the exception of cases involving discrimination. In addition, a member of the armed forces has significantly less autonomy over their life than a civilian, with their day-to-day timetable often not within their own control. They may also be stationed abroad. This means that in practical terms, individuals will find it more difficult to access a solicitor or to seek advice about a problem they have. It is also worth adding that

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<sup>1</sup> The Armed Forces Covenant, Section C(6), Responsibility of Care.

<sup>2</sup> The Armed Forces Covenant, Section C(15), Recourse.

members of the armed forces are much more limited in the way in which they can leave the employment of the relevant service than civilians, so when problems arise their options are very limited.

7. The armed forces don't just constitute employer. They are also landlord, healthcare provider, social worker and more. However members of the armed forces often will not have the same contractual or public law rights as civilians to deal with accommodation problems or to challenge poor healthcare. The right to make a service complaint is therefore essential, filling the void where civilian redress mechanisms are unavailable or inaccessible to service men and women. If members of the armed forces were unable to raise these types of grievance through a complaints process, they would have nowhere to turn to get things put right. Not only would this be unfair for the individual concerned, but the effects of unresolved grievances can also have a negative impact on the morale of whole units. Service complaints offer the armed forces an opportunity to identify systemic problems and to learn from mistakes that have been made, giving them vital information about how to improve the way they deal with those under their command.

8. Unfortunately, the history of service complaints is not a positive one. For decades there have been concerns that the internal complaints systems of the armed forces were not trusted by service men and women to resolve problems. In 2006, the report into the circumstances surrounding the death of four trainee soldiers at Princess Royal Barracks in Deepcut, Surrey, recommended introduction of an independent element into the service complaints system. Mr Justice Blake remarked:

*"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"*<sup>3</sup>

9. At the time, the Government rejected the call of Mr Justice Blake and the Defence Select Committee to establish an armed forces ombudsman, but did create the office of the Service Complaints Commissioner to oversee and report

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<sup>3</sup> 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.

independently on the operation of the service complaints systems. However evidence continues to suggest that the armed forces are struggling to protect service personnel from workplace problems such as bullying and harassment.

10. In her most recent report, the SCC 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.”<sup>4</sup>*

11. The 2013 Armed Forces Attitudinal 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. Yet only 8% of the *total of those subject to this behaviour* made a formal written complaint.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

12. The announcement of the creation of the ombudsman came only weeks after the verdict was delivered in the inquest into the death of Corporal Anne Marie Ellement, who killed herself 18 months after she alleged she was raped by a military colleague. The inquest found that Anne Marie had suffered workplace bullying, including rape-related bullying and the Coroner termed the situation a “hothouse”, concluding it was inevitable that incidents would occur.<sup>8</sup> When Anne Marie reported that she was being bullied it was not investigated.

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<sup>4</sup> Armed Forces Services Complaints Commissioner, Annual Report 2013, page 4.

<sup>5</sup> 2013 Armed Forces Continuous Attitude Survey, page 4.

<sup>6</sup> House of Commons Defence Committee, The work of the Service Complaints Commissioner for the Armed Forces, Eight Report of Session 2012-13, paragraph 8.

<sup>7</sup> Ibid.

<sup>8</sup> Narrative verdict, Inquest into the death of Corporal Anne Marie Ellement, 3 March 2014.

13. It is imperative that service men and women have the confidence to pursue a complaint, safe in the knowledge that it will be dealt with fairly and impartially, and that they can feel confident at the outset that making a complaint will not cause more problems or difficulties for their service life than it resolves. While a number of the proposals in the Bill are strong and begin to send the message that making a complaint will be worthwhile, a number of small policy details undermine this message. More fundamentally, two significant limits of the powers of the ombudsman – limiting the scope of what can be investigated and leaving the final decision as to the course of action to follow up to the internal Defence Council or its delegates – could seriously hamper the adequacy of the new model and risk creating the impression that complaints will not be effectively investigated and properly resolved. This risks discouraging complaints, with all the problems for individuals and the armed forces that a poor complaints system engenders and exacerbates.

#### **Clause 1: Creation of office of Service Complaints Ombudsman**

14. Clause 1 of the Bill would abolish the current role of Service Complaints Commissioner (SCC) and would replace it with the office of Service Complaints Ombudsman. The clause sets out that the ombudsman would be appointed by the Secretary of State and would not be a member of the armed forces. It adds that the ombudsman would hold and vacate office in accordance with his or her terms of appointment.

15. As part of our Military Justice campaign, Liberty has called for the creation of an independent armed forces ombudsman. As noted above, the service complaints system is not trusted by many service men and women and is not effective and timely in dealing with their complaints. An independent investigative tier to improve confidence in and the efficacy of the system is sorely needed. The office of the SCC is purely an oversight mechanism, with no powers of investigation, no powers to make recommendations and no powers to mandate outcomes. 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.<sup>9</sup> Until recently, Service Chiefs and the Ministry of Defence strongly refuted these claims and resisted attempts to change the SCC into an ombudsman. In evidence to the Defence Select Committee in 2012, the

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<sup>9</sup> House of Commons Defence Committee, The work of the Service Complaints Commissioner for the Armed Forces, Eight Report of Session 2012-13, paragraph 16.

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.”*<sup>10</sup>

16. We therefore very much welcome the belated establishment of the ombudsman and the introduction into the service complaints system of an empowered external element. As with any justice system, it is imperative that the military justice system is independent. This is the only way in which to guarantee impartial decisions and is necessary in order to engender confidence in the system, from both the service men and women it is meant to serve and among the wider public.

17. While we welcome the stipulation that the ombudsman must not be a current member of the armed forces, we note with a degree of concern that a number of aspects of the process for appointment set out in the Bill could be seen to undermine the independence of the ombudsman. For example, the ombudsman could be a person who has very recently left the armed forces. This could create the impression that the ombudsman is not sufficiently impartial and it certainly increases the chances that the ombudsman may know individuals involved in the handling of complaints he or she is investigating. The Defence Select Committee recommended that the Bill should stipulate that a person should not be eligible to be appointed as ombudsman for a period of five years after leaving the regular or reserve forces.<sup>11</sup>

18. Another problem is that the Bill does not set out how long the ombudsman’s term of office will last, leaving this information instead to the ombudsman’s terms of appointment. The Ombudsman Association’s criteria for the recognition of ombudsmen sets out under the heading on ‘independence’ that:

*“The term of office should be of sufficient duration not to undermine independence. The appointment should be for a minimum of five years. It may be subject to renewal but the renewal process should not undermine or compromise the office holder’s independence.”*

19. In the absence of a statutory term of appointment, the Secretary of State at the time will decide on the duration of the ombudsman’s term and it would be possible for senior members of the military to make suggestions as to the appropriate

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<sup>10</sup> House of Commons Defence Committee, The work of the Service Complaints Commissioner for the Armed Forces, Eight Report of Session 2012-13, paragraph 60.

<sup>11</sup> Defence Select Committee, Report on the Armed Forces (Service Complaints and Financial Assistance Bill), Fifth report of session 2014-15, paragraph 19.

term or to indicate whether they would prefer for a particular ombudsman to have their term renewed or not. The Bill also does not make clear whether or not an ombudsman can be reappointed. Reverend Nicholas Mercer, former Army Legal Adviser and Lieutenant Colonel explained to the Defence Select Committee his concern that this creates the danger that the Secretary of State would be tempted to appoint an ombudsman who was seen to have good relations with the chain of command.<sup>12</sup> The problematic nature of reappointment provisions has very recently been demonstrated in the case of the Chief Inspector of Prisons. The current Chief Inspector, Nick Hardwick, has almost come to the end of his first five year term. He has been described as a “*fearless reporter of facts*”.<sup>13</sup> The Ministry of Justice announced that he was entitled to apply for the role again, although he would not be automatically reappointed, as has happened with predecessors. In response, Mr Hardwick announced that he would not apply for reappointment on the basis that “*you can’t be independent of people you are asking for a job.*” During the passage of the Bill through the House of Lords, the Government indicated that the term of appointment would be for a minimum of five years and would be non-renewable. We are concerned that the absence of statutory provisions to this effect will create a significant risk that the independence or perceived independence of the ombudsman role will be compromised.

## **Clause 2: Reform of system for redress of individual grievances**

20. Clause 2 of the Bill inserts new Part 14A into the Armed Forces Act 2006, which updates the framework governing the internal complaints systems of each of the armed forces and also sets out provisions relating to the office of the new ombudsman.

### *Who can complain*

21. New section 340A of the Armed Forces Act sets out who can make a service complaint. As under the current system, entitlement to complain is limited to a person subject to service law or a person who was formerly subject to service law.

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<sup>12</sup> Ibid paragraph 23.

<sup>13</sup> By Lord Ramsbotham former Chief Inspector of Prisons, see: <http://www.theguardian.com/society/2014/oct/08/chief-inspector-prisons-nick-hardwick-denied-second-term>

22. This means that there is a small but important accessibility gap in both the internal complaints and ombudsman systems. When a service man or woman has died without making a complaint, there is no room for a family member to pursue a complaint on their behalf. The fact that an individual is deceased and can no longer benefit directly from the investigation of a complaint does not mean that other benefits cannot be obtained. Families of service men and women are often required to make sacrifices in support of their loved one's decision to join the services. Partners and children may live on barracks; parents may face long periods of uncertainty concerning the safety of their children. For many, they feel that they have entrusted the wellbeing of their loved one to the armed forces. When an individual's family or friends have information or evidence to suggest that their loved one was treated unfairly in their service life, it is important that they are able to find out the truth. Complaints are also acknowledged as useful to the service concerned. They can help to identify wider problems, the resolution of which is good for morale and the effective and fair operation of the service in question. In a situation where an individual has died, there is perhaps even more rather than less need to investigate.

23. This issue was considered in the House of Lords, where the Government argued that the service complaints system was not the appropriate place to deal with these types of complaint. The Minister stated:

*“A complaint about harassment might hinge on the intentions behind comments made or on the actions of either the complainant or the person who is alleged to have harassed them. There may be issues of what was considered acceptable behaviour by both parties. There may be witnesses to the alleged behaviour who need to be involved. For any process to be fair, and for there to be confidence in it, all the parties involved must be able to put forward their own version of events and be able to challenge the version presented by others. That is the natural basis of justice. It is particularly important where reputations or future careers may be affected.”<sup>14</sup>*

24. While we understand the concerns, we do not agree that in these circumstances it is impossible for a person implicated in a complaint to respond to any allegations and to have a fair opportunity to make their case – the questions simply have to be put to them. The Government suggested that there are alternative

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<sup>14</sup>House of Lords Hansard, 9 July 2014, per Lord Astor of Hever at column 23.

and more appropriate ways for family members to raise concerns. But if the armed forces take these other avenues of complaint seriously, then surely they will still require individuals involved to give their version of events and the force concerned will come to a conclusion as to the course of action to be taken? The consequences of this process will surely be as serious for those concerned as a service complaint.

25. On the basis of our experience of acting for clients in this area, we also challenge the suggestion that it is easy for families of deceased members of the armed forces to raise concerns through other routes. During debates in the Lords , the Minister raised the case 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 themselves, following which a decision was made that no charges should be brought. She committed suicide in October 2011. A very brief inquest was held which did not examine any of the matters in any depth. Liberty acted for Anne-Marie's sisters and following a judicial review we brought on their behalf, 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. This information about the difficult working and living conditions Anne Marie endured would not have been made available to either Anne Marie's family nor the Army had it not been for the hard fought for second inquest.

26. The Minister suggested that the Army was quick and ready to conduct its own internal investigations following the result of the second inquest.<sup>15</sup> However it took considerable work to get to this point for the family of Anne-Marie. The second inquest took place only with significant legal work and a judicial review. We suggest that the majority of grieving family members of a deceased member of the armed forces will not be in a position to instruct solicitors in order to establish the truth about circumstances surrounding the death of their loved one.

27. In addition, where an individual has died in circumstances which causes the family member to have concerns about the extent to which the welfare of their loved one was protected by the armed forces, it seems unfair to expect the family member

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<sup>15</sup> House of Lords Hansard, 9 July 2014, per Lord Astor of Hever at column 231.

to be content to approach the armed forces on an informal basis rather than there being a clear route for them to follow.

### *Admissibility of a complaint*

28. New section 340B sets out the procedure for making a complaint. If an individual's service complaint is deemed inadmissible by the internal complaints procedure, the individual concerned is able to request that the ombudsman reviews this decision. The ombudsman's decision on admissibility of a complaint will then be final and binding. Liberty very much welcomes this provision in the Bill. It is important that those who wish to make a complaint do not fall at the first hurdle due to biased or incompetent decision-making by an internal process.

29. 340B(1) also allows the Defence Council to make regulations about the procedure for making and dealing with a service complaint. We understand the desire on the part of the armed forces to play a role in setting out how their internal complaints system will operate. However, it is important to remember that this internal complaints system also replaces the role of the employment tribunal. Just as it would be completely inappropriate for an employer unilaterally to set the rules of engagement for an employment tribunal, it is inappropriate for the Defence Council to have absolute power in this regard. The Defence Select Committee commented "*We are convinced that there should be a degree of independent scrutiny and input into the content of the regulations for the procedure for making a complaint and determining the admissibility of service complaints*" and went on to recommend that a requirement that the Defence Council consult with the Ombudsman be inserted into the Bill.<sup>16</sup>

### *Ombudsman investigations – scope*

30. New section 340H makes provision relating to the new ombudsman's investigations. New subsection 340H(l) sets out that the ombudsman may investigate a complaint of maladministration in connection with the handling of a service complaint. New subsection 340H(4) sets out that the purpose of an investigation is to decide whether the alleged maladministration took place and if so, whether it could have resulted in an injustice being sustained by the complainant. This means that the

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<sup>16</sup> Defence Select Committee, Report on the Armed Forces (Service Complaints and Financial Assistance Bill), Fifth report of session 2014-15, para 29.

ombudsman may investigate whether a complaint was handled in a procedurally incorrect way, for example whether there was bias or whether relevant information or evidence was not taken into account. The ombudsman can also explore whether the mishandling of the complaint led to injustice, for example a fair outcome was not reached because of the maladministration. However, the ombudsman is not able to investigate the substance of the initial incident or incidents that generated the complaint or any injustice that arose from it, only the procedure for dealing with the complaint.

31. This is a fundamental omission from the proposed system. It is entirely conceivable that a complaint may be conducted in a procedurally sound way but that the conclusion of the investigation was perverse. It serves to make the scheme look somewhat bureaucratic rather than a genuine attempt by the armed forces to ensure that complaints can be dealt with in a fair and independent manner. It is unclear why the Government has accepted the need to introduce an external element to the complaints process, but does not wish them to have powers to investigate the substance of initial complaints. Surely it is just as important to establish that a complaint was resolved correctly as it is to establish that it was conducted in a fair manner? If the thrust of this Bill is to make the service complaints system more effective, individuals must have confidence in it. Anything that signals that the government is not committed to resolving complaints fairly will not support this aim. The Defence Select Committee concluded that the ombudsman should be able to investigate the substance of a complaint, noting that it saw *“no reasons to believe that this would undermine the chain of command”*.<sup>17</sup>

32. Arguments of efficiency also weigh in favour of allowing the ombudsman to consider the underlying complaint as well as any claims of maladministration. If the ombudsman can take a view on the initial complaint and also makes a finding of maladministration, the service concerned will not need to go back to reinvestigate the initial complaint. This will result in a faster outcome for an individual who will already have been through two internal complaint tiers and the ombudsman process.

33. When the ombudsman model was first adopted in the United Kingdom in the 1960s, ombudsmen did only investigate complaints of maladministration. However, as the model has become more popular and established, the powers of ombudsman

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<sup>17</sup> Defence Select Committee, Report on the Armed Forces (Service Complaints and Financial Assistance Bill), Fifth report of session 2014-15, para 42.

have developed. The Scottish Public Service Ombudsman, the Local Government Ombudsman for England and the Prisons Ombudsman are all empowered by statute to investigate 'service failure' in addition to maladministration. In its 2011 report on public service ombudsman, the Law Commission observed that it could see no reason why the Parliamentary Ombudsman – the first ombudsman in the UK – should not have its powers increased to investigate service failure too. Therefore it would be appropriate and consistent for the government to add to the Bill the power for ombudsmen to investigate the substance of initial complaints to establish whether they were resolved correctly.

#### *Applications to the ombudsman*

34. New section 340H(2) provides that an application to the ombudsman must be made in writing and must contain the information specified in regulations made by the Secretary of State. This is problematic. Liberty completely accepts that there must be a degree of formality to a complaints process and it is necessary that there is a record of the complaint. However, overly prescriptive requirements as to how applications are made could create the impression for service men and women that making a complaint is difficult and that the Ministry of Defence and armed forces want to dissuade complaints. This would undermine the purpose of this Bill, which is to ensure that they service complaints system is accessible and effective. In addition to problems of perception, the use in statute of 'in writing' could mean that an ombudsman feels compelled to decline complaints made by email, for example. Some members of the armed forces may struggle – for a huge variety of reasons – to be able to make a complaint in writing, and would prefer to make a complaint over the phone. It is unclear why this is not accommodated in the proposed scheme.

35. In its 2011 report on public service ombudsmen, the Law Commission explained that "*defining in statute how complaints should be made can become problematic as the methodology for communication changes (for example with developments in technology)*"<sup>18</sup> and concluded that "*there is no need for statutory requirements as to the form in which complaints are made.*"<sup>19</sup>

36. The Government has stressed that it expects that this provision will be interpreted broadly by any future Ombudsmen. It is difficult, in that case, to understand why this restrictive requirement forms part of the Bill at all.

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<sup>18</sup> The Law Commission, Public Service Ombudsmen, 13 July 2011, paragraph 3.17.

<sup>19</sup> The Law Commission, Public Service Ombudsmen, 13 July 2011, paragraph 3.19.

37. In addition, Liberty is concerned that the Secretary of State may make further regulations about the information that must be provided in a complaint to the ombudsman. It is surely for the ombudsman to determine what information is necessary in order for them to open a complaint? Broad powers for the Secretary of State to make regulations are unhelpful and fetter the proper discretion of the ombudsman to determine what information and processes are necessary and appropriate.

*Time limits for applications to the ombudsman*

38. New clauses 340H(5) and (6) set out that the Secretary of State may by regulation set time limits within which individuals must lodge their complaint with the ombudsman, but requires that this time limit must not be less than six weeks after the date on which the individual receives their decision from the relevant internal complaints system. New clause 340H(7) adds that it is for the ombudsman to determine whether an application has been made in time. Liberty understands the need for time limits in order to ensure that the ombudsman system is effective, but there will inevitably be cases where it is not possible for an individual to meet the time limits set out in regulation. For example, if an individual is stationed abroad or is in hospital they may struggle to meet the deadline. In these cases, it is only just that the ombudsman has discretion to accept a complaint. It is possible that this discretion could be read into the language of new subsection 340H(7). However, in the absence of clarification Liberty is concerned that a cautious ombudsman would not consider themselves to have the power to override the time limits set by the Secretary of State. Liberty therefore urges that the ombudsman's discretion is set out clearly on the face of the Bill.

*Procedure for ombudsman investigations*

39. Under new subsection 340I(1), it is for the ombudsman to determine whether to begin, continue or discontinue an investigation. It is entirely appropriate and that an independent office has discretion as to the opening and closing of complaints. However new subsections 340I(2) and (3) then send conflicting messages about the independence of the ombudsman. 340I(2) sets out that the Secretary of State may make regulations about the procedure to be followed in an investigation but under 340I(3) the procedure for carrying out an investigation is to be such as the ombudsman considers appropriate in the circumstances, subject to limits sets in

340I(2). It is unclear why the Government thinks that it is necessary for the Secretary of State to make provision about how the ombudsman can conduct investigations. If the intention of this provision is to allow the Secretary of State to set out an enabling framework to empower the ombudsman, then it would be helpful to specify this and to perhaps list the matters that the regulations may cover, for example the holding of hearings by the ombudsman. If this is not made clear, then it is possible that future Secretaries of State will use this broad provision to set limits on the way in which the ombudsman can operate to such an extent as to impede or even negate the effective operation of the system. While it is understandable that the Secretary of State has broader powers to set out – with some limits and in consultation with an independent body - the internal complaints system of the Ministry of Defence controlled armed forces operate, it is important to distinguish this from her powers in relation to an independent body such as an ombudsman. It would be preferable for provision for the Secretary of State to make regulations to be as limited and prescribed as possible, and for the text of primary legislation to state clearly that the detailed operation of the ombudsman's investigations cannot be mandated via any regulations.

#### *Investigative powers of the ombudsman*

40. New section 340J empowers the ombudsman to require that individuals provide for the purposes of an investigation documents or information within their possession or control. The ombudsman is also given the same powers as the High Court or the Court of Session for the purposes of the investigation in respect of the attendance and examination of witnesses and the production of documents. Under new section 340K, individuals who obstruct the ombudsman or act in a manner comparable with contempt of court can be sanctioned by a court.

41. Liberty very much welcomes these provisions. Not only would they equip the ombudsman with powers necessary to undertake investigations, but they would send a strong message to service men and service women that the Ministry of Defence and the armed forces take complaints and ombudsman investigations seriously. It is a pity that this strong message is currently undermined by other weaknesses in the Bill.

#### *Reports of investigations*

42. New section 340L sets out that the ombudsman would be required to prepare a report setting out his or her findings and recommendations. Under 340L(3) the ombudsman may make any recommendation for the purpose of remedying the maladministration or any injustice that the ombudsman considers have or could have been sustained as a result of the maladministration.

43. Liberty welcomes these reporting powers, which go further than indicated in the initial announcement by the MoD that it would establish an ombudsman. It is particularly welcome that the ombudsman can make a wide range of recommendations. However, as set out earlier in this briefing, it is disappointing that the ombudsman is able to investigate, report on and make recommendations solely in response to complaints of maladministration rather than the substance of initial complaints.

44. Further, we are concerned by unclear limits on the reporting powers of the ombudsman as set out in subsection 340L(7)(c) and we urge Peers to seek clarification from the Government as to their purpose and scope. The subsection provides that the Secretary of State may make regulations with respect to reports, including provision about obligations (including obligations of confidentiality) that may be imposed on persons to whom reports are sent. If this subsection is intended to indicate that the government intends that the privacy rights of complainants are not breached, we fully support this intention. However we anticipate that the Data Protection Act should cover this situation and the Defence Select Committee has asked the Government to confirm whether or not this is the case. We also add that it appears odd for the Secretary of State to seek to impose restrictions on those to whom reports are sent rather than requiring the ombudsman to comply with her duties under the relevant legislation. We are concerned that in the alternative this provision might be used to prevent complainants or others from speaking out about their experience and the outcome of an ombudsman's investigation. Not only might this constitute an interference with the individual's right to freedom of speech, but it would also significantly limit the persuasive power of the ombudsman if her findings and recommendations could not be made known more widely. The provision makes no reference to redacting reports in the interests of national security – unlike provisions for annual reports which appear later in the Bill – so it is unclear on which basis the Government seeks to impose these requirements.

*Non-binding recommendations*

45. It is a huge disappointment that new section 340M does not make recommendations made by the ombudsman binding. The section instead requires the Defence Council<sup>20</sup> to consider a report, to notify the ombudsman and the complainant of any action it decides to take and where it rejects a recommendation to give both the ombudsman and complainant its reasons for doing so. In the announcement made by the Ministry of Defence in March 2014 it was stated that the Defence Council would remain responsible for decisions taken in response to the ombudsman's recommendations in order to maintain the authority of the chain of command.<sup>21</sup>

46. Liberty very much welcomes the progress that the Ministry of Defence has made in accepting the need for an external oversight body in relation to service complaints. As set out above, independence is a core feature of any justice system and is essential to ensure that users of the system and the wider public can have confidence that decisions are made free from bias and other influence. The Ministry of Defence appears to accept this with the creation of the ombudsman. So it is unclear why it has decided to leave the final say to an internal rather than external mechanism.

47. 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 systems sends the wrong

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<sup>20</sup> The Defence Council is the senior departmental committee. It is chaired by the Secretary of State, and comprises the other ministers, the Permanent Under Secretary, the Chief of Defence Staff and senior service officers and senior officials who head the armed services and the department's major corporate functions. It provides the formal legal basis for the conduct of defence in the UK through a range of powers vested in it by statute.

<sup>21</sup> Philip Hammond MP, Secretary of State for Defence, Statement on Reform of the Service Complaints System, Thursday 13 March 2014.

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.

48. Liberty does not believe that the chain of command is undermined by admitting external elements to review processes. 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 investigation 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.

49. It is also useful to consider the cumulative impact of the proposals. As discussed above, the Bill does not provide for the ombudsman to investigate the underlying complaint. Any recommendations made by the ombudsman must relate only to the process of complaint handling. Given this significant limitation on the powers of the ombudsman, it seems particularly excessive to then give the armed forces the opportunity to refuse to implement recommendations.

50. It may be the case that the Government has more practical concerns about requiring the armed forces to accept recommendations, such as that the ombudsman may recommend something that the armed forces do not have the powers to do. The Defence Select Committee suggested that recommendations should be binding and suggested that practical concerns could be easily assuaged, as is considered good practice in many ombudsman schemes for the ombudsman to share a draft report of an investigation with the body being investigated prior to finalising it. If this approach were adopted, not only would it have the benefit of ensuring that the facts are all

correct, but it would give the relevant service the opportunity to point out if a recommendation was impracticable.<sup>22</sup>

51. Alternatively, the Government may be basing this decision on the fact that in the majority of public services ombudsman schemes, recommendations are not binding. Instead, it is hoped that the persuasive value of the ombudsman will suffice to encourage public bodies to comply with recommendations. If the public body does not do so, it is argued that this will best be resolved through political accountability, with individuals able to express frustrations at the refusal of public services to comply via the ballot box. However, the ombudsman is not a 'public sector' ombudsman in the usual sense, where the ombudsman is handling complaints about decisions or actions of Government departments in the provision of public services such as benefits and taxes. In this context, the Ministry of Defence or the relevant service is a public body, but it is acting as an employer. Therefore the better comparator is an employment tribunal, whose decisions are binding and enforceable.

52. 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...."*

53. Unfortunately it is far from clear 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 Ministry of Defence 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 Ministry of Defence 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

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<sup>22</sup> Defence Select Committee, Report on the Armed Forces (Service Complaints and Financial Assistance Bill), Fifth report of session 2014-15, para 63.

inquest into the suicide of Corporal Anne-Marie Ellement in March 2014. 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?

54. In evidence to the Defence Select Committee, the Government indicated that the *findings* of the ombudsman would be binding, but not the *recommendations*. If this is the case, it should be on the face of the Bill. Nonetheless, we do not consider that it goes far enough, especially if the ombudsman is only able to make findings on the basis of maladministration rather than the substance of the complaint, significantly restricting the area that ‘findings’ may cover.

#### *Referral of allegations*

55. Under new section 340N, if the ombudsman receives an allegation that a member of the armed forces has been wronged she may refer that matter back into the internal system of the relevant service. This replicates a current power of the SCC.

#### *Annual Report*

56. New section 340O requires the ombudsman to prepare for the Secretary of State an annual report commenting on the efficiency, effectiveness and fairness of the complaints system and the exercise of the ombudsman’s functions during that year. Liberty has always welcomed the SCCs annual reports and they have provided a vital insight into the service complaints system, and we support this proposal to continue with the annual reporting requirement.

57. During the passage of the Bill through Parliament and in evidence sessions with the Defence Select Committee there were a number of debates concerning the possibility of the ombudsman conducting ‘own initiative’ or ‘thematic’ investigations. It was suggested by the Government that there is a power implicit in the scheme for the ombudsman to report on themes, but not to conduct thematic investigations. The Defence Select Committee suggested that it was “*inappropriate*” that the Secretary of

State can require the ombudsman to conduct and report on a thematic investigation but that the ombudsman cannot do so at their own volition.

58. While a power of thematic investigation would be welcome, it is important to note that it would not be a substitute for a direct entitlement for individuals to ask the ombudsman to look at the substance of a complaint. It is important that individuals can have complaints resolved in as timely a manner as possible. Making a complaint the subject of a much wider investigations would inevitable slow down the process. It is equally important that each complaint is valued and considered on its own merits. It would be unfair to make investigation of a complaint reliant on the ombudsman considering that there is a broader issue at play. In addition, it is unclear that a wider investigation would provide the opportunity for the ombudsman to recommend a remedy in individual cases, instead focussing on generic recommendations for systemic improvement.

## **Conclusion**

59. The creation of the ombudsman marks significant progress and we welcome the Bill. We hope that the parliamentary process will strengthen the Bill, both by clarifying a number of the small details in the Bill and also by considering strengthening a number of powers of the ombudsman.

Sara Ogilvie