

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's briefing for Report Stage of the Armed Forces Bill in the House of Lords

April 2016

About Liberty

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

Liberty Policy

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

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

Contact

Bella Sankey

Director of Policy

Direct Line 020 7378 5254

Email: bellas@liberty-human-rights.org.uk

Rachel Robinson

Policy Officer

Direct Line: 020 7378 3659

Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie

Policy Officer

Direct Line 020 7378 3654

Email: sarao@liberty-human-rights.org.uk

Introduction

1. Launched in July 2013, Military Justice is Liberty's campaign to protect and uphold the human rights of those serving in our Armed Forces. We believe that the rights of service men and women are just as deserving of protection as those of civilians and we have been campaigning for changes to the military justice system to make it fair for all service personnel. Our work in this area has included public campaigning, policy development, and litigation on behalf of service men and women and their families. We represent the sisters of Anne-Marie Ellement, a member of the Royal Military Police who took her own life following her allegation that she had been raped by a RMP colleague who was dismissed without a proper investigation. Using the Human Rights Act we secured a second inquest into her death and a new investigation of her allegation that she had been raped. In October 2015, the Director of Service Prosecutions announced that following the fresh investigation two men had been formally charged with the rape of Anne-Marie. The two men were acquitted in April 2016. We also represent the families of Cheryl James, Sean Benton and James Collinson – three of the four trainee soldiers who died at the Deepcut Barracks from gunshot wounds between 1995 and 2001. We act also for the families of two British soldiers who died at Ballykinler barracks in Northern Ireland in 2012 and 2013 within 3 months of each other. There was a spate of 8 other serious self-harm incidents on the same barracks within the 6 month period within which the men died. Both had recently returned from active operations overseas and families are concerned about the quality of mental health and other support made available to them upon their return.

2. Following the recent acquittal of two men accused of the rape of Anne Marie Ellement, the Judge Advocate General Jeffrey Blackett took the unusual step of commenting on the inappropriate and deeply damaging attitude towards sexual relationships and offences within the armed forces at the time of the case:

"I also want to say something about the culture of the RMP in Sennelager in 2009. We have heard much about drinking to excess, sexual relationships between colleagues, intention to go to places that were out of bounds in the local town. The RMP more than other soldiers are required to uphold the standards and values of the British Army and to investigate those who fall below those standards. It appears to me that 110 Provost Company fell woefully short of those standards themselves. We all know the dangers of excessive drinking. The reasons that casual sexual relationships between colleagues in

the same unit are discouraged is because of the potential adverse effect they may have on moral and on operational effectiveness.”

The judge also condemned the failure of the police and prosecuting authorities to investigate and prosecute at the time the allegation was made and stated that the case should have been heard five years previously. He also called the behaviour of the defendants “disgraceful” and “dishonourable”.

3. It is unclear that this situation has improved. In its Sexual Harassment Report 2015, the Army recorded that 39% of servicewomen questioned had received unwelcome comments about their appearance, body or sexual activities compared to 22% of servicemen. 33% of servicewomen received unwelcome attempts to talk about sexual matters compared to 19% of men. 12% of women received unwanted attempts to be touched compared to 6% of men and 10% received unwelcome attempts to establish a sexual relationship despite discouragement compared to 2% of men. 4% of servicewomen were told that they would be treated better in return for a sexual relationship and 2% reported that they had been sexually assaulted.¹

Liberty urges all Parliamentarians to vote in support of Amendments 5 and 6 to the Armed Forces Bill.

Publication of statistics on sexual assault and rape

4. When the Armed Forces Bill was passing through the House of Commons at the end of 2015, the Government accepted our recommendation for systematic annual production of statistics on sexual assault and rape in the armed forces. Minister Mark Lancaster stated: *“I am determined to make the data that we publish robust, consistent and accessible. To that end, I am actively considering how best to publish the data as an official statistic.”*²

5. However the Government declined to put this requirement in primary legislation. During debate during Committee Stage in the House of Lords, the Government Minister Earl Howe sought to reject an amendment to provide for statutory reporting on the grounds that *“I suggest that we need to bear in mind that an unproven complaint should not blight a*

¹ Sexual Harassment Report 2015, page 23, Table 7.

² Armed Forces Bill Debate, 16 December 2015, Hansard at column 1623 per Mark Lancaster MP.

*person's career. This is a very sensitive issue and it is one on which I suggest that we must be very careful.*³

6. This is an odd position for the Government to take. Recording of crime statistics does not involve reporting the name of those alleged to have been involved in the incidents – they are anonymous statistics. It is also deeply irresponsible to suggest that “unproven complaints” ought to be the driver of the whole approach to sexual assault and rape in the armed forces. Evidence demonstrates that the armed forces remain a sexually charged environment where sexist behaviour, harassment and worse goes unreported and frequently unchallenged. The Government must take steps to show that allegations of sexual assault and rape will be taken seriously, rather than intimate that such allegations are something to be treated with scepticism.

7. Liberty encourages parliamentarians to vote for amendment 5. Amendment 5 would require the annual publication of statistics on the number of allegations of sexual assault and rape made by and against members of the armed forces along with statistics as to the number of referrals made to the Service Prosecuting Authority, the number of prosecutions and the number of convictions.

Commanding Officer's discretion to investigate allegations of sexual assault

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

9. However HMIC reports that *“An internal Army policy document issued in 2013 gives direction to commanding officers that all sexual offences must be reported to the RMP for investigation.”*⁴ It is not known whether the other two services have such a policy in place.

³ Armed Forces Bill Debate, 1 March 2016, House of Lords Hansard at column GC73 per Earl Howe.

10. In a note published by the House of Commons Library, it was explained that when Parliament debated the mandatory referrals process *“it seemed to have been accepted that the Government wanted to draw a line between those offences that are serious and those where the commanding officer should have some discretion.”*⁵ However, the note made clear that neither the House of Commons nor the House of Lords engaged in debate about the exemption of sexual assault from the scope of the mandatory referral process. It is therefore not at all clear why certain sexual offences came to be exempted.

11. Commanding Officers are institutionally unable to offer the independence necessary to investigate allegations of sexual assault involving victims and alleged perpetrators who are both known to them and within their control. Equally, they do not have the necessary level of expertise and experience to investigate these difficult offences.

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

13. A further problem with leaving this discretion in law, in particular where there is policy to the contrary, is that it creates room for confusion and grants cover for those who do not wish to follow policy or best practice. The HMIC report records that *“we were concerned to hear from a small number of RMP staff of a few occasions when commanding officers had decided to deal with offences that, based upon the facts presented to us, should have been referred to the RMP. Examples given included...sexual assault.”*⁶ It added that due to the failure of the services to maintain a crime register (as discussed above), there was no way for HMIC to corroborate this information. It concluded that *“Were this the case, it would be unacceptable as such action compromises the independence of any investigation, sharing of information and care for victims.”* This is clearly a concerning outcome for the individual

⁴ HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, page 13.

⁵ Letter from House of Commons Library, 28 February 2013, to Madeleine Moon MP.

⁶HMIC, An inspection of the leadership of the Royal Military Police in relation to its investigation, page 30.

concerned and goes against what both the Army and HMIC expect from the system. But for as long as the black letter of the law continues to grant Commanding Officers discretion in this area, it is only to be expected that in some cases they will use it.

14. During Committee Stage debate in the House of Lords, the Government response to an amendment to remove this discretion was inadequate and confused. Earl Howe, on behalf of the Government argued that *“The offence of sexual assault is so wide that, in my view, it is right for the commanding officer to have some discretion.”*⁷ He continued that this allowed the victim to determine whether complaints are referred to the police. However, as stated above, the Army has a policy in place that there should be no discretion exercised in cases of sexual assault. Therefore the explanation given by the Minister is entirely at odds with the approach that even the armed forces themselves believe ought to be taken.

15. The Government also suggested that it is important that victims rather than a Commanding Officer determines whether allegations are referred to the police⁸ and argued that as other employers are not required to refer complaints of this nature to the police, nor should be the armed forces.⁹ If the Government believes that it is for the victim to take responsibility for progressing allegations further then why does a mandatory process exist for other criminal offences? It is perverse to have a mandatory referrals process for other serious offences – including rape - but to refuse to apply it in cases of sexual assault. As to the second argument, this is a disingenuous position, as it ignores the fact that the Commanding Officer is not like another employer. The Commanding Officer is vested with powers to investigate and deal with allegations of criminal behaviour. When an individual reports an allegation to a Commanding Officer, they in effect are approaching the police.

16. The Government also stated that victims of sexual assault may bypass their Commanding Officer and go directly to a police force if they feel that their complaint has not been properly investigated. While this is factually correct, it completely misunderstands or ignores the reality that service women and men are trained from day one to operate within the institutional framework. For an individual to go above the head of their Commanding Officer will by many be considered a breach of loyalty which could have significant repercussions for their role in the services, on both a personal and professional level. In addition, victims of sexual assault are frequently traumatised by the effect of having their allegations disbelieved and by the process of having to repeat to others the details of their

⁷ Armed Forces Bill Debate, 1 March 2016, Hansard at column GC75 per Earl Howe.

⁸ Armed Forces Bill Debate 1 March 2016, Hansard at column GC75 per Earl Howe.

⁹ Armed Forces Bill Debate, 1 March 2016, Hansard at column GC76 per Earl Howe.

ordeal. For the Government to suggest that it is acceptable for victims of sexual assault to have to jump over hurdles until they find someone independent and experienced enough to handle their case is extremely disturbing.

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

18. Liberty encourages parliamentarians to vote for amendment 6, which would remove the discretion of a Commanding Officer to investigate allegations of sexual assault.

Sara Ogilvie