



House of Commons  
Defence Committee

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# The work of the Service Complaints Commissioner for the Armed Forces

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**Eighth Report of Session 2012–13**

***Volume II***

*Additional written evidence*

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## Defence Committee

The Defence Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Ministry of Defence and its associated public bodies.

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The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

### Committee staff

The current staff of the Committee are Alda Barry (Clerk), Dougie Wands (Second Clerk), Karen Jackson (Audit Adviser), Ian Thomson (Inquiry Manager), Christine Randall (Senior Committee Assistant), Carolyn Bowes and Rowena Macdonald (Committee Assistants), and Sumati Sowamber (Committee Support Assistant).

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# List of additional written evidence

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(published in Volume II on the Committee's website [www.parliament.uk/defcom](http://www.parliament.uk/defcom))

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# Written evidence

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## Written evidence from the British Armed Forces Federation (BAFF) (SCC 002)

### INTRODUCTION

1. This Memorandum is submitted on behalf of the British Armed Forces Federation (BAFF), an independent all-ranks tri-service representative staff association formed in December 2006 for serving members of Her Majesty's Forces, including the reserves. Former members of the forces may also join.

2. As a body which seeks to represent its members irrespective of rank, BAFF's interest in the service complaints system is primarily on behalf of the actual or potential complainer, but also includes those administering the complaints system and those who, with or without justification, find themselves complained about.

3. Our predecessors the BAFF Steering Group strongly supported the establishment of the Service Complaints Commissioner (SCC) under the Armed Forces Act 2006. BAFF has always been of the view that the Commissioner's powers and role should be increased to that of a full Armed Forces ombudsman responsible to Parliament.

4. We welcome the present inquiry, and are mindful of the significant role of the Defence Committee's predecessors in developing the debate which eventually led to the establishment of the SCC. The recommendations in the predecessor Committee's Duty of Care report<sup>1</sup> have, however, yet to be fully implemented.

5. We acknowledge the forthright commitment of Ministers and Service Chiefs to making the new system work and to cooperating fully with the Commissioner.

6. It is worth recalling that previous Ministers and Chiefs set their faces for many years against any move from the basic service complaints system under the single service discipline Acts of 1955–57.<sup>2</sup> Yet it would be very difficult to argue now that the 1955 system, such as it was, could in any way be appropriate for today's all volunteer professional forces.

7. While the Committee has invited written submissions from interested parties, Members will be aware that the Ministry of Defence's 2012 instruction on "Contact with parliamentarians" effectively forbids such contact by an individual member of the Armed Forces (without, of course, seeking to constrain contact with their constituency MP "on a purely personal matter").

### BULLYING

8. Because of its corrosive effect not only on individuals but also upon military discipline and cohesion, dealing with bullying must remain a priority for all concerned. While it can occur in any institution or any walk of life, bullying can be particularly damaging in the hierarchical and sometimes isolated service environment.

9. We have seen evidence of the "abuse of power or undermining of authority, particularly with regard to non commissioned and commissioned officers" which the SCC mentions in her 2011 report.<sup>3</sup>

10. We agree with the Commissioner<sup>4</sup> that the steady rise of "prescribed behaviour" complaints in the Army, particularly complaints about bullying, does not necessarily mean that there has been a rise in the actual incidence of such behaviour. Increased awareness may also play a part.

### INFORMATION AND AWARENESS

11. It is encouraging that the 2011 AFCAS report<sup>5</sup> shows a trend of increasing awareness of the SCC's existence, but awareness is still too low, even amongst commissioned officers. (10% of commissioned RAF respondents had "never heard of the Service Complaints Commissioner").

### PERCEPTIONS AND CULTURE

12. While the Services have in general responded extremely well to the development of the present service complaints system, there are cultural factors which have made it difficult for some officers to adjust. It can be difficult in any walk of life to deal with challenges (whether justified or not) to one's actions or decisions. It is entirely understandable that this can be even more difficult in the service environment.

13. We have seen a case in which a Commanding Officer, on becoming aware that a service wife had written to the SCC about matters of principle arising from a former unit, withdrew his personal support to the serviceman and arranged for the family to be dealt with thereafter by a subordinate. This shows that, unfortunately, there is still some factual basis to the perception that submitting a service complaint or involving the Commissioner may, as she puts it, have a "deleterious impact"<sup>6</sup> on the complainant.

14. The current atmosphere of redundancy and uncertainty is bound to increase the perception that submitting a service complaint may not be in the best interests of the complainer. Some will be particularly reluctant

to seek redress if it is seen to involve their present commanding officer, as opposed to some impersonal administrative failing.

#### EUROPEAN DIMENSION

15. BAFF currently has non-voting Observer status with the Brussels-based European Organisation of Military Associations (EUROMIL). As a result of that connection we are aware that the Commissioner and her office are highly regarded in other countries which already have, or are considering, some form of Armed Forces ombudsman institution. We have also observed that the appointment of the SCC has, if anything, enhanced the professional image of the United Kingdom Armed Forces amongst our overseas colleagues.

16. At a conference in December 2009 Hans-Gert Pöttering, the past President of the European Parliament, called for the creation of a European Military Ombudsman to be a focal contact point for various issues, including rules of engagement (ROE). BAFF opposed this proposal within EUROMIL on a number of grounds. Our strong reservations were shared by many of our overseas counterparts, including our concern about devaluing the status of national oversight arrangements, and a revised proposal was subsequently dropped.

17. The Council of Europe's Committee of Ministers adopted on 24 February 2010 a Recommendation<sup>7</sup> to member states on human rights of members of the Armed Forces. The United Kingdom (Ministry of Defence) was represented on the Working Group which revised the recommendations, as was BAFF through our Chairman's membership of the EUROMIL observer delegation. The recommendations include the following:

Members of the Armed Forces should have the possibility of lodging a complaint with an independent body in respect of their human rights. Members of the Armed Forces who claim to have been victims of harassment or bullying should have access to a complaint mechanism independent of the chain of command.

18. The Explanatory Memorandum accompanying the Recommendation cites in some detail the merits and benefits of a military ombudsman institution. The Council of Europe has recently (July 2012) initiated a review of national implementation of the recommendations. We consider the United Kingdom to be achieving or exceeding many (but not all) of the recommendations and that in many respects (but not all) our Armed Forces offer an example of good or best practice.

19. While references to human rights in the context of Armed Forces personnel are often dismissed, the European Convention of Human Rights has in reality contributed directly or indirectly to a number of changes which were initially opposed, but are now generally accepted as beneficial and sensible. These include far-reaching changes to the court martial and summary justice systems, the requirement to hold inquests into the deaths of Armed Forces personnel abroad (notwithstanding reservations about aspects of some inquests), the ending of discrimination on the grounds of sexual orientation, and of course the introduction of the current redress system and the establishment of the SCC.

#### THE ARMED FORCES OMBUDSMAN MODEL

20. Against that background, BAFF shares the SCC's view that her powers should be reviewed and that, of the four models examined in her Annual Report 2010,<sup>8</sup> the most efficient and effective model would be an Armed Forces Ombudsman. We agree that this would best protect the authority of the chain of command, and provide fairness both to individuals and to those complained about.

21. The detailed remit and procedures for the Armed Forces Ombudsman would need to be carefully designed, but unlike the position in 2006, the arrangements can now build on the experience acquired since then by the SCC, Ministry of Defence and Service authorities.

#### COMPLAINTS ABOUT MEDICAL TREATMENT AND MEDICAL DISCHARGES

22. We note the increase in contacts with the SCC about complaints of medical treatment and medical discharges, and the intention of the Surgeon General to revise and update the medical treatment complaints system and review its relationship with the service complaints system.<sup>9</sup> With ever-greater inter-agency working and integration between Defence Medical Services (DMS) and the National Health Service (NHS), there must be increasing likelihood that an individual complaint about treatment involves both DMS and NHS staff. This factor will no doubt play its part in the Surgeon General's review, and may support the case for oversight by an Armed Forces ombudsman operating in cooperation, and on an equal footing, with the NHS Ombudsman (Public Services Ombudsman in Scotland).

#### COMPLAINTS BY RESERVE FORCES PERSONNEL

23. We note that contacts from volunteer reserves made up 7% of all contacts to the SCC about potential Service complaints in 2011.<sup>10</sup> We have no data on the degree of awareness of the SCC amongst volunteer reserve personnel. We suspect that they tend to be less aware of the SCC than their regular counterparts, but also less likely to be deterred by career considerations from submitting a complaint and/or making contact with the SCC.

24. With increased reserves recruitment under FR20, and the prospect of changes to reservists' Terms and Conditions of Service, the handling of complaints by reservists may acquire more prominence in the future.

#### CONCLUSION

25. We are very grateful for the opportunity to make this submission, and would be pleased to submit further evidence on any particular points should that be helpful.

*September 2012*

<sup>1</sup> "Duty of Care", Defence Committee, Third Report of Session 2004–05, HC 63–1.

<sup>2</sup> Army Act 1955 (C.18), Air Force Act 1955 (c.19), Naval Discipline Act 1957 (c.53).

<sup>3</sup> SCC's Annual Report 2011, p 14.

<sup>4</sup> SCC's Annual Report 2011, p 24.

<sup>5</sup> Armed Forces Continuous Attitude Survey Main Results Edition 2012. Released 23 Aug 2012.

<sup>6</sup> SCC's Annual Report 2011, p 15.

<sup>7</sup> Recommendation CM/Rec(2010)4 of the Committee of Ministers to member states on human rights of members of the Armed Forces (Adopted by the Committee of Ministers on 24 February 2010 at the 1077th meeting of the Ministers' Deputies.)

<sup>8</sup> SCC's Annual Report 2010, pp 59–80, Ch 4—"Improvements for the future".

<sup>9</sup> SCC's Annual Report 2011. p 1.

<sup>10</sup> SCC's Annual Report 2011. p 13, footnote to fig.1.

#### Written Evidence from RAF Families Federation (SCC 003)

I write to provide evidence on the role of the Service Complaints Commissioner (SCC) from the perspective of RAF families. We have worked closely with the SCC since her office was established at around the same time the new RAF Families Federation was set up and, whilst only a small proportion of our casework overlaps, we have enjoyed good working relationships with Dr Atkins and her team and feel qualified to offer independent comment on her role and its impact on the RAF Service Complaints process.

From our perspective, over the past five years the SCC role has brought a much-needed focus to the staffing of complaints within the military system but has done little to address the root causes of the complaints themselves. Whilst I accept that the SCC's Annual Reports indicate a definite improvement in the staffing of complaints within the RAF system, with increased speed of staffing, better centralisation of data and a greater awareness of the need to treat complainants fairly, I do not detect a significant reduction in the number of complaints crossing either the SCC's desk or ours, and this is of some concern. There are still too many instances of personnel approaching our agencies seeking redress for the way they perceive they have been treated either by someone or by "the system". Many feel that they are caught up in a complex process of even more complex regulations and express frustration at their inability to get a sensible and timely response once the "system" has kicked in. Moreover, to read for the 4th year running that the SCC does not consider the Service Complaints process to be "effective, effective or fair" is a worrying trend that indicates further effort and resource may be necessary.

I have previously expressed my concerns to the RAF personnel staffs, and to Ministers, that, in comparison to my (halcyon!) days in the RAF, the Service has lost so much manpower and expertise in the HR arena (replaced only to a certain extent by the JPA system and self-service) that the quality of staffing is not what the HR staff might wish it to be—they are often simply too busy fire-fighting to focus on the quality of service being provided to their people. I don't blame the RAF for this—the HR staffs are doing a great job in difficult circumstances but when something or someone doesn't quite fit the mould, or a case requires more specialist knowledge of the rules and processes, I detect a lack of resource at unit level, and perhaps at Command and MoD level, too, to provide bespoke advice and support to anyone facing particularly challenging circumstances. Complaints can all too easily arise in such situations and prompt and effective staffing, backed up by strong communication, are then key to achieving resolution. When this is not delivered, people will turn to us or to the SCC and, whilst we tend to deal with different types of issues (for example it is rare for us to receive details of a sexual or racial harassment or bullying cases) there are common themes, with appeals and complaints about CEA (Board) crossing both desks, and allowances in general appearing to be an area of significant complaint, particularly since the recent review of MoD allowances.

As evidence of the RAF FF's concerns about Service Complaints, please find below an extract from a recent submission (July 2012) to the Min DPW&V which included reference to the Complaints process:

"Having just recently had a meeting with the Service Complaints Commissioner (SCC), I wish to raise a flag about our increasing concern that the Service Complaints process is becoming overwhelmed. We see only the 'tip of the iceberg' in terms of casework, but I worry that too many individuals are getting caught

up in protracted staffing procedures and that it is taking too long to get their complaints heard, investigated and assessed. I understand there is a particular backlog in getting legal staffs to complete their part of the process—we hear of cases sitting with the lawyers for weeks on end. There also seem to be significant delays at the SPVA, which frustrates the complainant and the parent P staff in equal measure.

The stress that some families are enduring, particularly if the case is linked to recovery of large amounts of CEA, is in my view unacceptable and I wonder if a focus on this might be helpful? I'm not sure if the other Federations get as involved in Service Complaint-related casework as we do—it is a chain of command issue primarily. However, if a family member wishes to ask for our confidential and independent advice on a complaint they wish to pursue, as long as it has a tangible link to family (and we agree they have a case to answer) we are happy to support them through the process. Some of these are now almost two years old. I understand that the MoD has conducted a review of the Service Complaints process which was supposed to report at the end of May 12. **I would welcome an update on this Review and seek the Minister's reassurance that the Service Complaints process will be kept under close scrutiny and that the recommendations articulated in the SCC's recent Annual Report are being taken seriously**".

Our perceptions regarding the role of the SCC are that the RAF families we represent tend to see Dr Atkins and her team as something of a "toothless tiger". Personnel who have spoken with us about the possible need to refer their case to the SCC have expressed significant concern at the SCC's lack of authority. They see her role as simply passing back to the chain of command to re-investigate something the chain of command has already reached a verdict upon—in effect, "marking their own homework". Serving personnel and families we have dealt with over the last five years have indicated a need for a truly independent review of their case, using external investigators, not the chain of command and that, without this type of resource, the SCC is forced to rely on an internal review. The chances of that review reaching a different conclusion are considered slim. They also cite that it can take a long time to staff a case via the SCC offices and that despite additional staff resource, the SCC is still struggling to cope with a very high workload. Staffing casework promptly is a continuing battle and, whilst many of the delays are not down to the SCC, but are due to the delayed responses from the three Services, the perception is that a delay is a delay, no matter whose fault it is. And if that delay is perceived in advance of submitting a complaint, it may well dissuade some from using the SCC at all.

In sum, we believe the SCC brings a necessary focus to the Service Complaints process and that Dr Atkins and her team have driven improvement across all three Services, albeit to varying degrees. By virtue of the SCC's access to the most senior military staffs and Ministers, we believe she is able to hold the Services to account but that her authority is limited and therefore further improvement is unlikely unless she is granted greater powers of independent investigation and the resources to undertake this additional task.

*Dawn McCafferty*  
*Chief Executive*

*July 2012*

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#### **Written Evidence from Major R A McLeod R SIGNALS LLB MA JP (SCC 004)**

##### **1. SERVICE COMPLAINTS COMMISSIONER POWERS**

"Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must".

Thucydides (460–395 BC), History of the Peloponnesian War, Sixteenth Year of the War, The Melian Dialogue.<sup>1</sup>

1. Following the deaths of Army personnel at the Princess Royal Barracks in Deepcut during the period 1995–2002, four enquiries took place, leading to reports by: the House of Commons Defence Select Committee, the Adult Learning Inspectorate, the Directorate of Operational Capability, and Sir Nicholas Blake QC. The last of these reports specifically examined the deaths of Sean Benton, Cheryl James, Geoff Gray, and James Collinson. Those reports were the catalyst for the Service Complaints process. That process has failed. It is capable of dealing with non-contentious cases, those exclusively involving junior personnel in which neither institutional interests nor the prestige of the chain of command are at stake, but beyond those heavily-circumscribed circumstances it is, as one victim described it, "not only useless, but worse than useless—if I knew that by submitting a complaint I was laying myself open for further mistreatment, I would have simply given up at the outset" (referring to a complaint stalled by Army HQ for 18 months at the time of writing).

2. Based on the experiences documented within this submission, it is recommended that to be effective, the SCC needs the powers detailed below. Concomitant to this, her office would require a significant increase in resources to be able to exercise its new powers. Assessing what those resources would be is, however, beyond the scope of this memorandum. It should be noted, however, that the cost of the SCC is likely to represent a significant saving to the MoD if it successfully reduces the MoD's losses at Employment Tribunals, and the unquantifiable loss of expensively trained, highly qualified personnel due to mis-management and misconduct. More importantly, the moral and human case for the fair treatment of service personnel defies financial calculation.

3. The following table documents the powers which the SCC needs to be credible and effective:

<i>Ser No</i>	<i>Power</i>	<i>Description</i>
1	Set complaints policy, including timelines	<p>While consultation with the MoD would be vital, the SCC should have the final say in setting MoD Service Complaints policy. This would primarily be in two areas: Joint Service Publications 831 and 763, which articulate MoD complaints handling policy, and—crucially—MoD timelines for Service Complaints handling.</p> <p>The MoD has an atrocious record for Service Complaints handling, with some complaints taking years to be investigated, let alone decisions being made. That justice delayed is justice denied is a cliché, but entirely accurate. As a consequence, many wrongs are incapable of being rectified, many complainants surrender in exhaustion and give up, and many service personnel do not even bother to submit a complaint as they realise that so doing is nugatory.</p> <p>Timelines for handling complaints from service personnel should be the same as those for civil servants: that the former have no one to defend their interests while the latter have unions is the realpolitik but reprehensible reason for the current incongruity between the MoD's treatment of the two. Operational reasons delaying service personnel's complaints should be justified on a case-by-case basis, not by treating service personnel as "second-class employees".</p>
2	Impose financial penalties for delayed complaint handling	<p>Having unified the civil service and service personnel timelines (with the SCC having final say on the latter), there needs to be an "incentives and enforcement" system to ensure that the MoD honour those timelines, both in terms of adequately staffing the service complaints system, and in ensuring that those staff progress cases diligently. The MoD currently has no such incentives.</p> <p>The SCC should be able to impose a penalty each time that an individual complaint is unjustifiably delayed by one month (noting that there may be valid operational or other reasons). This penalty must be linked with inflation so it is not rendered nugatory: Level 3 on the standard scale of fines for summary offences is suggested, currently £1,000, per section 37 of the Criminal Justice Act 1982, as this would allow it to evolve, as parliament amends that Act.</p>
3	Investigate complaints	<p>The SCC should have powers broadly equivalent to those of the Independent Police Complaints Commission (IPCC), which is able to investigate complaints independently, and make decisions entirely independently of the police, government and complainants. Like the police do with the IPCC, the Armed Forces should have first-instance jurisdiction over complaints, and the SCC should only be an office of last resort: The IPCC oversees the police complaints system and sets the standards by which the police should handle complaints. It is independent, making its decisions entirely independently of the police, government and complainants. The IPCC considers appeals from people who are not satisfied with the way the police force has dealt with their complaint. <b>Each police force has a Professional Standards Department (PSD) which is responsible for considering complaints and conduct matters involving police officers and police staff within their force.</b> The majority of complaints received by the IPCC are passed to the PSD for them to resolve. In addition, police forces must refer the most serious cases to the IPCC and, <b>where the public interest requires it, the IPCC may decide to investigate, manage or supervise a police investigation.</b></p> <p>Source: IPCC, <a href="http://www.ipcc.gov.uk/en/Pages/complaints.aspx">http://www.ipcc.gov.uk/en/Pages/complaints.aspx</a></p> <p>Service personnel should continue, as at present, to be able to submit a complaint directly to the SCC, as this provides a valuable source of advice to vulnerable and frightened junior personnel, and also serves to provide an objective and dispassionate perspective in cases where a complaint is not justified and a service person would benefit from the advice of an informed and empowered third-party who may be able to dissuade them from the rash submission of a meritless complaint.</p>

<i>Ser No</i>	<i>Power</i>	<i>Description</i>
4	Initiate investigations	<p>The SCC must be able to both direct that the Army initiate complaints investigations, and initiate investigations herself, of her own authority. This is important in cases where an incident is suspected to have occurred, and has been reported by a third-party, but the service personnel involved are too afraid to speak out, or are coerced not to do so. Such a power is likely to be used rarely, but its benefits should be self-evident. It is also useful where the Army are exercising their powers unlawfully across a wide community, for example placing soldiers under “de facto house arrest” by the imposition of curfews or simply bans on all junior soldiers leaving camp, as some garrison commanders have used in recent years, or the contrivance of “mandatory parades” at 0900 on Sunday mornings at church, as a device to overcome the fact that we can not order soldiers to go to church any more. These are the sorts of low-level but unlawful actions which illegitimately interfere with soldiers’ private lives, and which commanders can order without consequences, and which soldiers correctly fear that they would suffer consequences from reporting as a complainant. Were they able to inform the SCC and allow her to initiate investigations where she felt it justified, however, fears of victimisation would be mitigated, as there would not need to be a named complainant.</p>
5	Take over improperly-delayed investigations	<p>Once complaints are filed with the MoD, it is vital that the department’s current powers to stall cases, sometimes for years, and in so doing cover up serious misconduct, are removed. If 28 days after submission a case has not been progressed in accordance with the time frames set out by the SCC (See Set complaints policy, including timelines, above) and a service person believes the delays to be without good reason, they should have the right to request that the SCC intervenes directly to seek information, issue binding direction, or take over the investigation. This is in line with best practice from the Irish Defence Force Ombudsman:</p> <p style="padding-left: 40px;">If you are a member or a former member of the Defence Forces of Ireland and you believe that you have been treated unfairly or would like information about how to process a complaint, the Office for the Office of the Defence Force is here to help you. The Office of the Ombudsman serves as an Office of last resort for serving Members of the Defence Forces who <b>must first exhaust existing internal grievance procedures</b> before the Ombudsman can review or examine the case. However, there is a provision within the Legislation establishing the Office of the Ombudsman for Defence Forces which says that <b>if within 28 days your case has not been progressed</b> in accordance with the time frames set out and you believe the delays to be without good reason, <b>you have a right to make contact with the Ombudsman directly.</b></p> <p>Source: Ombudsman for the Defence Forces, <a href="http://www.odf.ie/aboutus/">http://www.odf.ie/aboutus/</a></p> <p>One problem with this would be the risk that a significant number of cases being mishandled by the MoD could result in a backlog being created with the SCC, thus defeating the purpose of allowing the SCC to take over complaints. Accordingly, it is strongly suggested that if the SCC needs to exercise her powers to take over a case, the capitation costs of all SCC personnel working on that case should be payable by the MoD. This would ensure that there was no disadvantage to the SCC in taking cases over, and would remove the perverse incentive for the MoD to abdicate responsibility both for an investigation, and the cost of it. (This is, in effect, a version of the “polluter pays” principle.)</p>
6	Intervene immediately, by exception, in time-critical cases, to forestall a wrong or prevent irreparable damage	<p>“There may be cases where a pre-emptive service complaint is necessary to forestall a wrong that could be redressed by a later service complaint. For example, where irreparable damage of a wrongful or malicious action to career has been done.” This text is from a letter from the SCC to the ... who dismissed the SCC’s warning, and as predicted “irreparable damage” was done, and—a year later—the Army has not substantively advanced the service complaint. Notwithstanding the above caveats about responsibility for service complaints lying, by default, with the military, the SCC must have the power to exercise discretion and intervene immediately in cases</p>

<i>Ser No</i>	<i>Power</i>	<i>Description</i>
		where this is justified. (As in all cases where the MoD disagrees with the SCC's actions, it should be able to challenge them by judicial review.)
7	Be notified of all service complaints	In the case of the IPCC, police forces must refer the most serious cases to the IPCC and, where the public interest requires it, the IPCC may decide to investigate, manage or supervise a police investigation. A related provision for the Armed Forces should ensure that full copies of all service complaints are forwarded to the SCC within 7 days of receipt, so as to provide independent oversight. This could be accomplished relatively inexpensively by ensuring that scanned copies of complaints are uploaded on to a shared information management system to which MoD, the RN, Army and RAF, and the SCC have access: providing the SCC's office with Defence Information Infrastructure (DII) terminals would achieve this with negligible effort. At present, the only information available to the SCC regarding many complaints is the basic statistical information recorded on the Joint Personnel Administration system (JPA), the quality of the information on which is highly variable.
8	Dismiss meritless complaints	<p>It is important that trivial or vexatious complaints be filtered out at the earliest possible stage, so as to avoid wasting the SCC's, MoD's, and other service personnel's time and resources. At present this is a significant weakness in the current system: meritless complaints waste time and money, as there is no mechanism to prevent complainants escalating such complaints after they have been rejected, in so doing "clogging the system". As a consequence, other service personnel with legitimate grievances find their complaints delayed, and this contributes to the many cases in which other service personnel, looking on, recognise that the service complaints system is too slow and ineffective to be permitted any credibility.</p> <p>Granting the MoD power to unilaterally dismiss complaints before they have exhausted the current internal "escalatory chain" to a Service Complaint Panel is fraught with risks, and would confer on the MoD [further] powers to cover up misconduct. Permitting them to do so while providing complainants a right of appeal to the SCC would, however, allow the MoD to reject meritless complaints, while allowing the service person an appellate avenue to an independent and impartial authority outside of the MoD. The SCC could then:</p> <ol style="list-style-type: none"> <li>Approve the MoD's decision to dismiss a complaint.</li> <li>Reject the MoD's decision to dismiss a complaint, and direct the MoD to reconsider their decision (with binding recommendations).</li> <li>Reject the MoD's decision to dismiss a complaint, and take over responsibility for investigating the case.</li> </ol>
9	Compel evidence	<p>The SCC must have specific powers to both compel witnesses to provide documentary material to investigations, and to attend to give oral evidence. It is strongly suggested that the SCC's powers should, at a minimum, replicate those in the statute creating the Irish Defence Force Ombudsman, the Ombudsman (Defence Forces) Act 2004 (<a href="http://www.oireachtas.ie/documents/bills28/acts/2004/a3604.pdf">http://www.oireachtas.ie/documents/bills28/acts/2004/a3604.pdf</a>).</p> <p>The nearest equivalent in English law to that act appears to be Section 21 of the Inquiries Act 2005, which provides Inquiries with statutory powers to compel evidence. The powers would be exercisable on behalf of the SCC by the senior investigator in specific investigations. It is envisaged that most requests for information from the SCC would not need to be made under such powers, merely because such powers would exist. At present, Army HQ, for example, is both able and willing to bluntly and arrogantly dismiss expressions of concern sent by the SCC to the MoD: this is due to the complete lack of powers vested in the SCC at present.</p>
10	Wide investigatory powers	The statute creating the Irish Defence Force Ombudsman, the Ombudsman (Defence Forces) Act 2004, provides for the appointment of investigation officers, and confers on them the necessary powers to investigate complaints including, inter alia, the power to search military premises:

<i>Ser No</i>	<i>Power</i>	<i>Description</i>
		<p>An investigation officer may, for the purpose of obtaining any information which may be required in relation to the matter under investigation and in order to enable the Ombudsman to perform his or her functions under this Act, do any one or more of the following—(a) at all reasonable times enter any premises, including...a military installation, in which there are reasonable grounds to believe that any activity in connection with a complaint is or has been carried on or that books, records or other documents in relation to a complaint are kept and search and inspect the premises and any books, records or other documents on the premises.</p> <p>Source: Ombudsman (Defence Forces) Act 2004, <a href="http://www.oireachtas.ie/documents/bills28/acts/2004/a3604.pdf">http://www.oireachtas.ie/documents/bills28/acts/2004/a3604.pdf</a></p> <p>This example is listed to highlight the disparity between the protections afforded to victims of misconduct by the Armed Forces in other countries, compared to the UK. For example, military ombudsman in the following countries have subpoena powers to compel evidence from the Armed Forces: Austria, Estonia, Germany, Ireland, the Netherlands, Norway, Poland, Romania, Serbia, Slovenia, and Sweden.</p>
11	Direct implementation of decisions	<p>The SCC must have the power to enforce her decisions, as ombudsman in other spheres of democratic society do. She should be able to impose a penalty each time that implementation by the MoD of an individual decision is unjustifiably delayed by one month (noting that there may be valid operational or other reasons). This penalty must be linked with inflation so it is not rendered nugatory: Level 5 on the standard scale of fines for summary offences is suggested, currently £5,000, per section 37 of the Criminal Justice Act 1982, as this would allow it to evolve, as parliament amends that Act.</p> <p>Decisions should be enforceable, if necessary, by the High Court on application of the SCC, using all the usual means. The MoD should be able to challenge the SCC's decisions via Judicial Review.</p>
12	Recommend policy changes to the MoD, and require a timely ministerial response	<p>Recognising that the SCC will have a unique insight in to service personnel's problems, and will often be the only representative to whom service personnel can turn, she should have the power to make policy recommendations to which ministers should be obliged to respond within a maximum period of, for example, two months. This would enable systemic and institutional issues within the MoD to be identified, escalated, and an authoritative departmental response issued—and examined by parliament—in a way that is currently impossible. While the SCC currently writes an annual report, there is no obligation for the MoD to respond to discrete issues, much less do so substantively and in a timely manner.</p>

#### **Associated points relating to the Service Complaints process overall, beyond SCC powers**

13	Assisting Officers need training, careful selection, and protection	<p>The only source of advice provided to subordinates in both Service Complaints and disciplinary action is an Assisting Officer. This poses three problems:</p> <ol style="list-style-type: none"> <li>1. The Assisting Officer almost invariably works for the same chain of command as the subordinate, and if the subordinate is alleging misconduct by that chain of command, the Assisting Officer's loyalties realistically will be towards the latter.</li> <li>2. There is nothing to stop the superior officer, being the subject of the complaint, attempting to influence who should be appointed to assist the subordinate (there is at least one documented instance of just such a practice).</li> <li>3. Many Assisting Officers are junior officers with little experience, who are ill qualified to advise or protect the interests of complainants. They are filling roles in which they have no training, little interest, and no incentive to speak truth to power. Assisting Officers should be: <ol style="list-style-type: none"> <li>a. Trained fully in their duties and responsibilities.</li> <li>b. Where appropriate, or requested, appointed from outside the chain of command, for example if the chain of command themselves are implicated in a complaint.</li> </ol> </li> </ol>
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Ser No	Power	Description
14	The service complaints system should be able to grant compensation	<p data-bbox="571 260 1366 513">c. Assisting Officers should be given binding and enforceable (via SCC oversight) guarantees that they will not be penalised for acting in accordance with their consciences, even if so doing inconveniences the chain of command, and that their actions and decisions when acting as Assisting Officers will not be used in appraisal reports and promotion recommendations. This is broadly similar to the so-called “Morris direction” given to board (“jury”) members in courts martial, which assures them that their verdict must be entirely independent, and protects them from external influence.</p> <p data-bbox="571 541 1366 821">Sometimes the damage done by the military, to service personnel’s welfare or careers, is so great that it cannot be mitigated by remedial action. In such cases, the inability of the service complaints system to grant financial compensation is invidious: it breaches the fundamental principle that there should be no right without a remedy. ... Forcing such personnel to pursue legal action is not what service personnel deserve for the risks to which they subject themselves on the country’s behalf. More ominously, the lack of financial remedies means that many service personnel, however badly wronged they have been, will not submit complaints because they recognise that there is no effective remedy available.</p> <p data-bbox="571 821 1366 929">Assertions that this would create a “where there’s blame there’s a claim culture” are both patronising to service personnel who have committed themselves to military careers, and fails to take in to account the powers recommended above to be able to dismiss meritless complaints.</p> <p data-bbox="571 929 1366 1073">The Canadian Forces Ombudsman, in their report <i>The Canadian Forces Grievance Process: Making It Right for Those Who Serve</i>, dated May 2010, recommended these very powers for their service complaints system: <b>“Why the Chief of the Defence Staff Should Be Able to Grant Compensation”</b></p> <p data-bbox="571 1073 1366 1517">...We believe that, within an appropriate regulatory and policy framework, it is possible for the Chief of the Defence Staff to be given the power to grant monetary compensation in the context of a grievance. More than that, we believe that it is essential that the Chief of the Defence Staff has this authority in order to make the grievance process more responsive and fairer to members of the Canadian Forces... Requiring grievors to submit a claim against the Crown after what is often a very long grievance process is unfair because it adds complexity and legality to what is supposed to be an informal, equitable process. Instead of the Chief of the Defence Staff’s decision being final, many grievors find out that they have to begin a new process... ..The Chief of the Defence Staff does not have the authority to deal with all aspects of a grievance. The system was confusing to the Federal Court, where Canadian Forces grievances and federal Public Service grievances are often challenged. How can we expect a Canadian Forces member fighting a battle against the chain of command, and usually without any legal assistance, to know what to do?</p> <p data-bbox="571 1517 1366 1770">...The court alludes to a very important principle underlying the Canadian legal system: namely, that there is no right without a remedy. Simply put, a proper review process must be able to not only determine whether someone was treated fairly or according to applicable standards, but must also be able to correct any unfair or improper treatment. Courts that are able to find someone guilty of a crime have the power to impose appropriate sanctions, and tribunals that determine if an individual’s rights were infringed are supposed to have the power to grant remedies for any infringement.</p> <p data-bbox="571 1770 1366 1936">We believe that this legal principle meshes with an important military concept: Leaders must be given the tools and authority needed to accomplish the goals for which they are responsible. In the case of the Canadian Forces grievance process, the Chief of the Defence Staff has not been given the authority to act as the final authority with certain monetary aspects of grievances.</p>

<i>Ser No</i>	<i>Power</i>	<i>Description</i>
		<p>In this sense, the grievance process is deficient. We have seen complaints where there was a clear decision that the grievor was treated unfairly but the Chief of the Defence Staff had to inform the grievor that he was unable to grant the compensation sought, as he did not have the authority to do so. It is not fair to members of the Canadian Forces that the Chief of the Defence Staff can find that they have been treated unfairly but, in many instances, does not have the ability to grant the compensation that will, at least to some extent, make up for the unfair treatment. The chain of command, which is entrusted to ensure the well-being of our troops, must have the tools and authority it needs to take care of them. In turn, military members need to be confident that the chain of command has the ability to take care of them.”</p> <p>The Canadian Forces Grievance Process: Making It Right for Those Who Serve (<a href="http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/gp-prg/doc/gp-prg-eng.pdf">http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/gp-prg/doc/gp-prg-eng.pdf</a>)</p>
15	The Army’s AGAI 67 internal sanctions regime should be replaced with a fair system	<p>The Army’s Internal Sanctions regime, AGAI 67 Major Administrative Action should be replaced with an Article 6-compliant (ie independent and impartial “fair trial”) process designed by ACAS and the SCC, and reported on publicly for the MoD and the Defence Committee to review. The Army should contribute to, but not have power of veto over, the design of this replacement.</p>
16	The summary hearing system should be replaced	<p>The summary hearing system should be replaced by a “summary sentencing” system, offering soldiers the choice of pleading guilty at regimental level, with a fixed sentence and its implications articulated before they make that plea, with a court martial as the alternative. Entitlement to publicly funded legal advice must commence in this “summary sentencing system” at the outset, so that soldier’s decisions are informed and as free of coercion as possible. This would protect the Army’s interest in allowing soldiers who have committed minor offences to “get it out of the way” summarily, while removing from the Army the ability to:</p> <ol style="list-style-type: none"> <li>a. Coerce vulnerable junior personnel to relinquish their right to a proper court martial (a “fair trial”), rendering such rights nugatory.</li> <li>b. Cover-up misconduct by favoured personnel by going through the motions of prosecution, with acquittal as a fait accompli.</li> </ol> <p>This new system must include oversight by the SCC. Presently—and contrary to Sir Nicholas Blake QC’s Deepcut Review—the SCC is excluded from any involvement with the summary hearings system.</p>
17	An empowered SCC 24/7 helpline should be introduced	<p>There should be a 24/7 urgent service complaints hotline allowing service personnel to report time-critical issues. Without this, soldiers caught up in events ... cannot seek informed, independent and empowered intervention, and there will be the risk of more such incidents.</p>
18	Annual Training Tests in “Human Rights” should be mandated	<p>All-ranks military training and education in legal issues is, broadly speaking, limited to the law of armed conflict. This has two disadvantages:</p> <ol style="list-style-type: none"> <li>1. It further inculcates an already deep-seated attitude that the law is something that only poses a threat to the Army, rather than a valuable framework describing both rights and obligations, and</li> <li>2. It leaves service personnel ignorant about areas of impermissible behaviour regarding treatment of subordinates, beyond the most egregious misconduct attracting criminal sanction.</li> </ol> <p>A Mandatory Annual Training Test should be introduced explaining the post-Holocaust origins, and contemporary relevance, of human rights in wider society, within the military itself, and on operations. The current defensive attitude to the law needs to be replaced by one in which it is seen as a key guide in shaping the sort of society in which we wish to live, and military we want representing us:</p>

Ser No	Power	Description
19	Independent analysis should evaluate options for Royal Military Police and Army Legal Services independence	<p data-bbox="635 260 1366 620">“Training has an important role to play in ensuring that Armed Forces uphold and respect human rights, both in relation to civilians and within the military itself. At a basic level, human rights training may identify practices that should be avoided, but it may also do more by enhancing the civic education of members of the Armed Forces. Training is valuable both for new recruits and for those at later stages of their military career. Indeed, officers have a particular responsibility for creating an ethos in which human rights are upheld. Apart from formal inclusion of human rights in the curriculum for recruits and officers, this chapter also discusses other means of communicating the importance of human rights, such as through professional codes of conduct, as well as the role of military colleges in this important task ...”<sup>2</sup></p> <p data-bbox="571 627 1315 681">Handbook on human rights and fundamental freedoms of armed forces personnel, OSCE (2008), Human Rights Education, p 204.</p> <p data-bbox="571 707 1366 1569">Independent analysis, outwith the MoD, should evaluate options for ensuring that the Army’s policing and legal services provision are adequately independent, not just to protect from outright corruption, which is perceived as unlikely, but the insidious effects of personnel unconsciously acquiescing to the needs of the overarching Army to which they belong, over their professional policing and legal duties. For example, the Advisory branch of Army Legal Services is usually the sole source of legal advice to the Army’s chain of command, when dealing with service personnel issues such as bullying, victimisation, harassment, sexual harassment and assault. In-house legal practice presents special challenges with regard to professionalism. Every lawyer owes his clients the sometimes-conflicting duties of loyalty and professional independence, but that conflict is exacerbated in the in-house context, where exercising independent judgment and maintaining objectivity are more difficult, and even greater loyalty is demanded by the employer. The lawyer’s economic well-being depends on continued good relations with a single employer. In the military, in-house lawyers may be torn by the potential for conflicts between the interests of the military chain of command and the interests of service personnel. In other words, maintaining high professional standards can conflict with career objectives. A number of attributes of the job potentially foster neglect, or even disregard, of professional obligations. This is particularly true in the Armed Forces where, for example, Army Legal Services have in the past told their officers that they are “Army Officers first; lawyers second”. This is particularly the case when performance reviews and appraisal reports are written by non-lawyers, who may not recognize, understand or share the lawyer’s ethical obligations— Army Legal Services officers’ appraisal reports are routinely written by their superiors in the mainstream Army. These appraisal reports are the means by which officers’ careers, assignments, promotions, and “contract extensions” are determined. For example, as Channel 4 News reported in Oct 11:</p> <p data-bbox="635 1576 1366 1989">“Top army lawyer slams MoD over human rights abuses. The army’s top lawyer during the Iraq war tells Channel 4 News his superiors blocked him when he tried to make British forces treat prisoners in a lawful way... Lt Col Mercer was Commander Legal of the British land forces that invaded Iraq at the start of the war in 2003. He was, in other words, the army’s top lawyer in Iraq. A successful and well-regarded career officer, it was his job to make sure British troops stayed within the law. But Lt Col Mercer’s efforts to do that job were to cost him dear. ...He describes how he was blocked, harassed and mocked by his superiors in the MoD as he tried to make sure British forces treated prisoners in a lawful and humane way. ... had the procedures he proposed been implemented, it is likely that innocent Iraqi hotel worker Baha Mousa—who died after 36 hours of abuse and beating at the hands of British soldiers—would still be alive. Had he been listened to, Britain would have saved tens of</p>

<i>Ser No</i>	<i>Power</i>	<i>Description</i>
		<p>millions of pounds paid out in compensation and legal fees. And—many argue—had his professional advice been taken, Britain’s reputation would not have been tarnished by the allegations of torture and mistreatment which continue to surround operations in Iraq and have tarnished the UK’s reputation around the world. So why did this happen? Mercer argues that the root cause is what he calls an attitude of “moral ambivalence” about Britain’s human rights obligations which goes right to the top of the MoD.”</p> <p>Source: <a href="http://www.channel4.com/news/top-army-lawyer-slams-mod-over-human-rights-abuses">http://www.channel4.com/news/top-army-lawyer-slams-mod-over-human-rights-abuses</a></p> <p>Finally, the level of oversight exercised by the Solicitor’s Regulatory Authority and Bar Standards Board is extremely low for lawyers working for the military as opposed to their privately-employed counterparts who are more closely scrutinised, and thus with it, there is far lower risk of sanction, disciplinary action or malpractice liability.</p>
20	Service personnel should be granted access to Employment Tribunals beyond the narrow confines of the Equality Act 2010.	<p>At present, only service personnel claiming under the Equality Act 2010, and its antecedent legislation, can access Employment Tribunals. Recruiting campaigns targeted at ethnic minorities in the late 1990’s rhetorically asked, “Is the idea of soldiers having access to industrial [now Employment] tribunals a waste of paper?” going on to state: “No. Every soldier has the right to appeal to the independent law of the land. Justice must not only be done, but must be seen to be done.” Draft legislation is in place (section 192 of the Employment Rights Act 1996) awaiting enactment to extend that entitlement to all service personnel. The MoD are right, “Every soldier should have the right to appeal to the independent law of the land. Justice must not only be done, but must be seen to be done”—as well as an empowered ombudsman, all service personnel should be granted access to Employment Tribunals.<sup>3</sup> Existing, limited, rights of service personnel to access Employment Tribunals have not caused any detriment to combat effectiveness; there is no reason to justify the continued denial of access to other service personnel for any reason other than to shield MoD from possible embarrassment—that is not a legitimate policy justification.</p>

## 2. FAILINGS OF THE CURRENT SYSTEM—OVERVIEW

The Review returns to the four young people whose...deaths are tragic. The untimely loss of their young lives to their families and loved ones shattering and painful still. Although the possibility of sacrifice and death in service must be ever present in the life of a soldier, as recognised in the Military Covenant, each of these deaths seems so unnecessary as to compound the grief of those they left behind. ... The Review is, nevertheless, convinced that their loss has not been without consequence. The deaths of these four young people have had profound impact on the Army as an institution and the thinking of its Generals. ... By their deaths, each of these young people have served to help protect others from harm and abuse. **Their deaths will not be forgotten. Their lives have not been in vain.**<sup>4</sup>

Sir 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 p 416.

### Summary

- The Army currently suffers from a lack of regulatory oversight, of an independent and impartial third-party organisation to enforce checks and balances, which can insist upon fair and lawful behaviour, and with the power and resources to investigate misconduct, make determinations, and impose financial penalties (the only penalties which truly have the power to induce better behaviour).
- The current system, whereby the Army chain of command purports to investigate itself for misconduct, not only fails those who do report complaints and seek help, but even more egregiously, ensures that others suffering mistreatment realise that they too have no effective redress, and must suffer in silence.
- The Service Complaints Commissioner must be imbued with the powers of an independent, impartial and empowered Armed Forces ombudsman—including the ability to impose financial penalties.
- There must be a root and branch overhaul of the Army’s AGAI 67 internal sanctions regime—overseen by ACAS and the SCC.

- The Army’s *raison d’être* is the application of lethal force on the nation’s behalf: this justifies a margin of appreciation from civilian society, but not the absolute and wholesale cleaving of employee protections.
- Service personnel risk their lives for their country: deviations from civilian standards ought only to be those necessary and proportionate in a democratic society.
- In the British Army, the coin of the realm is power, manifested as rank. Rank can and does shield its holders from the consequences of misconduct.
- The Army is willing to cover-up mistakes, bully personnel, victimise those who complain, and harass those who are perceived to be “rocking the boat”, in order to protect the power and prestige of the chain of command.
- The risks of being overly deferential to rank should be heeded, and tempered by a robust and independent ombudsman system staffed, funded, and capable of both investigating Army misconduct, and imposing penalties upon the MoD when they fail.
- The lessons of Deepcut, and the recommendations of Sir Nicholas Blake QC’s Deepcut Review, have been ignored by the MoD.

### *Analysis*

1. The Army currently suffers from a lack of regulatory oversight, of an independent and impartial third-party organisation to enforce checks and balances, which can insist upon fair and lawful behaviour, and with the power and resources to investigate misconduct, make determinations, and impose financial penalties (the only penalties which truly have the power to induce better behaviour). The Service Complaints Commissioner (SCC), Dr Susan Atkins, has the highly circumscribed role of monitoring the Service Complaints process overall, and reporting annually to parliament. Her small team have neither the authority nor the resources to investigate complaints, nor the ability to make findings, direct remedial action or impose financial penalties. As a comparison, the much-maligned and ineffectual Press Complaints Commission was a model of strength and efficacy against the current system of unthinking deference to power that epitomises the current lack of effective scrutiny to which the Army is subjected.

2. Service personnel’s only effective remedy is if they can escape the Army’s internal mechanisms, to an independent and impartial tribunal (an Article 6-compliant tribunal, to use the legal term). Employment Tribunal access is available, per the Equality Act 2010, if the complaint follows discrimination based on one or more of nine characteristics articulated in the Act—most notably race, gender and sexuality.

3. The current system, whereby the Army chain of command purports to investigate itself for misconduct, not only fails those who do report complaints and seek help, but even more egregiously, ensures that others suffering mistreatment realise that they too have no effective redress, and must suffer in silence.

4. Two key changes are essential if the Army is to be able credibly to assert—and if parliament is to be assured—that service personnel are treated fairly and lawfully:

- (a) **Imbue the Service Complaints Commissioner with the power of an independent, impartial and empowered Armed Forces ombudsman—including the ability to impose financial penalties.** The Service Complaints Commissioner must be vested with powers of an ombudsman, with the financial and staff resources to investigate cases independently, make binding decisions, and enforce financial penalties for both the original misconduct and delayed complaint handling. All of these are essential, most critically the last: senior Army officers presenting to the Joint Services Command and Staff College in April 2012 emphasised above all else the need to avoid discrimination because of the financial penalties imposed by Employment Tribunals; they were very considerably more phlegmatic about the Service Complaints process, apparently because the latter is toothless (however extreme the behaviour complained of in a Service Complaint, the Army investigate themselves, they can take years to make a decision, and they have no powers to award financial compensation, and thus there is no risk to the Army other than a transitory reputational threat, easily mitigated with clichés about “a few bad apples”, “not the behaviour expected”, “won’t happen again”, et cetera.)
- (b) **Root and branch overhaul of the Army’s AGAI 67 internal sanctions regime—overseen by ACAS and the SCC.** The Army’s internal sanctions regime stands alone in the UK in granting an employer vast powers of sanction, suspension and dismissal, without independent oversight, or checks and balances. The Army’s *raison d’être* is the application of lethal force on the nation’s behalf: this justifies a margin of appreciation from civilian society, but not the absolute and wholesale cleaving of employee protections. Service personnel risk their lives for their country: deviations from civilian standards ought only to be those necessary and proportionate in a democratic society. The Army’s regular strength will soon be a mere 82,000—such a small group (0.13% of the population), dispersed across constituencies in the UK, and with a culture of deference to power, is dangerously easy to mistreat. Even to those in the Army, its administrative action system is an irrelevance unless they are subjected to its whims, and then realise how helpless they are. The Army’s current systems serve only the interests of the hierarchy. In the absence of any representation—unique among professions<sup>5</sup>—MPs, and specifically HCDC, are the only people able to protect the interests of service personnel. Equivalent civilian internal administrative/disciplinary systems are governed by

ACAS rules,<sup>6</sup> and there is a compelling case that ACAS, in conjunction with the SCC's office, should rewrite the Army's AGAI 67 system.

5. The Army's "administration action" (AGAI 67) system confers extensive powers to the chain of command: there are no safeguards to protect junior personnel from the chain of command itself, and nothing to prevent dishonest commanders from pursuing vendettas against those over whom they exercise power. The Service Complaints process has been singularly useless; its effect, if not its purpose, has been to provide empty assurances to external agencies that otherwise might be tempted subject the Army to the same standards expected of any other organisation [in a democracy]. The SCC, parliament, and the HCDC specifically, should be aware that having successfully excluded itself from oversight by Employment Tribunals and Employment Appeals Tribunals (except in discrimination cases), the Army has ensured that Service personnel are powerless, subject to the arbitrary exercise of power by their employer.

6. **Rank and Power.** In the British Army, the coin of the realm is power, manifested as rank. Rank can and does shield its holders from the consequences of misconduct. The Service Complaints Commissioner (SCC)'s report to parliament published on 31 Mar 11,<sup>7</sup> criticised "'Service focus blindness': an inability to view a case from outside the cultural perceptions of the Service". The Army's instinctive desire to protect itself from adverse external scrutiny has been demonstrated even when the consequences of misconduct have been lethal: soldiers complicit in the killing of Baha Musa were, in the words of Mr Justice McKinnon, who presided over the subsequent court martial, "not charged with any offence simply because there is no evidence against them, as a result of more or less obvious closing of ranks".<sup>8</sup> In another, lower level and much more common case, the same instinct was demonstrated by a Brigadier whose subordinate asserted, prior to any investigation of the facts, that "The Commander is not in a position to ... undermine the Commanding Officer". It is to avoid just this behaviour that:

The regulations introduce into the redress system for some cases, an element which is independent of the chain of command. The Defence Council will delegate cases to be heard by service complaint panels. Under the Grievances Regulations an independent member, who will be neither a member of the regular or reserve Armed Forces nor a civil servant, must be appointed to service complaint panels for complaints about broadly: ...improper or biased behaviour. Such behaviour might, for example, include taking steps to prevent unauthorised activity coming to light or a decision that is purportedly made for a particular reason when the actual reason would be unsustainable in the circumstances.<sup>9</sup>

7. The SCC notes that this apparently encourages better decision-making: "Service Boards and SCPs sitting with an independent member appear to make a broader range of decision than Service members SCPs, who are most likely to reject complaints on appeal."<sup>10</sup> For anyone to get to the stage of a Service Complaints Panel takes years at the current rate of progress, rendering any retrospective vindication pointless. Justice delayed is justice denied. As already explained, the Service Complaints system serves merely as an ineffective façade—ineffective at rectifying injustice against service personnel, that is, but apparently entirely effective at shielding the Army from external scrutiny. The Army fiercely guards its actions from external oversight, and they have absolute power over service personnel. As Lord Acton noted, "All power tends to corrupt; absolute power corrupts absolutely".<sup>11</sup>

8. **Authority Gradient.** This is a familiar concept in industry, and efforts are made to mitigate the adverse consequences it creates. In the case of AGAI 67 action and Service Complaints it appears to be the root cause of the Army's problem. It "refers to the balance of decision-making power or the steepness of command hierarchy in a given situation. Members of a crew or organization with a domineering, overbearing, or dictatorial team leader experience a steep authority gradient. Expressing concerns, questioning, or even simply clarifying instructions would require considerable determination on the part of team members who perceive their input as devalued or frankly unwelcome. Most teams require some degree of authority gradient; otherwise roles are blurred and decisions cannot be made in a timely fashion. However, effective team leaders consciously establish a command hierarchy appropriate to the training and experience of team members".<sup>12</sup>

9. While the Army needs a hierarchical structure, the considerable power this confers upon senior officers must be carefully managed: "Authority gradients impede the ability of someone with less authority to challenge someone with more authority, as well as **the willingness of the more authoritative individual to hear and heed warnings.** Traditionally, the concept of authority gradients has been applied to the military and aviation; more recently it has been cited as a likely cause of errors in medicine. Awareness of individual fallibility and the potential for error are two attitudes that can lessen the potential influence of authority gradients".<sup>13</sup>

10. As the Royal College of Surgeons (RCS) warns, "Rather than encouraging an illusory 'culture of excellence', modern, evidence-based error management depends on the principle that error is a normal human attribute and must be detected by constant vigilance. It must also be managed by each and every member of the team".<sup>14</sup> In the British Army, this should be the function of the Service Complaints system. It does not work. The RCS go on to caution that "effective teams depend on appropriate organisation, working conditions and procedures. **These make the core values of the team visible...**" and cites a number of examples, including this:

"A patient was admitted for the removal of her right kidney. Due to a clerical error the admission slip stated 'left.' The operating list was transcribed from the admission slips. The patient was not woken from sleep to check the correct side on the pre-operative ward round. The side was not checked from the notes

or consent form. The side was questioned by the consultant surgeon on the patient's arrival in theatre but was not confirmed. The consultant instructed the specialist registrar to carry out the operation. The consultant mistakenly put the correctly labelled x-rays on the viewing box back to front. The consultant supervised the positioning. The specialist registrar did not check the side and was not alerted to this being the wrong site by noticing the normal pulsation in the renal artery of the kidney he was removing. **A medical student observing the operation suggested to the specialist registrar that he was removing the incorrect kidney but was told by the specialist registrar that she was wrong. The mistake was not discovered until two hours after the operation. The patient later died**.<sup>15</sup>

11. The Army is equally willing to cover-up mistakes, bully personnel, victimise those who complain, and harass those who are perceived to be “rocking the boat”, in order to protect the power and prestige of the chain of command. The risks of being overly deferential to rank should be heeded, and tempered by a robust and independent ombudsman system staffed, funded, and capable of both investigating Army misconduct, and imposing penalties upon the MoD when they fail. Such a system, an “Armed Forces Ombudsman”, has been recommended since the bullying scandals of the 1980s, and, most obviously, by Sir Nicholas Blake QC's The Deepcut Review—A review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002.

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<sup>2</sup> Prof. Ian Leigh and Dr Hans Born, *Handbook on human rights and fundamental freedoms of armed forces personnel*, Warsaw: Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (ODIHR) (2008), Chapter 19, Human Rights Education, p204 <http://dro.dur.ac.uk/8720/1/8720.pdf>

<sup>3</sup> For a useful summary of the issues and history surrounding service personnel's access to Employment Tribunals, see *Crosbie v Secretary of State for Defence* [2011] EWHC 879 (Admin) (07 April 2011), <http://www.bailii.org/ew/cases/EWHC/Admin/2011/879.html> and *Booley v MoD* [2012] UKEAT 1821\_11\_1907 (19 July 2012) [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2012/1821\\_11\\_1907.html](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2012/1821_11_1907.html)

<sup>4</sup> Concluding words of Sir Nicholas Blake QC, in the Deepcut Review, *A review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002*, p416. <http://www.official-documents.gov.uk/document/hc0506/hc07/0795/0795.pdf>

<sup>5</sup> Lord Garden asked Her Majesty's Government: *Whether there is any bar to serving members of the Armed Forces forming an association along the lines of the Police Federation*. [HL3245] *The Parliamentary Under-Secretary of State, Ministry of Defence (Lord Drayson): The Police Federation of England and Wales was established by the Police Act 1919, under which it has a statutory responsibility to represent its members in all matters affecting their welfare and efficiency. There is no similar basis under which members of the Armed Forces could form an association along these lines*. 23 Jan 2006 : Column WA143, Hansard Written Answers, Monday, Armed Forces: Welfare, <http://www.publications.parliament.uk/pa/ld200506/ldhansrd/vo060123/text/60123w01.htm>

<sup>6</sup> The Employment Act 2008 introduced a simple mechanism intended to promote prompt and less formal resolution of workplace problems, linked to a new statutory, seven-page, Code of Practice on Disciplinary and Grievance Procedures developed by ACAS following public consultation. The ACAS code of practice requires far higher standards of fairness during civilian internal procedures than AGAI 67 provides personnel, even though the latter have no access to Employment Tribunals or the Employment Appeals Tribunal. With no one representing service personnel's interests, however, the Army can contrive as unfair and unlawful a system as it wishes, minding only to ensure that it is not *overtly* and *palpably* so to uninformed observers.

<sup>7</sup> Service Complaints Commissioner's Annual Report 2010, page 57.

<sup>8</sup> House of Lords/Commons, Jt HR Cte, 28th report.

<sup>9</sup> Explanatory memorandum to the Armed Forces (Redress of Individual Grievances) Regulations 2007 and the Armed Forces (Service Complaints Commissioner) Regulations 2007, p 3, para 7.3.

<sup>10</sup> Service Complaints Commissioner's Annual Report 2010, page 23.

<sup>11</sup> Lord Acton writes to Bishop Creighton that the same moral standards should be applied to all men, political and religious leaders included, especially since “Power tends to corrupt and absolute power corrupts absolutely” (1887). Quoted in John Dalberg-Acton, 1st Baron Acton, *Essays on Freedom and Power* (Boston: Beacon, 1949), p 364.

<sup>12</sup> US Department of Health, Agency for Healthcare Research and Quality.

<sup>13</sup> Croskerry, P., *Patient Safety in Emergency Medicine*. 2009, Philadelphia: Wolters Kluwer Health/Lippincott Williams & Wilkins. xvii, p428. Quoted in Michigan College of emergency physicians 10 November review.

<sup>14</sup> Reason J. *Managing Patient Safety*—A multimedia resource. TVC Films Limited; 2005, cited in *The Leadership and Management of Surgical Teams*, Royal College of Surgeons (2007), p 12.

<sup>15</sup> *The Leadership and Management of Surgical Teams*, Royal College of Surgeons (2007), p 15.

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