



# ***Armed Forces (Service Complaints and Financial Assistance) Bill [HL]***

**Bill No 102 of 2014-15**

**RESEARCH PAPER 15/05** 23 January 2015

The *Armed Forces (Service Complaints and Financial Assistance) Bill (HL)* (Bill 102 of session 2014-15) was introduced into the House of Lords on 5 June 2014, where it received Second Reading on 23 June. It completed its parliamentary stages in the upper house on 20 October and was passed to the Commons, where it received First Reading on 21 October. No amendments were made to the Bill in the House of Lords. Draft regulations were published on 29 December 2014. Second Reading in the Commons is on 2 February 2015.

The intention of the Bill is to reform the Service complaints System and strengthen independent oversight by converting the role of the current Service Complaints Commissioner into a Service Complaints Ombudsman. It sets out the framework for the redress of service complaints and introduces a streamlined appeals process. It amends the *Armed Forces Act 2006*. The Bill also includes a power to make payments to charities, benevolent organisations and others for the benefit of the armed forces community.

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## 1 Summary

The *Armed Forces (Service Complaints and Financial Assistance) Bill (HL)* (Bill 102 of session 2014-15) was introduced into the House of Lords on 5 June 2014, where it received Second Reading on 23 June. It completed its parliamentary stages in the upper house on 20 October and was passed to the Commons, where it received First Reading on 21 October. No amendments were made to the Bill in the House of Lords. Draft regulations were published on 9 July 2014 and re-published on 29 December 2014. Only one opposition amendment to the Bill was moved in the House of Lords and was rejected on division.

The Service complaints system provides a means for serving or former personnel to make a complaint about the treatment they received while subject to Service Law. This is a statutory right set out in the *Armed Forces Act 2006*. In the same Act the Government created a separate office of the Service Complaints Commissioner to provide independent oversight of the internal complaints system.<sup>1</sup> This was in response to recommendations made by the Deepcut Review and the Defence Select committee, and in opposition to those who argued such a post might undermine the chain of command.

The Commissioner, Dr Susan Atkins, has repeatedly criticised the workings of the Service complaints system since taking office in 2008, describing it as ineffective, overloaded and beset by delay. In recent years she has called for her position to be converted to that of an Ombudsman. The Defence Committee, Members of Parliament and Liberty have all made the same recommendation. Members of the Armed Forces have expressed dissatisfaction with the complaints process.

Until recently the present Government resisted such calls, as did its predecessor. However, in March 2014 the then Secretary of State announced that, after discussions with the Commissioner, he intended to reform the present internal complaints system, expand the Commissioner's current powers and convert the Commissioner's office into an Ombudsman.

As the title of the Bill suggests, it covers two separate areas: the Service complaints system, and payments to charities and other organisations that support the armed forces community. The Bill:

- Reforms the current Service complaints system
- Creates a Service Complaints Ombudsman to replace the existing Service Complaints Commissioner
- Gives the Ombudsman new powers in relation to the complaints system
- Enables the Ministry of Defence to make payments to charities, benevolent organisations and others for the benefit of the armed forces community.

This Bill inserts new provisions into the *Armed Forces Act 2006*, which will continue as the main Act dealing with complaints within the Armed Forces.

**Clause one** of the Bill creates the office of the Service Complaints Ombudsman, to replace the existing Service Complaints Commissioner. **Clause two** reforms the current Service complaints system – it sets out the framework for the redress of service complaints. It also

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<sup>1</sup> The Commissioner has special powers where a complaint is about unacceptable behaviour such as bullying, harassment or discrimination and must be kept informed by law about the handling of a complaint and the outcome.

outlines the powers of the Ombudsman. **Clause three** makes note of consequential amendments. **Clause four** concerns financial assistance for the benefit of the armed forces community.

The Service Chiefs support the bill in its entirety, according to the Government. Lord Astor of Haver, who guided the Bill through the House of Lords for the Ministry of Defence, said the bill strikes "the right balance between creating strong and independent oversight and maintaining the authority of the chain of command."<sup>2</sup>

However, this assertion is questioned by the Defence Committee, who suggest the Bill "does not go far enough." Members of the House of Lords, led by Lord Rosser for the Opposition, tabled amendments to the Bill during its progress in the House of Lords designed to increase the independence of the Ombudsman and expand the powers of the office. In particular, they were concerned that the Ombudsman would not be able to investigate the substance of a complaint, nor be able to investigate, on his or her own initiative, thematic or systemic abuses identified during the course of his work.

The impact on the chain of command was a concern of some former Chiefs of the Defence Staff. The balance between oversight and preserving the chain of command was a recurring theme in debates in the House of Lords and is explored more fully in section five.

The focus on preserving the chain of command reflects the unique nature of the Armed Forces and Service life. Service personnel do not have the protection of a contract of employment and only very limited rights of access to an employment tribunal. The Services are not just an employer but they also enforce discipline and provide justice, housing, healthcare and welfare support. As such, the types of complaints made vary widely and predominantly relate to pay and terms and conditions of service.<sup>3</sup> However allegations of bullying and harassment have received considerable attention in the media and prompted interest from a number of Members. In particular, the suicide of Corporal Anne-Marie Ellement was cited by several Parliamentarians.<sup>4</sup> Lord Thomas of Gresford observed: "the public interest and concern is about allegations of bullying and harassment that fall short of criminal offences."<sup>5</sup>

Nicola Williams has been selected by the Ministry of Defence to replace Dr Atkins as Commissioner. She will become the first Ombudsman as and when the legislation is enacted.

This Paper provides first a brief background of the evolution of the complaints system and the Commissioner's role, and views on why there is now a need to both reform the Service complaints system and to convert the Commissioner into an Ombudsman. Section four outlines how the new system will work, as envisaged in the Bill. Section five discusses the more contentious elements of the bill raised by Members of the House of Lords, complemented by the thoughts of the Defence Committee. Clause 4, regarding financial assistance to charities, is dealt with separately in section six. The Bill, with its explanatory notes, are published on [the Bill's page on the Parliament site](#). Background material on the Bill, including the draft regulations, is [colated on Gov.uk](#).

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<sup>2</sup> HL Deb 23 June 2014 c1053

<sup>3</sup> HL Deb 23 June 2014 c1036

<sup>4</sup> Corporal Anne-Marie Ellement committed suicide in October 2011. She had alleged two fellow soldiers had raped her but military prosecutors did not take the case forward. The coroner ruled that bullying and the lingering effect of the alleged rape were factors in her suicide and also criticised the Army's handling of her records. The Army apologised after the coroner's ruling.

<sup>5</sup> HL Deb 23 June 2014 c1040

## 2 Background: why is the Bill being introduced?

The deaths of four young soldiers between 1995 and 2002 at the Princess Royal Barracks, Deepcut, Surrey, prompted the Defence Committee to undertake an inquiry into the Ministry of Defence's duty of care to Service Personnel. The report, *Duty of Care*, published in 2005, recommended that an independent military complaints commission be established.<sup>6</sup> It suggested it should be:

- Independent of the Armed Forces and the Ministry of Defence
- Its recommendations would be binding
- It would have the power to look at past cases
- It would have access rights to all documentation and persons

The Government in its response<sup>7</sup> accepted there was a case for introducing an independent element to the Service complaints system. It undertook to examine different models and take it forward in the *Armed Forces Bill* due later that year.

### ***The Armed Forces Bill 2005***

In November 2005 the Government introduced the *Armed Forces Bill*, a major piece of legislation that was to overhaul the military justice system and replace the previously separate single Service complaints system (redress of grievances). The Bill included provisions for the establishment of a Service Complaints Panel which would include the presence of an independent person. It did not, however, establish an independent commissioner, as recommended by the Defence Committee.<sup>8</sup> The Committee said in response that this was insufficient and urged the Government to put forward amendments to the Bill to strengthen the level of independence in the proposals.<sup>9</sup>

In March 2006, while the Bill was progressing through Parliament, Sir Nicholas Blake QC delivered his review into the deaths of the four soldiers at Deepcut. The Deepcut Review recommended the establishment of an independent "Commissioner of Military Complaints" or Armed Forces Ombudsman. He recommended the office should be able to receive complaints from Service personnel or their families, to supervise the investigation of such complaints, to supervise the response to a complaint, and provide advice on any disciplinary or administration action to be taken. He also recommended the post holder provide an annual report on issues relating to the welfare of officers.<sup>10</sup>

The Government rejected the Review's suggestion to create an Ombudsman in its response to the Review, published in June 2006. The Government argued such a proposal would be difficult to reconcile with the workings of a military complaints system, in terms of the chain of command and the role of prosecuting authorities.

However, the Government did announce that it would appoint a Commissioner to report annually on the fairness and effectiveness of the military complaints system:

We propose independent, external inspection and review of the military justice system and the military complaints system, together with independent members on Service

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<sup>6</sup> Defence Committee, *Duty of Care*, 14 March 2005, HC 63-1 2004-05

<sup>7</sup> The Government's response to the House of Commons Defence Committee's third report of session 2004-05, on duty of care, 12 July 2005, Cm 6620

<sup>8</sup> *Armed Forces Bill (Bill 94 of 2005-06)*, House of Commons Library Research paper 05/86

<sup>9</sup> Defence Committee, *Armed Forces Bill*, 8 December 2005, HC 747

<sup>10</sup> [The Deepcut Review](#), 29 March 2006, HCP 795, session 2005-06

complaints panels dealing with complaints of bullying and harassment. We will appoint an independent person as a commissioner to report annually on the fairness and effectiveness of the military complaints system and we will publish his report. He will have direct access to Ministers. That commissioner will also have a power to refer complaints or allegations of bullying or harassment to the Commanding Officer for action; and to be notified of the outcome.<sup>11</sup>

The Government duly amended the *Armed Forces Bill* at Committee Stage in the House of Lords on 12 October 2006.<sup>12</sup>

The Defence Committee welcomed the creation of the Commissioner in its report *Armed Forces Bill: proposal for a Service Complaints Commissioner*, published on the same day as the Bill received Royal Assent.<sup>13</sup> However, the Committee drew attention to the fact that the role proposed for the Commissioner fell a long way short of the investigatory body proposed by the Committee in its 2005 *Duty of Care* report.

### **The Armed Forces Act 2006**

The *Armed Forces Act 2006* received Royal Assent on 8 November 2006 and came into effect on 1 January 2008. The specific rules and procedures of the Service Complaints Commissioner in the complaints process and the types of allegations to which these provisions will apply were set down in secondary legislation: *Armed Forces (Service Complaints Commissioner) Regulations 2007*, *Armed Forces (Redress of individual grievances) Regulations 2007* and *Armed Forces Redress of Individual Grievances (Procedures and Time Limits) Regulations 2007*.

A Joint Service Publication entitled JSP 831 *Redress of Individual Grievances: Service Complaints* sets out the procedures to follow for complainants and those responsible for handling service complaints.

### **Calls for reform of the complaints system and an Ombudsman**

Dissatisfaction with the complaints system and the limits to the Commissioner's powers has mounted as time has passed. The Commissioner has repeatedly criticised the complaints system and the Services' handling of complaints. She has called for her position to be converted to an Ombudsman every year for the last four years. The Defence Committee has made similar calls, most notably in a report on the work of the Commissioner published in early 2013, and more recently in its report on the Bill under discussion. Several Members of Parliament have spoken in favour of an Ombudsman, as has the human rights group Liberty. The Armed Forces attitudes survey also suggests members of the forces are dissatisfied and lack confidence in the complaints system. All of these concerns are explored below.

The Service Complaints Commissioner is required by the *Armed Forces Act 2006* to report annually to the Secretary of State on the efficiency, effectiveness and fairness of the Service complaints system. In March 2014 she told the Secretary of State "for the sixth year running I am unable to give you and Parliament an assurance that the system is working efficiently, effectively or fairly." She concluded "the system needs to be simplified and the powers of the SCC strengthened."<sup>14</sup>

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<sup>11</sup> [The Government's response to the Deepcut Review](#), 13 June 2006, Cm 6851

<sup>12</sup> [Armed Forces Bill: Lords Amendments in Committee and Report Stage](#), House of Commons Standard Note 04180, 3 November 2006

<sup>13</sup> Defence Committee, *Armed Forces Bill: proposal for a Service Complaints Commissioner*, 8 November 2006, HC 1711 2005-06

<sup>14</sup> "Annual Report 2013, *Service Complaints Commissioner*, 27 March 2014; p4 and p65



Dr Atkins first made her recommendation for an Ombudsman in her *Annual Report 2010*. She argued the powers of the Commissioner were not sufficient to ensure Service personnel are treated fairly when they make a complaint. She concluded “*the time is right now for an Armed Forces Ombudsman*.”<sup>15</sup> She recommended improving the investigative process, simplifying the system (including removing one level of appeal) and improving the Service Complaints Panel process.

The Ministry of Defence conducted a review of the Service complaints system between 2010 and 2012. The MOD told the Defence Committee in written evidence that it did not support the Service Complaints Commissioner’s recommendation that the role become an Ombudsman:

The review concluded in June 2012 that it did not support the SCC’s recommendation that the role become an Ombudsman but accepted that greater benefit could be gained for the fairness, effectiveness and efficiency of the complaints system if the SCC offered views on process whilst complaints were still live.

5. As a result, and with the aim of making best use of all resources and enabling her post to focus better on tackling undue delay, the SCC subsequently put forward an alternative, non-Ombudsman model for her role. Following further detailed consideration of the proposal between MoD and the SCC, it was taken formally by the SPB in September 2012 and a phased introduction of the new model from January 2013 was agreed.<sup>16</sup>

The MOD also told the Defence Committee the review had examined but rejected her recommendation (recommendation 10.9) to remove one of the three levels of the complaints process to speed up the process and reduce delay. The three levels are: Commanding Officer, Superior Officer, and Defence Council. The MOD concluded that removing a level “carried a considerable risk of creating greater backlogs, and would likely involve delegating authority to grant redress on wider Service or tri-Service issues below the Defence Council, to an inappropriate degree.” But it added it would continue to explore this.<sup>17</sup>

The new powers came into effect in January 2013. A new target to resolve all new service complaints in 24 weeks, running from the date the complaint is submitted to its resolution came into effect on 1 January. And the Commissioner has a new power to make a report to the Secretary of State on the handling of a case when it is closed if she is not satisfied that the case was handled properly by the chain of command. In outlining the changes, the Commissioner welcomed them as an interim measure but repeated her belief that “an Armed Forces Ombudsman is required to ensure the fair treatment of Service personnel and as part of the Armed Forces Covenant.”<sup>18</sup>

Madeline Moon MP led a Westminster Hall debate on both the service complaints process and the service justice system on 31 January 2013. The particular focus of the debate was on sexual harassment in the armed forces and how such allegations and complaints were

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<sup>15</sup> “[Service Complaints Commissioner for the Armed Forces Annual Report for 2010](#)”, *Service Complaints Commissioner*, 31 March 2011

<sup>16</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013, Ev 13

<sup>17</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013, Ev 13

<sup>18</sup> “[Changes to the Service Complaints Commissioner’s Powers](#)”, *Service Complaints Commissioner press release*

dealt with. Several Members called for an Ombudsman to be created, including Madeline Moon, Penny Mordaunt, Martin Horwood and Gemma Doyle.<sup>19</sup>

The Defence Committee returned to the subject of the complaints system and the Commissioner in early 2013 when it published *The work of the Service Complaints Commissioner for the Armed Forces*.<sup>20</sup> The Committee recommended (recommendation 16) the Government change the role of the Commissioner to one of an Armed Forces Ombudsman, referencing the Armed Forces Covenant and the duty of care principles:

The Service complaints system is an important part of ensuring that the duty of care that the nation owes to its Service personnel is carried out effectively. We commend the Government for recognising this in the Armed Forces Covenant. The Service Complaints Commissioner role is an integral part of honouring the Covenant's commitment to the duty of care to the Armed Forces and the opportunity for Service personnel to seek redress when they believe they have been treated inappropriately or unfairly. We acknowledge the progress made in delivering a fair, just and efficient Service complaints system but there is a long way to go. There are too many reports of Service personnel being reluctant to raise genuine complaints and grievances. We are also concerned that complaints are not being raised when they implicate individuals above the complainant within the chain of command.

This is a time of great changes in the Defence arena and many of these changes may lead to an increase in the number of Service complaints. The Service complaints system has evolved, as has the role of the Commissioner, but there are still too many instances of delay, inefficiency and lack of resources. These must be dealt with urgently so as to ensure there is confidence in the system and the Commissioner. The Government should change the role of the Commissioner to one of an Armed Forces Ombudsman. This would be an important first step in raising confidence in the Service complaints system and making it more effective and efficient. We will maintain a close interest in the work of the Commissioner and the Service complaints system, particularly in whether the recent changes to the role of the Commissioner and changes to the complaints system prove to be effective. Our Servicemen and Servicewomen deserve a complaints system that is as good as it can be. Not to provide this would be a failure of the nation's duty to them—and a breach of the Covenant.<sup>21</sup>

The Commissioner was unable to report that the Service complaints system was working efficiently, effectively or fairly in her annual report for 2012, published in March 2013.<sup>22</sup> She highlighted serious delays in the Army and the RAF in handling complaints; a lack of confidence in the complaints system; and the complexity and fairness of the complaints system and in the office of the Complaints Commissioner. She argued:

I remain firmly of the view that an Armed Forces Ombudsman is needed, as part of the Armed Forces Covenant, to provide Service personnel, their families and the public with confidence that those who put their lives on the line will be treated properly.<sup>23</sup>

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<sup>19</sup> HC Deb 31 January 2013 c347-368WH

<sup>20</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013

<sup>21</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013, para 22

<sup>22</sup> "[Service Complaints Commissioner for the Armed Forces submits fifth Annual Report](#)", *Service Complaints Commissioner*, 21 March 2013

<sup>23</sup> "[Service Complaints Commissioner for the Armed Forces submits fifth Annual Report](#)", *Service Complaints Commissioner*, 21 March 2013

The Ministry of Defence returned to this topic again in June 2013 when it published its response to the Defence Committee's report *The work of the Service Complaints Commissioner for the Armed Forces*. It acknowledged the complaints system "is not working consistently well." The MOD said it was open to new ideas to further improve the complaints system but said "they cannot be at the expense of maintaining the primacy of the chain of command, which so critically underpins morale and discipline particularly in conflict." The MOD said the key factor when considering more reform "is not simply whether or not to re-title the SCC's role but about how reform would promote a system that is fair, effective, efficient and quicker to operate." The MOD confirmed it had begun discussions with the Commissioner at the end of April 2013 to explore what further, specific improvements might be made and how the Commissioner's role might be developed.<sup>24</sup>

Defence Minister Mark Francois confirmed the following month that discussions with the Service Complaints Commissioner regarding reform of the Service complaints system were underway. He added: "the MOD remains committed to ensuring that the service complaints process is as fair, effective and efficient as it can be." The MOD added that it was considering the Commissioner's proposal "with a genuinely open mind."<sup>25</sup>

Dr Atkins reiterated the need for an Ombudsman in her most recent annual report, published in March 2014 (*Annual Report 2013*). While acknowledging improvements had been made by the individual Services in how they record and handle complaints, she noted the incidence of bullying, harassment and discrimination in the Army "appears to be increasing as do complaints about such treatment" and falling confidence in the Service complaints system. She concluded:

For all these reasons the SCC is not able, for the sixth year running to give an assurance that the system is working efficiently, effectively or fairly. The system needs to be simplified and the powers of the SCC strengthened.<sup>26</sup>

She identified three reasons why she had not been able to report to the Secretary of State that the Service complaints system operates efficiently, effectively or fairly since 2008:

- Lack of confidence in the system
- Unreasonable delays in the resolution of complaints
- Lack of accurate data on how complaints are handled<sup>27</sup>

The views of Service personnel on their experiences in the Armed Forces are captured in the Armed Forces Continuous Attitudes Survey. This is an annual publication and the most recent edition was published on 21 May 2014.

Section 4 of the Survey seeks the views of personnel on whether they are treated fairly in their Service. They are also asked questions on discrimination, bullying and harassment, and experiences of the Service complaints procedures. The main findings from the 2014 survey are:

- 10% believe they 'have been the subject of discrimination, harassment or bullying in a Service environment in the last 12 months', unchanged since 2013.<sup>28</sup>

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<sup>24</sup> *The work of the Service Complaints Commissioner for the Armed Forces: Government's and Commissioner's Responses to the Committee's Eighth Report of Session 2012–13*, 27 June 2013, HC 505 2013-14

<sup>25</sup> HC Deb 11 July 2013 c32WS; The full response was laid in the Library on 25 November 2013: [DEP2013-1865](#)

<sup>26</sup> "Annual Report 2013, Service Complaints Commissioner, 27 March 2014

<sup>27</sup> "Annual Report 2013, Service Complaints Commissioner, 27 March 2014, chapter 5

- 9% of those who answered yes to the above question made a formal complaint.<sup>29</sup>
- Of those who made a formal complaint, 64% were dissatisfied with the outcome of their complaint.
- The Royal Marines are the least likely to report being the subject of discrimination, harassment or bullying.

There was widespread awareness of the complaint procedure and the Commissioner. 82% know where to get information about the Service complaints procedure for unfair treatment, discrimination, harassment and bullying and 73% know, at least to some extent, how the Service Complaints Commissioner can help with discrimination, harassment and/or bullying.<sup>30</sup>

The survey asked those who said they did believe they had been the subject of discrimination, harassment or bullying in the last 12 months why they had not made a formal complaint. The reasons given included: "I did not believe anything would be done if I did complain" (54%); "I believed it might adversely affect my career or workplace" (53%); "I was worried that there would be recriminations from the perpetrators" (30%); "I did not want to go through the complaints procedure" (23%).<sup>31</sup>

The Defence Committee noted the views of Service personnel in its 2013 report on the work of the Service Complaints Commissioner. The Committee said: "we are disappointed and concerned that Service personnel who felt they had been the victim of a behaviour which may give rise to a prescribed complaint did not have confidence to pursue this matter through the chain of command."<sup>32</sup>

The human rights organisation Liberty represents the families of several soldiers who they believe have been failed by the Service justice system. These include Anne-Marie Ellement, Cheryl James, Sean Benton and James Collinson. It is running a campaign on military justice and in 2014 published a report entitled *Military Justice – proposals for a fair and independent military justice system*. As the title suggests, the report is focused on the Service justice system rather than the complaints procedure. The report does, however, discuss the need for a Service Complaints Ombudsman. Liberty has produced a briefing on the Bill. It succinctly summarises the flaws with the current system: "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."<sup>33</sup>

### **Evolution of Government thinking**

The Government's response to pressure to reform the complaints system and create an Ombudsman has evolved over time. The previous Government was initially reluctant to legislate for a Commissioner until the very last stages of the *Armed Forces Act 2006*. The current Government was, until recently, similarly reluctant to convert that position to that of an Ombudsman.

An internal review of the complaints system between 2010 and 2012 resulted in some changes. The review's conclusions also prompted formal discussions between the MOD and the Commissioner of further ways to improve the system. These discussions eventually

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<sup>28</sup> AFCAS 2014, section 4, p9

<sup>29</sup> Ibid

<sup>30</sup> Ibid

<sup>31</sup> [AFCAS 2014 annex](#), tables B4.44, B4.46, B4.47, B4.45

<sup>32</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013, para 8

<sup>33</sup> Liberty's briefing on the Armed Forces (Service Complaints and Financial Assistance) Bill for Committee Stage in the House of Lords, July 2014

resulted in the then Secretary of State announcing, in March 2014, the Government would adopt a new complaints system model and also convert the Commissioner's post to that of a Service Complaints Ombudsman.

### **Legislating for a reformed complaints system and the Ombudsman**

In a [written statement](#) the then Defence Secretary, Philip Hammond, began by saying "a fair, effective and efficient system for handling complaints is an important part of our delivery of the armed forces covenant." He said the work of the MOD and the Commissioner on exploring alternative models for handling complaints, and the role of the Commissioner, had resulted in an outline of a new model for the Service complaints system which "we believe offers important advantages over the system introduced by the Armed Forces Act 2006." One of the criticisms of the current complaints system is the potentially lengthy time it can take for a complaint to be resolved. Mr Hammond said the new model "should lead to a higher proportion of complaints being decided more quickly." He outlined the major changes, which are detailed in the following section, adding:

the proposals I have outlined above represent a significant change to the way that service complaints are handled, and in particular to the role of the commissioner. As a result, I have decided that this new role would be better reflected in a change in the title of the commissioner's post to the "service complaints Ombudsman".

Mr Hammond said the changes would require amending the *Armed Forces Act*. He then concluded by referencing the chain of command:

In today's armed forces, there is a strong commitment to ensuring that complaints from service personnel are taken seriously and handled fairly. No service man or woman should lack confidence in seeking redress through the current system. However, we can do better, and, in particular, I believe we can resolve complaints more quickly. I believe that the approach I have outlined will strengthen the chain of command, support the interests of complainants, and enhance the contribution of the future service complaints Ombudsman.<sup>34</sup>

The 2014 Queen's Speech duly announced the Government's intention to introduce legislation "to improve the complaints system in the Armed Forces through the creation of an Ombudsman."

The explanatory notes published with the Bill cite two reasons behind the change in thinking. First, the repeated criticisms of the current system by the Service Complaints Commissioner in her annual reports to Parliament. Second, the work of the House of Commons Defence Committee and the Committee's recommendation in its report of February 2013 that the Commissioner's role be changed to that of an Armed Forces Ombudsman.<sup>35</sup>

#### *The Armed Forces Covenant*

The Armed Forces Covenant states that the Government and the chain of command has a responsibility of care towards members of the Armed Forces. This includes an environment which is free from bullying, harassment, and discrimination.

The *Armed Forces (Service Complaints and Financial Assistance) Bill* was introduced in the House of Lords on 5 June 2014. Lord Astor of Hever, Parliamentary Under Secretary of State and the Lords Spokesman on Defence, guided the Bill through the Lords. He began Second Reading by referencing the Armed Forces Covenant and the Government's obligations to members of the Armed Forces:

<sup>34</sup> [HC Deb 13 March 2014 c35WS](#)

<sup>35</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013, para 66

The welfare of our service personnel is one of the most important responsibilities of government. In enshrining the principles of the Armed Forces covenant in legislation this Government have signalled their determination to meet their obligations to our service men and women, their families and veterans. A fair, effective and efficient system for handling internal complaints in the Armed Forces is an essential part of our duty to service personnel, and it underpins operational effectiveness.

[...]

We have a duty to ensure that there is a fair, effective and efficient system in place to deal with any complaints and grievances that service personnel may have in relation to their service.<sup>36</sup>

He acknowledged the complaints system needed improving:

The current Service complaints system was set up by the Armed Forces Act 2006. We have worked hard since then to make that system operate as fairly, effectively and efficiently as possible and many service complaints are dealt with promptly and successfully. However, , the Government recognise that performance is still not good enough and have concluded that it can be significantly improved.<sup>37</sup>

He concluded:

Today's Armed Forces are committed to ensuring that complaints from service personnel are taken seriously and handled fairly and effectively, and that lessons are learnt when things go wrong. No member of our Armed Forces should lack confidence in the system for dealing with their complaints. The proposals set out in the Bill will both streamline and strengthen that system. The Bill will support the interests of complainants and create a strong and independent Ombudsman. The measures in it underline the commitment of this Government to the principles of the Armed Forces covenant and the obligations we owe our service personnel, veterans and their families.<sup>38</sup>

The additional expenditure associated with changes made in this Bill will be met from the MOD's existing resource allocation. In the Bill's explanatory notes, the MOD estimates the increased cost of a full-time Ombudsman and additional staff to be around £530,000 a year, and additional fees for independent persons appointed to decide service complaints or appeals to be around £10,000 to £30,000 a year.

### **3 The Bill: how it changes the Armed Forces Act 2006**

The *Armed Forces Act 2006* is the primary Act dealing with complaints within the Armed Forces. Sections 334 to 339 of Part 14 of the *Armed Forces Act 2006* set out the current legislative framework for redress of individual grievances, more commonly referred to as the Service complaints system. Section 366 in part 18 makes provision for the office of Service Complaints Commissioner.

The *Armed Forces (Service Complaints and Financial Assistance) Bill* inserts new provisions into the *Armed Forces Act 2006*. The Bill repeals those provisions of Part 14 of the *Armed*

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<sup>36</sup> HL Deb 23 June 2014 c1029

<sup>37</sup> HL Deb 23 June 2014 c1030

<sup>38</sup> HL Deb 23 June 2014 c1033

*Forces Act 2006* which set out the system for redress of individual grievances for members of the armed forces.

Clause 1 of the Bill inserts into the *Armed Forces Act 2006* new section 265B which creates the office of the Service Complaints Ombudsman, and repeals section 366 of the 2006 Act, thereby abolishing the office of the Service Complaints Commissioner.

Clause 2 inserts new Part 14A into the *Armed Forces Act 2006*. New sections 340A to 340O outline the framework for the new system for dealing with the redress of service complaints.

The Defence Council will be responsible for making the detailed regulations for the internal system of redress under the new legislation. The Secretary of State will also have functions of making regulations about certain aspects of the internal system, specifically about matters excluded from the internal system; who may be appointed to decide complaints, and when independent members are required; and the role of the Ombudsman.

Draft regulations were published on 9 July 2014 and updated on 29 December 2014. They are available on [Gov.uk](http://Gov.uk). These are:

- *Draft Armed Forces (Service Complaints) Regulations*
- *Draft Armed Forces (Service Complaints Miscellaneous Provisions) Regulations*
- *Draft Armed Forces (Service Complaints Ombudsman Investigations) Regulations*

Only the *Draft Armed Forces (Service Complaints Miscellaneous Provisions) Regulations* is a statutory instrument subject to the affirmative resolution procedure. The regulations subject to affirmative procedure<sup>39</sup> are:

- New section 340A: Who can make a service complaint? (Regulations made under section **340A(4)**).
- New Section **340E**: Further provision about persons and panels deciding service complaints (Regulations made under section **340E(1)**).
- New section **340N**: Referral of certain allegations.<sup>40</sup>

Sections 4 to 7 will come into force on Royal Assent. Sections 1 to 3, and the Schedule, will come into force by regulations.

## 4 The Bill: Provisions

This section explains how the reformed Service complaints system will work, as set out in the Bill as brought from the Lords. The relevant clauses are highlighted in bold and follow the order they appear in the Bill. This section does not highlight the more contentious elements of the Bill – that is the subject of section five of this paper. Also, clause 4 of the Bill, which relates to payments to charities and other organisations which support the armed forces community, is looked at separately in section six of this Paper.

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<sup>39</sup> To go through the 'affirmative procedure' refers to statutory instruments which must be approved by both the House of Commons and the House of Lords to become law. Conversely the 'negative procedure' refers to statutory instruments which automatically become law unless there is an objection from either House.

<sup>40</sup> [Memorandum by the Ministry of Defence for the House of Lords Delegated Powers and Regulatory Reform Committee](#), 9 June 2014

The explanatory notes on the Bill are available on [the Bill's page on the Parliament site](#), from which some of the following is taken.

#### 4.1 Key changes

The Bill sets out the framework for the redress of service complaints and introduces a reformed and streamlined appeals process. It creates a Service Complaints Ombudsman to replace the current Service Complaints Commissioner.

##### *Changes to the internal Service Complaints system*

The key changes to the complaints system are designed to make it more streamlined and thus reduce delay. This includes:

- A two-stage rather than three-stage process with the removal of one level of Appeal
- Removes the right of an Officer to have a complaint referred to Her Majesty

At present, the system has three levels. Level 1 is the prescribed officer, usually the Commanding Officer. Level 2 is the superior officer and level 3 is the Defence Council. Upon receipt of a complaint the CO decides whether he/she can deal with the complaint in reasonable time or if he/she has sufficient authority. If not, they may refer the complaint to the Superior Officer or directly to the Defence Council if the Superior Officer does not have the authority to grant the required redress. If the complainant is not satisfied with the outcome at level 1 or 2 the complaint is referred to the next highest level for consideration. This means there are potentially two levels of appeal after the initial decision on a complaint is made.

The MOD says the underlying policy is for the Defence Council to identify the lowest level with the necessary authority to deal with a complaint fully and to identify a higher level to provide a single level of appeal.<sup>41</sup>

The new proposals in the Bill are:

- Upon receipt, the Defence Council will assign a complaint to the person or panel of persons who has the authority to investigate fully and provide appropriate redress.
- Upon appeal, to identify the person or panel of persons who has the authority to investigate fully and provide appropriate redress.
- Service personnel can apply to the Ombudsman if they believe that the handling of their complaint has been subject to maladministration after the first decision is made, instead of having to pursue further appeals within the internal complaints process.
- Removes the right to go to the Defence Council.
- Removes the ability of a limited number of Service personnel to have a service complaint referred to Her Majesty.
- In some instances, some complaints will be decided at the Defence Council level in the first instance.

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<sup>41</sup> [Memorandum by the Ministry of Defence for the House of Lords Delegated Powers and Regulatory Reform Committee](#), 9 June 2014, para 8



*Service Complaints Ombudsman: new powers*

The Bill gives the Ombudsman new powers in relation to the complaints system, as compared to the Service Complaints Commissioner. The Ombudsman will have the power to:

- Overturn a decision to exclude a complaint
- Overturn a decision to reject an appeal
- Investigate whether there has been maladministration<sup>42</sup> in the handling of a complaint
- Require the production of information and documents for the purposes of an investigation
- Refer to the High Court anyone who unlawfully obstructs him or her in carrying out an investigation
- Bind the Defence Council by the findings of his or her investigation into a complaint of maladministration
- Recommend remedial action to the Defence Council upon making a finding of maladministration of a complaint

These powers differ considerably from those of the current Commissioner, who cannot become involved in the handling of an individual complaint other than to monitor its progress. She cannot investigate any complaint made to her. However if she receives an allegation of bullying, harassment or discrimination and refers that allegation to the chain of command, she must be kept informed of that complaint's progress.

Some functions will remain the same as those of the current Commissioner, including the right to be notified of the progress of complaints she receives and refers to the complaints system.

As now, the Ombudsman will be required to provide an annual report to the Secretary of State on the efficiency, effectiveness and fairness of the complaints system, and also raise any other aspects of the system in that report. However, he or she can only investigate a complaint brought by a complainant and has no statutory power to initiate investigations on thematic or systemic issues unless requested to do so by the Secretary of State.

## **4.2 Overview of the new system**

### *Who can make a Service complaint?*

Those subject to service law or those who have ceased to be subject to service law may make a complaint about an alleged wrong relating to his or her service which occurred while he or she was subject to service law (**340A**).

### *Is the complaint admissible?*

The regulations state the procedure for making and dealing with a service complaint. Briefly, these identify who the specified officer is to whom the complainant should make the complaint; the procedure for making a service complaint; what time limits apply; and what is not covered by the complaints system (excluded complaints) (**340B**). A person may not make

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<sup>42</sup> Lord Astor of Hever said the term maladministration is deliberately not defined. He explained at committee stage that "maladministration covers traditional grounds of judicial review, such as procedural impropriety and irrationality, but also wider concepts such as excessive delay, failure to give adequate advice, or rudeness." HL Deb 9 July 2014 c253

a service complaint about a matter of a description specified in regulations made by the Secretary of State (**340A(4)**).

**Regulation 4** of the *Armed Forces (Service Complaints) Regulations 2014* states what the complainant must include in a complaint, which must be made in writing to the specified officer. It must outline how the complainant thinks himself or herself wronged; whether the complainant's commanding officer or immediate superior in the chain of command is the subject of the complaint or alleged to be implicated; the redress sought; the date on which the complaint is made and either the date or the time period. The complainant must also explain why the complaint was not made within the time limit, if applicable.

#### *The Specified officer*

The complaint must go to an officer who will decide whether the complaint is admissible. The identity of the specified officer is laid out in **Regulation 3** of the *Armed Forces (Service Complaints) Regulations 2014*:

- If the complainant is subject to service law then the specified officer is the complainant's commanding officer.
- If the complainant is no longer subject to service law (i.e. they have left service), the specified officer is the person who was the complainant's last commanding officer or that officer's successor in post; or such other officer as may instead be appointed by the Defence Council.
- If the specified officer (i.e. the commanding officer) is the subject of the service complaint, or is alleged to be implicated, the specified officer is his or her immediate superior in the chain of command. If that person is also the subject of the complaint or is alleged to be implicated, the Defence Council will then appoint a specified officer who is of the same or equal rank to that officer and is not subject of the complaint or alleged to be implicated by the complainant.

#### *The admissibility of a complaint*

The specified officer's role is not to judge the merits of the complaint, but whether the complaint is admissible in accordance with section **340(B)**. The officer must decide whether the complaint is about a matter excluded from the Service complaints systems in regulations made by the Secretary of State; whether the complaint is inadmissible on other grounds specified by the Defence Council in regulations; or whether the complaint is out of time.

**Regulation 5** of the 2014 Regulations states a complaint is not admissible if:

- the complaint does not state an alleged wrong;
- is made after more than three months beginning on the date on which the matter complained about occurred;
- the complaint is substantially the same as a complaint brought by the same person which is either currently under consideration or has already been decided under the service complaints process.

The regulations also provide for the Specified Officer to extend the limit if in the circumstances it is just and equitable to do this. This might apply if the complainant has been

bereaved or is about to receive medical treatment, or had training or operational commitments.<sup>43</sup>

#### *Excluded complaints*

Excluded complaints are those that should not be resolved by the complaints system.

Section **340A(4)** states a person may not make a service complaint specified in regulations made by the Secretary of State. Excluded complaints are listed in **Regulation 3** and the schedule of draft *Armed Forces (Service Complaints Miscellaneous Provisions) Regulations*. Broadly speaking, these refer to pensions,<sup>44</sup> discretionary awards or discipline or criminal offences. The latter should be raised through the service justice system.<sup>45</sup>

#### *Intervention of the Ombudsman*

An individual may now approach the Ombudsman if a complaint was made outside the time limit and he or she feels the Specified Officer was wrong not to extend the time limit on just and equitable grounds. If the Ombudsman agrees, the Ombudsman's decision is final and the complaint will be returned to the chain of command to proceed.

The Ombudsman can also intervene, if requested by the complainant, if a complaint has been declared inadmissible on merit grounds at this stage, as there is no power for a specified officer to make such a judgement on receiving a complaint. The Ombudsman would in these circumstances be expected to overturn the inadmissibility decision and the complaint would proceed.<sup>46</sup>

#### *Investigation of a complaint*

Once a complaint is admitted, the Defence Council will decide whether the complaint can be dealt with by a person or panel of persons appointed by the panel or by the Council themselves. The person or panel appointed, or the Defence Council, must then decide whether the complaint is well-founded; what redress, if any, would be appropriate; and to grant any such redress (**340C**).

This differs from the current system whereby a complaint is heard by a Service complaints panel. The new system will assign a person or group of people to a complaint who have the authority to grant appropriate redress. The system also enables independent members to be involved if required, for example, in complaints of bullying.

Section **340E** of the Bill allows the Secretary of State to make regulations regarding the eligibility and independence of any person or panel appointed by the Defence Council. A person is described as independent if they are not a member of the regular or reserve forces or a civil servant, or included in a list maintained for the purposes of this section by the Secretary of State.

#### *Delegation of functions by the Defence Council*

The Defence Council may authorise someone to help investigate service complaints on the Council's behalf. The Bill provides that regulations made by the Defence Council may enable the Council to delegate various of its functions to other persons (**340F**). **Regulation 15** of the draft *Armed Forces (Service Complaints) Regulations* states the Council may delegate to any

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<sup>43</sup> HL Deb 9 July 2014 c236

<sup>44</sup> The pension Internal Dispute Resolution Procedure covers maladministration

<sup>45</sup> For ease of comparison, excluded matters are provided in Schedule 1 of the *2007 Redress of Individual Grievances Regulations* and are also listed in para 2.32 of [Joint Service Publication 831](#)

<sup>46</sup> HL Deb 9 July 2014 c238

person any of the Council's functions under these Regulations, unless the Council is to decide on the complaint itself.

### *Appeals*

Part of the streamlining of the process is to reduce the number of appeals that can be made. In the new system, the complaints process will be two-staged – the initial decision and, if required, an appeal. This applies to complaints not considered by the Defence Council itself in the first instance. Upon receipt of the appeal, the Defence Council will be able to consider the appeal itself or appoint a person or panel to do so. The time limit for bringing an appeal is set in regulations but must be at least six weeks from the time the complainant received the initial decision (i.e. the complainant has six weeks in which to make an appeal) (**340D**). However, regulations state that the Defence Council may allow an appeal to be brought beyond the time limit if in the circumstances it is just and equitable to do so, as set out in **regulation 11(2)** of the draft *Armed Forces (Service Complaints) Regulations*.

The Defence Council regulations may put in place other time limits for different steps in the process. However, they cannot foreshorten the time limits set out in the Bill for the complaint to be first made (three months) and for a complainant to appeal (six weeks) (**340G**). The time limits are set out in **Regulation 5(3)(b)** and **Regulation 10(5)** of the draft *Armed Forces (Service Complaints) Regulations*.

### *When the Ombudsman investigates*

The Ombudsman's role is to investigate allegations of maladministration<sup>47</sup> in connection with the handling of a complaint by the Armed Forces. It is not to investigate the merit of the complaint itself.

The Ombudsman may become involved in a complaint in two main ways.

1. *An individual has made a complaint through the internal complaints system.* The Ombudsman may intervene at several stages of the complaints process. The Ombudsman may overturn a decision by the receiving officer to reject a complaint at first instance, and overturn a rejection of an appeal, if a complainant draws it to the Ombudsman's attention. These are new powers and the Ombudsman's decision is final. A complainant may also apply to the Ombudsman after a decision is received or after the completion of an appeal, if they feel their complaint was mishandled. It is for the Ombudsman to decide whether to take on a case (**regulation 8** of the draft *Armed Forces (Service Complaints) Regulations*).

2. *Allegation received directly from a complainant.* As is now the case, the Ombudsman will be able to receive from anyone allegations of wrongs done to a person in the Armed Forces. This is to provide an alternative route to those who do not wish or are unable to approach the chain of command directly. The Ombudsman will not investigate the allegation but can refer an allegation to the specified officer. The officer must then inform the prospective complainant an allegation has been received and ask whether that person wishes to make a complaint. The Ombudsman must then be kept updated about the progress of any such complaint made (**340N**).

### *Powers of the Ombudsman to compel production of documents and examine witnesses*

The Ombudsman will have statutory powers to compel production of documents or other information for the purposes of an investigation. This power will have the backing of the

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<sup>47</sup> Lord Astor of Hever said the term maladministration is deliberately not defined. He explained at committee stage that "maladministration covers traditional grounds of judicial review, such as procedural impropriety and irrationality, but also wider concepts such as excessive delay, failure to give adequate advice, or rudeness." HL Deb 9 July 2014 253

powers of the court if someone unlawfully obstructs him in carrying out an investigation or does something akin to ‘contempt’ of court. This is a new power **(340K)**.

Lord Astor assured members of the Lords that the Ombudsman will have access to Ministers and approach the chain of command at any level on any issue.<sup>48</sup>

*Recommendations to the Defence Council*

The Ombudsman must produce a report for the Defence Council on the completion of an investigation into possible maladministration. If the Ombudsman finds maladministration, the report must set out the Ombudsman’s recommendations (if any) as a result of that finding. The Ombudsman may make any recommendations he or she considers appropriate, including recommendations for the purpose of remedying the maladministration and any injustice that the Ombudsman considers has or could have been sustained by the complainant. He must include reasons for each of the findings and recommendations. The report must be sent to at least the Defence Council and the complainant. The Secretary of State may make regulations containing provision for the correction of accidental errors in reports and about obligations that may be imposed on persons to whom reports are sent **(340L)**.

The Defence Council must inform the Ombudsman and the complainant of the action (if any) the Council decides to take in response to the findings and recommendations. This could involve a reconsideration of the complaint. The Ombudsman must give reasons, in writing, for the rejection of any recommendation.

*Removal of the right to have a complaint referred to Her Majesty*

The Bill will remove Article 337 (Reference of individual grievance to Her Majesty) of the *Armed Forces Act 2006*. This gives an Officer (or someone who was an Officer at the time the matter complained about occurred) who has had their complaint considered by the Defence Council, the right to require a report on the complaint to be made to Her Majesty in order to receive Her Majesty’s directions on the complaint.<sup>49</sup>

*Annual report to Secretary of State to be placed before Parliament*

As is the case now, the Ombudsman is required to prepare an annual report to the Secretary of State for Defence, which will also be placed before Parliament. The report is to focus on the efficiency, effectiveness and fairness of the system **(340O)**. Specifically, the report is to cover the following matters:

- a) the efficiency, effectiveness and fairness with which the system for dealing with service complaints has operated during that year
- b) the exercise by the Ombudsman during that year of the Ombudsman’s functions under this Part, and
- c) such other aspects of the system mentioned in paragraph (a), and such matters relating to the functions mentioned in paragraph (b), as the Ombudsman considers appropriate or the Secretary of State may direct.

The Secretary of State may exclude from the report any material he or she considers to be against the interests of national security or which might jeopardise the safety of any person **(340O(5))**.

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<sup>48</sup> HL Deb 9 July 2014 c226

<sup>49</sup> JSP 831, para 5.33; see also [Memorandum by the Ministry of Defence for the House of Lords Delegated Powers and Regulatory Reform Committee](#), 9 June 2014, para 8

The Secretary of State can also ask the Ombudsman to prepare a report on any aspect of the system or any matter relating to the Ombudsman's functions (**3400(6)**).

#### *Appointing the Ombudsman and terms of office*

To be eligible for the position of the Ombudsman, a candidate must not be a member of the regular or reserve forces, or be employed in the civil service of the state. The Ombudsman will not be regarded as a Crown servant and will be appointed by Her Majesty on the recommendation of the Secretary of State (**365B**). All candidates will be required to meet the *Standards in Public Life* principles.

Lord Astor of Hever explained the recruitment process to members of the Lords at Committee stage. The interviewing panel will include a mix of military and civil service personnel. Once a candidate has been selected by the panel and approved by the Secretary of State, he or she will undergo a pre-appointment hearing by the House of Commons Defence Committee. Lord Astor added the post holder will be required to demonstrate proven analytical skills and the ability to make sound judgements and recommendations on the basis of evidence, along with a proven record in change management. Prior service in the armed forces, either regular or reserve, or in the civil service will not be a bar. He added there is a "fine balance to be struck between having some relevant knowledge of the way that the services operate and being completely new to their ethos."<sup>50</sup>

The Bill is not explicit about the duration of the appointment but Lord Astor of Hever said during the Bill's Committee stage in the Lords that the Ombudsman will serve a five year, non-renewable term. It is a full-time post, as opposed to the part-time (three days a week) position of the current Service Complaints Commissioner. The staff of the office will also be increased from about 9 to 20 members.

### **4.3 The new Commissioner/Ombudsman**

The Ministry of Defence advertised for a new Service Complaints Commissioner in July 2014. Anna Soubry, Minister for Defence Personnel, Welfare and Veterans, nominated Nicola Williams as her preferred candidate.<sup>51</sup> The Defence Committee held a pre-appointment hearing with Ms Williams on 26 November 2014 and subsequently endorsed her nomination. She is expected to take up her position in February 2015.

She will serve a five year, non-renewable term and will transition into the Ombudsman's position once the Bill has been enacted.

## **5 The Bill: views of the House of Lords, the Defence Committee and others**

The preceding section explains how the new system will work, as laid out in the Bill. This section highlights the aspects of the Bill that were raised during the Bill's passage through the House of Lords. It also includes the views of the Defence Committee and the Government's response to the Committee's report on the Bill;<sup>52</sup> Liberty, the human rights

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<sup>50</sup> HL Deb 9 July 2014 c226-227

<sup>51</sup> Ms Williams' cv can be found in Defence Committee Report *Pre-appointment hearing for the Service Complaints Commissioner*, 28 November 2014, HC 832 2014-15

<sup>52</sup> Defence Committee, *Armed Forces (Services Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2014-15; *Armed Forces (Service Complaints and Financial Assistance) Bill: Government Response*, 19 December 2014, HC 900 2014-15

organisation, which prepared briefings for the Bill's Report and Committee stages in the Lords;<sup>53</sup> and the Royal British Legion.<sup>54</sup>

Broadly speaking, the main concerns are:

- The powers of the Ombudsman to investigate thematic or systemic abuse on his or her own initiative
- Whether the Defence Council must abide by the findings *and* the recommendations of the Ombudsman
- Whether family members can make or continue a complaint
- The independence of the new Ombudsman
- The impact on the chain of command
- Time limits

No Government amendments were tabled. All the amendments tabled at Committee and Report stage were either withdrawn or not moved. Only one amendment was moved at Third Reading and was rejected on division. It concerned the powers of the Ombudsman to investigate thematic or systemic abuse on his or her own initiative.

### **5.1 Should the Ombudsman be able to investigate thematic or systemic abuse on his or her own initiative?**

*New section 3400 entitled: Annual report on system for dealing with service complaints.*

Members of the Lords were concerned that the Bill limits the Ombudsman's ability to investigate and report on thematic or systemic abuse he or she might identify in the course of his or work. Members noted that the Commissioner told the Defence Committee that although the *Armed Forces Act 2006* gives the Secretary of the State the power to request a report from her, in addition to the statutory required annual report, he has never exercised that power.<sup>55</sup>

Lord Rosser, Lord Tunnicliffe and Lord Thomas all tabled amendments that would enable the Ombudsman, after advising the Secretary of State, to investigate any matter deemed to be in the public interest on any aspect of the Service complaints system or any matter relating to the Ombudsman's functions, and make a report to the Secretary of State. The question was raised at Second reading and was debated in Committee and on Report. The only amendment moved to division was at Third Reading and was rejected by 209 votes to 172.<sup>56</sup>

Lord Rosser cited the support of the current Commissioner and the Defence Committee in increasing the Ombudsman's powers.<sup>57</sup> At Third Reading he expressed dissatisfaction with the limits imposed on the Ombudsman who can only report, but not investigate, concerns over systemic or thematic issues, and that it would then be up to the Defence Council or Ministry of Defence to decide whether any further action is taken to investigate those

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<sup>53</sup> "Military Justice – proposals for a fair and independent military justice system" *Liberty*, June 2014

<sup>54</sup> "Legion welcomes Service Complaints Ombudsman", *Royal British Legion*, 4 June 2014

<sup>55</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, HC 720 2012-13, 26 February 2013, para 68

<sup>56</sup> HL Deb 20 October 2014 c430

<sup>57</sup> HL Deb 9 July 2014 c240

concerns.<sup>58</sup> The Government said that the Bill allows for the Secretary of State to request the Ombudsman produce a report, but Lord Rosser said at no time in the last six years has the Secretary of State made such a request. As such, he said it is “not credible to argue the ability of the Secretary of State to call for such reports covers the situation.”<sup>59</sup>

Lord Astor outlined the Government’s opposition to the amendment at both Report and Third Reading. At Report he said the Ombudsman would be able to identify thematic issues and bring these to the attention of the Defence Council and Secretary of State by a number of methods:

- In the annual report, as required by section 340O
- In the production of individual investigation reports, as required by new section 340L
- Contacting the Defence Council or the Ministry of Defence directly to follow up on a recommendation made.<sup>60</sup>

Lord Astor added the Government does envisage that the Ombudsman will publish information on any matters of general concern arising from the operation of the Service complaints system.

However, the Government does not want the Ombudsman to have any statutory powers to investigate thematic issues, nor to be an inspectorate for the Armed Forces. Lord Astor explained at Report stage:

[...] I must be clear also about what we do not want the Ombudsman to do. It is important that we have a common understanding on this. Although we want the Ombudsman to address wider issues, including where they have identified systemic abuse, we do not want the Ombudsman to have any statutory powers to investigate thematic issues. We do not, for example, want the Ombudsman to have any powers to require the production of papers or to question witnesses beyond the powers set out in respect of the exercise of the Ombudsman’s primary function of investigating alleged maladministration in the handling of service complaints and whether, as a result, injustice has been caused.

We do not want the Ombudsman to be an inspectorate for the Armed Forces or to perform the functions of a rapporteur. We believe that this would fundamentally change the role of the Ombudsman. Conferring such a role on the Ombudsman would also serve to divert the resources of the office. This would frustrate one of the key reasons for the reform of the redress process, which is to guard against undue delay in the resolution of service complaints.<sup>61</sup>

Lord Astor expanded on the Government’s reasoning at Third Reading as to why it does not want the Ombudsman to have a statutory power:

1. Carrying out such investigations would divert the Ombudsman from their primary role
2. The Ombudsman might not be the best person to carry out such an investigation

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<sup>58</sup> HL Deb 20 October 2014 c430

<sup>59</sup> Ibid c423

<sup>60</sup> HL Deb 29 July 2014 c1545

<sup>61</sup> HL Deb 29 July 2014 c1546



3. The Ombudsman's office should not be an inspectorate.<sup>62</sup>

Lord Rosser said in response the Government's position was not credible. He said the Government:

have not provided a sufficiently convincing explanation of the difficulties that would be caused by the Ombudsman having the power to carry out investigations into thematic issues of concern of his or her own volition, even though they do not dispute that it may be necessary to carry out such investigations – but only if the Secretary of State requires the Ombudsman to do it. So it may be necessary if the Secretary of State wants it but not if the Ombudsman thinks it should be done.<sup>63</sup>

The Defence Committee has similarly recommended such an amendment in its report on the Bill. It proposed the following amendment to section 340O:

The Ombudsman may report to the Secretary of State on any matter relating to service complaints and the procedure for the handling of service complaints as the Ombudsman considers appropriate.<sup>64</sup>

The Committee expressed disappointment the MOD had rejected its previous recommendation to give this power to the Ombudsman. It suggested it is "inappropriate that the Secretary of State will have the power to ask the Ombudsman to report on a thematic issue but that the Ombudsman will not be able to do so of their own volition":

73. We are disappointed that the MoD has so far rejected our recommendation that the Service Complaints Commissioner should be able to research thematic issues and produce reports. We believe that the Ombudsman would on many occasions be best placed to identify patterns of complaints that are poorly handled or types of complaints that are not being handled properly. Rather than undermining it, the identification and resolution of these matters would increase confidence in the chain of command.

74. We accept the Ombudsman will have powers to draw attention to thematic problems with the system in their Annual Report or in communication with Ministers. Whilst these options would be appropriate in many cases they may not be sufficient in all. We believe it is inappropriate that the Secretary of State will have the power to ask the Ombudsman to report on a thematic issue but that the Ombudsman will not be able to do so of their own volition. We do not envisage the establishment of a bureaucratic inspectorate for the Armed Forces, but do believe there are benefits to be gained by giving the Ombudsman the authority to undertake thematic reviews. These could contribute to identifying potential areas to be improved in the MoD's and the chain of command's responsibility of a duty of care towards Service personnel. We propose an amendment to this effect, set out as amendment H in the annex to this report.<sup>65</sup>

The Committee had previously recommended such a power in its report *The work of the Service Complaints Commissioner for the Armed Forces*.<sup>66</sup>

The Government rejected the Committee's argument in its response to the Committee's report. It restated the two reasons given above – namely, that it would significantly change

<sup>62</sup> HL Deb 20 October 2014 c428

<sup>63</sup> HL Deb 20 October 2014 c430

<sup>64</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, amendment H

<sup>65</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, para 73-74

<sup>66</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, 26 February 2013, HC 720 2012-13, recommendation 17

the ombudsman's role and also require a more specialist investigative role – and that the Bill already provides means for the Ombudsman to highlight thematic issues.<sup>67</sup>

## 5.2 Should the Ombudsman be able to investigate the substance of a complaint?

At Second Reading Lord Palmer of Childs Hill asked why the Ombudsman could not have the same powers as the Canadian Armed Forces Ombudsman in being able, in compelling circumstances, to deal with the substance of the complaint as distinct from only investigating the process.<sup>68</sup>

Lord Thomas of Gresford said “the most significant limitation of the Bill” is that it confines the Ombudsman to investigating an allegation of maladministration in connection with the handling of a complaint, rather than investigating the substance of the initial incident. He argued that if the procedure was correctly followed, the Ombudsman would have no power to put right a decision on the merits of the complaint “no matter how perverse it appears to him to be.” He asked: “is it not as vital to ensure that the right decision was taken on a complaint as that it was simply procedurally correct?”<sup>69</sup>

The subject was debated at Report stage within a wider discussion on whether the Ombudsman should be able to initiate reports on thematic or system abuses. Lord Astor of Hever said the Service Chiefs have made it clear they believe it should “be the chain of command that investigates complaints and works with complainants to find a solution that they are satisfied with.”<sup>70</sup>

The Defence committee believes the Ombudsman should be able to investigate the substance of the original complaint once the Service's internal process has been completed. The Committee said it sees “no reason to believe that this would undermine the chain of command.” The committee drafted an amendment that would give the Ombudsman power to investigate a service complaint. The Committee also drafted an amendment to enable the Ombudsman to investigate and report on “any maladministration” that might have taken place during the handling of a Service complaint, not just that alleged in the application to the Ombudsman.<sup>71</sup>

The Government said in their response to the Committee that they had “given very careful thought to this and are satisfied” that what is provided in the reformed system is appropriate for the Ombudsman. The Government emphasised its belief in the chain of command being responsible for the welfare of members of the armed forces. It also noted Dr Atkins has not called for this power.<sup>72</sup>

Liberty suggests preventing the Ombudsman from investigating the substance of a complaint is “a fundamental omission from the proposed system.” The organisation added:

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

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<sup>67</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill: Government Response to the Committee's Fifth Report of Session 2014-15*, 19 December 2014, HC 900 2013-14

<sup>68</sup> HL Deb 23 June 2014 c1036

<sup>69</sup> HL Deb 23 June 2014 c1039

<sup>70</sup> HL Deb 9 July 2014 c242

<sup>71</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14 para 41-42

<sup>72</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill: Government Response to the Committee's Fifth Report of Session 2014-15*, 19 December 2014, HC 900 2013-14

that a complaint was resolved correctly as it is to establish that it was conducted in a fair manner?<sup>73</sup>

### 5.3 Should family members be able to make a complaint?

Any service man or woman who is currently serving or has left the service but wishes to complain about matters that occurred during their service can contact the Ombudsman directly. If a complaint is received by the Ombudsman, and he considers the person has been wronged, then the Ombudsman may refer the allegation to the appropriate officer (see section 3: *specified officer*) (new section **340N**). This avenue is designed particularly for those who may be suffering abuse, harassment or discrimination which may, or may not, involve the individual's senior officers.

A family member, friend or someone representing a current or former member of the armed forces may also contact the Ombudsman, as they can now complain to the Commissioner about a matter that has occurred to that individual during their service. In this situation, the Ombudsman may refer this to the appropriate officer, who must then contact the person and make them aware of the procedure for making a complaint and the time limits for doing so, and ascertain whether they wish to make a complaint (new section **340N**). To be clear, family members cannot make a complaint themselves, but they can bring an alleged wrong to the attention of the Ombudsman (and currently the Commissioner) who can refer it as previously described.

At issue in the Lords was whether a family member or next of kin of a current or former member of the Services who had died would be able to bring or continue a complaint about an alleged wrong that occurred while the person was subject to Service law. The Bill retains the provision of the *Armed Forces Act 2006* in only allowing living current or former members of the services to make a complaint. And while family members can currently contact the Commissioner, complaints from families about how the Armed Forces have treated them or about the death of a Service man or woman are outside the Commissioner's remit.

The case of Anne-Marie Ellement was repeatedly cited by Members of the Lords.<sup>74</sup> Lord Astor of Haver noted: "It is clear that there is support across the House for allowing complaints to be made or continued in such circumstances."<sup>75</sup>

This subject was discussed at length in the House of Lords and raised at Second Reading, Committee and Report Stage. All the amendments on this topic by Lord Rosser among others<sup>76</sup> were either withdrawn or not moved.

Lady Dean of Thornton-le-Fylde raised the issue at Second Reading and Lord Rosser and Lord Thomas of Gresford both tabled amendments at Committee stage and Report stage that would enable next of kin or a family member to make a complaint if they felt a person who had died during the course of his or her service was wronged in any matter relating to his or service. Both Lords cited the case of Anne-Marie Ellement.

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<sup>73</sup> "Liberty's briefing on the [Armed Forces \(Service Complaints and Financial Assistance\) Bill for Committee Stage in the House of Lords](#)", *Liberty*, July 2014

<sup>74</sup> Corporal Anne-Marie Ellement committed suicide in October 2011. She had alleged two fellow soldiers had raped her but military prosecutors did not prosecute the individuals. The coroner ruled that bullying and the lingering effect of the alleged rape were factors in her suicide. The coroner also criticised the Army's handling of her records. The Army apologised after the coroner's ruling. See "[Cpl Anne-Marie Ellement: Army apologises as coroner finds bullying was suicide factor](#)", *Daily Telegraph*, 3 March 2014 and similar media coverage.

<sup>75</sup> HL Deb 9 July 2014 c230

<sup>76</sup> Amendments were tabled by Lord Rosser and Lord Tunnicliffe, and Lord Thomas of Gresford, Lord Palmer of Childs Hill, Baroness Garden of Frogmal and Baroness Suttie.

Lord Rosser explained at Report stage “we simply seek a process that would enable issues to be raised by the family on behalf of the member of the services who has died” whether death occurs before a complaint has been made or when a complaint is already going through the process but has not been finalised.<sup>77</sup> He also suggested that it is not unusual for an allegation of a crime to be pursued after the person who has been the victim of that crime has died.<sup>78</sup> Lord Thomas similarly argued that it should be open to the next of kin to make a complaint.<sup>79</sup>

Lord Astor rejected the amendments. His argument centred on the need for fairness and he insisted that for the complaints system to be fair “it has to give equal consideration to all parties who may be involved.”<sup>80</sup> All of those involved, he added, must feel it has treated them fairly. And an investigation of a complaint must involve all parties: the person making the complaint and those who are accused of perpetrating the wrong.

Lord Astor said complaints can be drawn on a wide range of issues and vary between the services. He said a majority tend to be about terms and conditions issues, while bullying and harassment complaints differ according to Service (43% for the Army and 10% of all complaints for the Royal Navy in 2013. He did not give a number for the Royal Air Force). He added complaints that could be described as having the potential to have an adverse effect on career prospects and on pay tend to be the greatest in number. He said in 2013, such complaints accounted for 89% of all Navy complaints, 50% in the Army and 54% in the Royal Air Force.<sup>81</sup>

Lord Astor explained that the usual practice is for a complaint to cease if the complainant dies before it has been concluded. However, in certain cases, for example if a complaint concerns factual matters and only documentary evidence is required, a complaint can be progressed even with the death of the complainant. He said it would be “in the spirit of the Armed Forces Covenant” to complete such a complaint and make the appropriate redress in these cases.<sup>82</sup>

Lord Astor rejected Lord Rosser’s parallel with the Prisons Ombudsman, saying the Service complaints system is not geared to dealing with criminality or ascertaining why someone died, and that there are other mechanisms for investigating the causes of matters connected with a death, such as inquiries, inquests and criminal investigations.<sup>83</sup>

The Minister rejected the Lords’ other arguments. He argued that as Service complaints are generally about a person, an examination of their complaint needs that person’s involvement in the process. He reiterated the point of the complaints system: to provide a correction, recompense or practice redress for the person feeling aggrieved. He suggested the amendments would enable a family member to complain when it was not known whether the person who died actually wanted to make a complaint or not, or had already received some form of informal resolution. Lord Astor added:

If an application to the Ombudsman had been made by the complainant before they died, there may be circumstances in which that could continue, depending on the feasibility of doing so and on whether appropriate redress could eventually be granted. This would apply equally to the bringing of an appeal in the internal system. As I said to

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<sup>77</sup> HL Deb 29 July 2014 c1535

<sup>78</sup> HL Deb 9 July 2014 c229

<sup>79</sup> HL Deb 9 July 2014 c230

<sup>80</sup> HL Deb 19 July 2014 c230

<sup>81</sup> HL Deb 19 July 2014 c230

<sup>82</sup> HL Deb 29 July 2014 c1538

<sup>83</sup> HL Deb 29 July 2014 c1437

my noble friend, if there is serious redress or something that needs to be put right, that would be within the interests of the Armed Forces and I am sure that the chain of command would want the situation to be rectified.”<sup>84</sup>

The Defence Committee did not raise this issue in its report on the Bill. However, in evidence to the Committee for its previous report on the work of the Service Complaints Commissioner, the Commissioner mentioned she had been contacted in two separate cases by family members who she said were “extremely distressed that the matters their loved ones had started to raise would not be investigated.”<sup>85</sup>

Liberty represents the family of Anne-Marie Ellement. After a judicial review, a fresh inquest was ordered that found the lingering effects of an act of alleged rape, work related despair and bullying (including rape-related bullying) contributed to Anne Marie’s death. Liberty argued that the 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.”<sup>86</sup> In its briefing on the Bill, Liberty recommended the bill be amended to allow the partner or family of a deceased member or former member of the armed forces to continue or initiate a service complaint. It argued:

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.

Liberty added: “denying family members the opportunity to ask for a complaint to be investigated is both unjust for families and a wasted opportunity for learning and improvement.”<sup>87</sup>

#### 5.4 How independent is the Ombudsman?

One of the dominant themes of debate on the Bill in the Lords was the independence *and* perceived independence of the new Ombudsman. This was articulated by Lords who sought reassurance for individuals seeking redress of alleged wrongs that their complaint would be fairly heard. On the opposing side were those who fear the effect on the chain of command – this is explored in section 5.6 below.

The importance of the perception of independence, as well as actual independence, has been acknowledged by the Ministry of Defence. Lord Astor observed at various times that the Bill seeks to assure Armed Forces personnel that the Ombudsman is independent, for without that assurance “they will see no benefit in approaching it and no value in its investigations.” He noted that if they lack confidence in the chain of command in the process, then complaints “will not be raised and matters of concern cannot be addressed, which can ultimately have a detrimental effect on unit cohesion and effectiveness.”<sup>88</sup>

Debate on this topic focused on the eligibility requirements for the position of the Ombudsman, which is stated in new section **365B**, and the terms of office, which are not explicitly mentioned in the Bill.

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<sup>84</sup> HL Deb 29 July 2014 c1539

<sup>85</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, 26 February 2013, HC 720 2012-13, Ev 9, q35

<sup>86</sup> “[Liberty’s briefing on the Armed Forces \(Service Complaints and Financial Assistance\) Bill for Committee Stage in the House of Lords](#)”, *Liberty*, July 2014

<sup>87</sup> *Ibid*

<sup>88</sup> HL Deb 9 July 2014 c254

Firstly, section **365B** states a person may not be appointed as the Ombudsman if they are a member of the regular or reserve forces or are a civil servant. Lord Rosser and Lord Tunnicliffe tabled an amendment that would prevent the appointment of a person who has been a member of the regular or reserve forces in the five years prior to the date of appointment. Lord Rosser raised the issue of the importance of the perception of independence:

If service personnel are to have a level of confidence in the new system which they do not have in the present arrangements, the Ombudsman is seen not only to have greater powers but to be truly independent of those whose actions he or she might be investigating, and of those to whom he or she would be making recommendations.<sup>89</sup>

As to the amendment, he said “the principle concern should be to appoint someone who is not only truly independent but perceived as being so.”<sup>90</sup> Lord Palmer of Childs Hill disagreed, saying primary legislation should not exclude certain people, suggesting to do so would limit the options that are available.<sup>91</sup>

Lord Astor responded for the Government by saying there is a “fine balance to be struck between having some relevant knowledge of the way that the services operate and being completely new to their ethos.”

He said postholders must “be demonstrably independent of those whom they seek to hold to account for the way in which complaints have been handled”, adding:

That is why the Ombudsman is outside the chain of command and has access to Ministers when the Ombudsman considers its necessary. The Ombudsman will also be able to approach the chain of command at any level and on any issue, should there be a need to do so. The Ombudsman will continue to be accommodated outside the defence estate to reinforce the independence of the role and the Ombudsman will recruit its own staff in line with prevailing Civil Service recruitment guidelines. The Bill includes a new provision as a further mark of the role’s independence and security of the postholder’s tenure, in that the postholder’s appointment will be subject to appointment by Her Majesty.

Lord Astor laid out the recruitment process. He said the interviewing panel will include a mix of military and civil service personnel. Once a candidate has been selected by the panel and approved by the Secretary of State, he or she will undergo a pre-appointment hearing by the House of Commons Defence Committee. Lord Astor added the post holder will be required to demonstrate proven analytical skills and the ability to make sound judgements and recommendations on the basis of evidence, along with a proven record in change management. Prior service in the armed forces, either regular or reserve, or in the civil service will not be a bar.<sup>92</sup>

In evidence to the Defence Committee for its 2013 report, Dr Susan Atkins outlined the three qualities she thought the new Commissioner (as was then) should have:

- No military background: Service Chiefs told her they benefit from her outside perspective, and service personnel said they would not have used the Commissioner’s services if she was from a military background.

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<sup>89</sup> Ibid c223

<sup>90</sup> Ibid c224

<sup>91</sup> Ibid c225

<sup>92</sup> HL Deb 9 July 2014 c225-227

- Understanding of justice and fairness and cultural and organisation change: there is a need to be able to understand, respect and value the services you are working with and work with them to improve.
- The post should be full-time.<sup>93</sup>

Secondly, section **365B** says the Ombudsman “holds and vacates office in accordance with the terms of his or her appointment.” It is not explicit either in the Bill or in the draft regulations, as published on 29 December 2014.

Lord Rosser asked at Committee Stage what the terms would be. Lord Astor said the Government intends for the Ombudsman to serve a five year, non-renewable term. This is different to the current terms for the Commissioner, who serves a three-year term, renewable once.<sup>94</sup> The five-year period “will give the future Ombudsman sufficient time to familiarise themselves in the role and then become fully effective.”<sup>95</sup> He added putting the length of appointment in the terms of appointment rather than the Bill allows the Government flexibility to increase the length of the appointment in the future, should that prove beneficial.

The Ombudsman’s position will also be full-time, rather than the three-day week the Commissioner currently works. The staff will be increased from about nine to 20.

The Defence Committee recommended excluding those who have served in the regular or reserve forces in the last five years and to introduce a non-renewable term of appointment of between five and seven years. The Committee argued the five year exclusion “would assist in underlining the independence of the Ombudsman and reduce the possibility that someone taking up the post could be known to parties involved in a complaint or have been involved themselves with a complaint.”<sup>96</sup>

The Committee also recommended the term should be a minimum of five years and that it should not be renewable. The Committee believes these elements of the appointment need to be included on the face of the Bill.<sup>97</sup>

In its response to the Committee, the Government said the Committee’s concerns about appointing former service personnel were “unwarranted” and rejected its recommendation to amend the Bill. The Government similarly rejected putting the five-year non-renewable term in the face of the Bill, saying it would remove all possibility of flexibility.<sup>98</sup>

Liberty also recommends a statutory term of appointment of a non-renewable five years. It suggests not having a statutory term of appointment could risk compromising the independence or perceived independence of the Ombudsman:

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<sup>93</sup> Defence Committee, *The work of the Service Complaints Commissioner for the Armed Forces*, 26 February 2013, HC 720 2012-13, para 79-80

<sup>94</sup> Dr Susan Atkins was appointed on 1 December 2007 for a three year fixed term appointment which was later extended by four months to the end of March 2011 to reflect the timetable for publishing the Commissioner’s Annual Report. Dr Atkins was reappointed for a second and final three year term to 31 March 2014. Source: *The work of the Service Complaints Commissioner for the Armed Forces*, 26 February 2013, HC 720 2012-13, para 79

<sup>95</sup> HL Deb 9 July 2014 c226

<sup>96</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, para 18

<sup>97</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, para 25

<sup>98</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill: Government Response to the Committee’s Fifth Report of Session 2014-15*, 19 December 2014, HC 900 2013-14

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 term or to indicate whether they would prefer for a particular Ombudsman to have their term renewed or not. This would create a significant risk that the independence or perceived independence of the new Ombudsman will be compromised.<sup>99</sup>

### 5.5 Should the Defence Council abide by the findings *and* the recommendations of the Ombudsman?

The debate in the Lords, and evidence to the Defence Committee, exposed confusion as to whether the Ombudsman's findings *and* recommendations are binding on the Defence Council.

Lord Astor said at Second Reading "The Defence Council would remain responsible for the decisions taken in response to the Ombudsman's recommendations, thereby maintaining the authority of the chain of command... cogent reasons would need to be given for rejecting any recommendation."<sup>100</sup>

Lord Thomas of Gresford discussed the distinction between the findings of the Ombudsman and his recommendations. He referenced a 2011 report by the Law Commission that noted that "over time, the practice has developed whereby an Ombudsman makes findings of fact and of the existence of maladministration that is causing injustice to individuals, and then recommends action that the public body should take to remedy the injustice." He said the Law Commission concluded that recommendations should be seen in a different light and are "part of the political process, since compliance with recommendations may require the reallocation of a significant amount of public funds."<sup>101</sup> He called for section 340M to be explicit that the Defence Council is bound by the findings of the Ombudsman – it cannot open up the facts again and find differently to the Ombudsman. He also sought reassurance on the reasons the Defence Council might give for rejecting a recommendation.<sup>102</sup>

Lord Astor responded to the latter point, saying the Defence Council will be required to provide written reasons if it refuses to implement recommendations. He also said these reasons can be judicially reviewed.<sup>103</sup>

Lord Thomas raised this at Committee stage, tabling an amendment to **340M** explicitly requiring the Defence Council to accept the findings of the Ombudsman.

Lord Astor said in response that it is the Government's intention "that the finding of the Ombudsman in its investigative report will, in effect, be binding on the Defence Council." He added:

The Defence Council would be able to judicially review those findings if it considered them to be irrational or otherwise flawed on other public law grounds. However, we do not anticipate that happening, and expect the Defence Council to accept the findings before going on to consider any recommendations that the Ombudsman may have made in the case.<sup>104</sup>

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<sup>99</sup> "Liberty's briefing on the Armed Forces (Service Complaints and Financial Assistance) Bill for Committee Stage in the House of Lords", *Liberty*, July 2014, p9

<sup>100</sup> HL Deb 23 June 2014 c1032

<sup>101</sup> HL Deb 23 June 2014 c1040

<sup>102</sup> HL Deb 23 June 2014 c1040

<sup>103</sup> HL Deb 23 June 2014 c1054

<sup>104</sup> HL Deb 9 July 2014 c255



He argued it is not necessary to make specific provision for it in the Bill because of recent judicial consideration in relation to the local government Ombudsman:

there has been recent judicial consideration of the legal status of both findings and recommendations in relation to the local government Ombudsman. While that consideration related to a different Ombudsman, we anticipate that a court would apply those principles to the legal status of the Service Complaints Ombudsman's findings. As such, we do not consider that it is necessary to make specific provision for this in the Bill.<sup>105</sup>

Turning to the question of the recommendations of the Ombudsman, Lord Astor explained the Defence Council would not be free simply to reject the recommendations because it disagreed with them. They would need to provide very good, cogent written reasons to do so. These circumstances could include where the implementation of the recommendations in full is unworkable or where significant resource implication may be involved. He argued: "it is right that [the] Defence Council should be able to reach a final decision on matters covered in any recommendations made by the Ombudsman."<sup>106</sup>

The Defence Council will decide precisely how it will respond. Lord Astor suggested this could be simply a matter of making an apology to the complainant; or for a piece of evidence to be reconsidered by the person who made the final decision in the internal process to see whether that would affect the outcome of their decision; or for there to be a full reconsideration of the complaint at the final stage of the complaint process. This could involve appointing a new person or panel of persons to hear the complaint again.

The Defence Committee welcomed the MOD's clarification that any findings of the Ombudsman *are* binding. However, the Committee is concerned that "as currently drafted, new section 340M does not adequately reflect this intention." The Committee also recommended that the Ombudsman's *recommendations* be binding on the Defence Council. The Committee argued "We are confident that the Ombudsman will be ready to consult to identify what is feasible when framing his or her recommendations and we are therefore not convinced by the MoD's objections in this respect."<sup>107</sup>

The Government did not waver from its stated position in its response to the Defence Committee.

Liberty similarly argued the Defence Council should be bound by the recommendations of the Ombudsman. Liberty argued leaving it to the Defence Council left the military open to the perception that it is "scared of transparency and accountability" and "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." Liberty posits "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."

Liberty suggests the Ombudsman could share a draft report with the Defence Council, which would give the latter the opportunity to point out if a recommendation was unworkable. The organisation questions whether, on past evidence, the MOD can be expected to comply with the Ombudsman's recommendations. It concludes:

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<sup>105</sup> HL Deb 9 July 2014 c256

<sup>106</sup> HL Deb 9 July 2014 c256

<sup>107</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, para 63

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?<sup>108</sup>

## 5.6 Potential impact on the chain of command

Is the creation of the position of the Ombudsman a threat to the chain of command? This was an issue voiced by several Members of the House of Lords, including several former Service Chiefs, concerned as they were with what they argued was the need to protect the unique status of the Armed Forces and preserve the chain of command.

The question of whether the Ombudsman's powers might undermine the chain of command permeated the debate at Second Reading and during discussions on amendments at Committee and Report stage.

A number of former senior members of the Armed Forces articulated this fear at Second Reading. Lord Dannatt, a former Chief of the General Staff, said "whatever happens must not prejudice the integrity of the chain of command."<sup>109</sup>

Lord Boyce, a former Chief of the Defence Staff, said he was "at a loss" to understand why an Ombudsman is seen as necessary. He said he was very concerned that the powers outlined in the Bill "seem set to undermine the command chain which is fundamental to fighting efficiency." He said he suspected political correctness was driving the changes. He also expressed particular disquiet about section 340K, which is discussed further below.

Lord Ramsbotham, a former Adjutant-General,<sup>110</sup> argued against the need for an Ombudsman. He expressed concern that the implications of the proposed powers of the Ombudsman in relation to the chain of command "may not have been properly thought through." He also raised concerns about coroners who "rather than just doing their job, have started to interfere with command decisions and question them in court." He suggested this may undermine confidence in the whole coronial system in the armed forces. He concluded "I am most unhappy... at the thought of someone being introduced into the system with more powers than currently exist, because of the possible implications for the paramountcy of the chain of command."<sup>111</sup>

Earl Attlee, a member of the Army Reserve, expressed concern that the chain of command might, under the new system, concentrate on procedure to satisfy the Ombudsman at the expense of resolving the grievance using skill and experience.<sup>112</sup>

Viscount Trenchard feared changing the Commissioner to an Ombudsman seems to "challenge the essential premise that the Armed Forces should retain responsibility wherever possible for handling their own complaints within the services."<sup>113</sup>

Baroness Garden of Frogmal observed in her speech that "legislation should not remove from commanding officers the responsibility and authority to deal with complaints at a local level... However, the need for independent oversight has become apparent."<sup>114</sup>

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<sup>108</sup> [Liberty's briefing on the Armed Forces \(Service Complaints and Financial Assistance\) Bill for Committee Stage in the House of Lords](#), *Liberty*, July 2014, p22

<sup>109</sup> HL Deb 23 June 2014 c1037

<sup>110</sup> The Adjutant-General is responsible for developing the Army's personnel policies and supporting its people

<sup>111</sup> HL Deb 23 June 2014 c1044

<sup>112</sup> HL Deb 23 June 2014 c1044

<sup>113</sup> HL Deb 23 June 2014 c1047

Lord Astor said in response:

The system proposed by the Bill strikes the right balance between having strong and independent oversight of the complaints process and maintaining the authority of the chain of command.<sup>115</sup>

Two former Chiefs of the Defence Staff, Lord Boyce and Lord Craig of Radley, called for the removal of section **340K**<sup>116</sup> during the Committee stage. Lord Boyce argued section 340K “could be seen to be violating the integrity of the command chain.”<sup>117</sup> Lord Craig of Radley argued it would give the Ombudsman power of command over an individual even though the Ombudsman does not form any part of the chain of command. He said allowing the issue of contempt to be taken direct to a civilian court could lead to a protracted, time-consuming and more expensive consideration of the issue. He suggested instead that the Ombudsman should report any individual he perceived to be in contempt for obstruction to the Defence Council, who would then instruct the individual to comply. If they did not, that would constitute a failure to obey a lawful command and be dealt with accordingly.<sup>118</sup> Lord Deben and Earl Atlee also spoke in favour of the amendment.

Lord Thomas of Gresford disagreed. He argued, as did Lord Astor, that “if you are going to call for papers and witnesses, as one rightly should, there has to be a sanction attached.”<sup>119</sup> Lord Astor added that without the enforcement provision, the Ombudsman would not be able to compel the production of relevant evidence or information from civilians or former members of the Armed Forces over whom the chain of command has no ongoing authority.<sup>120</sup>

Lord Astor also spoke to the wider issue of whether such a power should apply to the Armed Forces. He argued that without such enforcement powers, the power of enforcement would be left with the body under investigation by an independent Ombudsman. This, he said, is unacceptable as a matter of principle. He added such powers of compulsion are a common feature of Ombudsman legislation and that it is not anticipated that the power would be used in anything other than exceptional circumstances. He made it clear the current Chiefs of Staff were fully behind the bill *in its entirety* (author’s emphasis).<sup>121</sup>

This topic also came up in relation to the appointment of the Ombudsman, which is discussed in section 5.4 above.

The Defence Committee believes an Ombudsman will not undermine the chain of command. In its report on the Bill, the Committee said:

A strong independent Service Complaints Ombudsman will not undermine the chain of command, as some Service Chiefs have argued. Instead, it will build confidence in the chain of command as Service personnel see that their commanders take seriously their duty of care and are willing to rectify mistakes.<sup>122</sup>

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<sup>114</sup> HL Deb 23 June 2014 c1038

<sup>115</sup> HL Deb 23 June 2014 c1053

<sup>116</sup> New section 340K gives the Ombudsman power to refer a person to the High Court if they obstruct the Ombudsman in the course of an investigation. It follows section 340J which provides the Ombudsman with the same powers as the High Court to require access to and examination of witnesses and the production of documents.

<sup>117</sup> HL Deb 9 July 2014 c247

<sup>118</sup> HL Deb 9 July 2014 c247-248

<sup>119</sup> HL Deb 9 July 2014 c249

<sup>120</sup> HL Deb 9 July 2014 c250

<sup>121</sup> HL Deb 9 July 2014 c250-251

<sup>122</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14

The Committee noted that the fear independent oversight and regulatory powers could undermine the chain of command was the reason given by the Ministry of Defence when it initially resisted the Committee's calls for a Service Complaints Commissioner in 2005. The Committee says its report "proposes a number of amendments to the Bill which we believe will improve the Service complaints system while still preserving the integrity of the chain of command."<sup>123</sup>

## 5.7 Time limits

Lord Rosser sought clarification on the time limits and what the circumstances might be for the Ombudsman to accept a complaint outside the time limit.

Lord Astor noted the importance of time in the complaints system, noting that the time taken to deal with a complaint can be crucial to perceptions that the process is fair. As an aside, Dr Susan Atkins has repeatedly criticised the length of time it can take for a complaint to reach conclusion and in her annual reports complained the system can be beset with delays.

Lord Astor explained to Lord Rosser that the three-month time limit for making a complaint, which is the same time period as now, is because this is fairest on all involved:

It is a period that is neither so short that the individual could not corral the facts and put together their complaint nor so long that those details will be forgotten. To extend that period to six months would risk the very problems arising that the current time limit is designed to avoid.<sup>124</sup>

He said the same considerations influenced the six-week time limit for making an appeal. Lord Astor thought: "there is a balance between the need to keep the process moving on and giving individuals' time to gather their thoughts."

However, he added that the Regulations allowed some flexibility, as "fairness also requires... that there should be the ability to react to unforeseen circumstances." The draft *Armed Forces (Service Complaints) Regulations* therefore give the chain of command and the Ombudsman discretion to extend the time limits if it is "just and equitable" to do so. These circumstances could where include an individual has suffered a bereavement, is about to receive medical treatment, is on leave, or has training or operational commitments that prevent him or her from filing the complaint/appeal within the time limits. Lord Astor explained that as these are procedural matters they are spelt out in regulations rather than in the Bill.<sup>125</sup>

The regulations made by the Defence Council may put in place other time limits for different steps in the process. However, the regulations cannot foreshorten the time limits set out in the Bill. New section **340B(3)** states the time limit (the specified period) must be at least three months beginning on the day on which the matter complained of occurred (i.e. the time limit cannot be reduced to less than three months). New section **340D(3)** sets out a limit of six weeks for an appeal to be made, beginning on the day on which the complainant received notification of the decision appealed against.

The Defence Committee argued that the chain of command have a duty to deal with complaints in a "timely and fair manner" and recommended amending the Bill to enable the Ombudsman to investigate any delays:

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<sup>123</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, para 11

<sup>124</sup> HL Deb 9 July 2014 c235-236

<sup>125</sup> HL Deb 9 July 2014 c236

We note the Commissioner's evidence to us that delays in dealing with complaints are the main reason for unfairness in the system and that such delays could give rise to a finding of maladministration by the Ombudsman. We also note her comments that it would be unjust and an abuse of the system if Service personnel were deliberately not being allowed to make complaints about wrongs that had been done to them because they were being ruled out of time without the individual circumstances being looked at, or there was delay, or people were not being told about their rights and that again this could lead to a potential finding of maladministration. The chain of command have a duty to their personnel to deal with complaints in a timely and fair manner. We consider these matters sufficiently important to be included on the face of the Bill as matters that the Ombudsman can investigate.<sup>126</sup>

## 5.8 Other matters raised by the Defence Committee

The Defence Committee raised several points not discussed above in its report *Armed Forces (Service Complaints and Financial Assistance) Bill*.

The Committee called on the MOD:

- To publish detailed draft regulations before Second Reading and for the Committee to be consulted on them (para 29).
- To consult the Ombudsman on the establishment of a central tri-service Service complaints unit and to inform the Committee of the outcome of the consultations (para 33).
- To provide the Committee with the findings of the Defence Internal Audit on the accuracy of the Department's and Services' systems for recording Service complaints (para 34).
- To ensure that the processes set out in the Joint Service Publication for the new Service complaints system are as straightforward as possible (para 47).

The Committee recommended the Bill be amended:

- To require the Defence Council to consult the Service Complaints Ombudsman before making regulations under Clause 2 of the Bill (the reform of system of redress of individual complaints).
- To limit the right of the Secretary of State to impose obligations of confidentiality, in respect of the Ombudsman's reports, to matters of national security or where the safety of any person may be jeopardised. Section **340L(7)(c)** currently allows the Secretary of State to make regulations with respect to reports about obligations (including obligations of confidentiality) that may be imposed on persons to whom reports are sent.<sup>127</sup>

Liberty similarly raises the last point about confidentiality. It says 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, it suggests the Data Protection Act should cover this situation and says it is concerned the provision "might be used to prevent

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<sup>126</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, para 45

<sup>127</sup> Defence Committee, *Armed Services (Service Complaints and Financial Assistance) Bill*, 23 October 2014, HC 508 2013-14, conclusions and recommendations

complainants or others from speaking out about their experience and the outcome of an ombudsman's investigation."<sup>128</sup>

### *Service police*

The Defence Committee also expressed concern about the investigation of complaints against the Service Police. This is not included in the Bill but mentioned by the Committee in its report. The Committee called on the MOD to set out a timescale for when it is intended that the Service Police should come under the auspices of the Independent Police Complaints Commission's (IPPC) system. The Committee recommended the chain of command inform the Ombudsman when it receives a complaint regarding the Service police and that it should specify the nature of such a complaint. The Committee also requested the MOD ensure that where complaints are made to the Ombudsman about the Service Police, he or she has expert assistance from qualified professionals to review such cases (para 77).

### **Government response**

The Government's response to the Committee's report was published on 19 December 2014. On the issues mentioned above, the Government:

- Published draft regulations attached in its response to the Report, and published new draft regulations on 29 December 2014.
- Said it had no plans for a tri-service complaints handling unit.
- Agreed to share the findings of the Defence Internal Audit when it has been finalised, which is scheduled to be in the first quarter of 2015.

The Government rejected the Committee's suggestion to amend the Bill to require the Defence Council to consult the Ombudsman on the Defence Council Regulations which set out procedural matters of the internal redress system. The Government said the Commissioner is informally consulted on all the regulations, and has the means in the annual reports to express any concerns with the internal process. The Government also noted the Defence Council Regulations will be made by statutory instrument and will therefore be subject to the agreement of Parliament.

The Government also rejected a proposed amendment regarding confidentiality, stating that as appropriate safeguards will be in the regulations, there is no need for further provision on the face of the Bill.

## **6 Financial assistance for benefit of the armed forces community**

The [Armed Forces Covenant](#)<sup>129</sup> is a statement of the moral obligation that exists between the nation, the Government and the armed forces. It was published in May 2011 and its core principles were enshrined in law, for the first time, in the *Armed Forces Act 2011*. Detailed information on the covenant is available from the [Gov.UK website](#)<sup>130</sup> and in Library standard note, *The Armed Forces Covenant* (SN/IA/6519).

The use of covenant funding to support organisations working with the armed forces community is currently constrained by two pieces of legislation:

- section 31 of the *Local Government Act 2003*, which confines payments to local authorities to England and Wales

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<sup>128</sup> Liberty's briefing on the *Armed Forces (Service Complaints and Financial Assistance) Bill* for Committee Stage in the House of Lords", *Liberty*, July 2014, p18

<sup>129</sup> Ministry of Defence, *The Armed Forces Covenant*, May 2011

<sup>130</sup> Gov.UK, *Fulfilling the commitments of the armed forces covenant* [accessed 30 October 2014]

- section 70 of the *Charities Act 2006*, which limits financial assistance to charities and other benevolent institutions which provide a direct or indirect benefit to England

Without legislative change, the Government has said that its ability to support organisations in Scotland, Wales and Northern Ireland will be “significantly limited”.<sup>131</sup>

## 6.1 The Bill

**Clause 4** of the Bill authorises the Secretary of State for Defence to give financial assistance to a person in respect of activities that benefit any part of the armed forces community in any part of the United Kingdom. **Clause 4(3)** states that financial assistance may only be given:

- to a public authority, in respect of activities that are carried out in the exercise of functions of the authority that are functions of a public nature
- to a person other than a public authority, in respect of activities that are carried out for a charitable, benevolent or philanthropic purpose

The Secretary of State will be able to specify conditions on the financial assistance given, such as the purposes for which it can be used; the circumstances in which it is to be repaid; and reports on how it has been used (**clause 4(5)**).

The “armed forces community” includes serving members of the regular and reserve forces, veterans and their families. The latter includes partners, former partners, children, as well as other persons connected with serving personnel and veterans (**clause 4(2)**).

## 6.2 Debate in the Lords

When introducing the Bill in the House of Lords, Lord Astor gave the following background to clause 4:

(...) One of the best signs that the Armed Forces covenant is working is the extent to which groups in the voluntary and community sector are involved in supporting our service personnel, veterans and their families. Many of these groups are small, locally based and run by dedicated volunteers. They help bind the services to our communities and provide the sort of active, caring and focused support that is needed....

The Government need to work in partnership with such organisations and that includes providing financial assistance where appropriate. During the past four years, the Government have committed £105 million to delivering the commitments of the covenant...

The funding covered by Clause 4 is aimed at organisations rather than individuals. Organisations working with the Armed Forces community are based throughout the United Kingdom and we want them to be able to benefit from these funds wherever they are located. However, the use of covenant funding is currently constrained by two pieces of legislation: Section 31 of the Local Government Act 2003 confines payments to local authorities to England and Wales while Section 70 of the Charities Act 2006 limits financial assistance to charities and other benevolent institutions which provide a direct or indirect benefit to England. We have got around these restrictions on a temporary basis by making payments under the Appropriation Act but this is not a long-

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<sup>131</sup> Ministry of Defence, *Impact Assessment on the Armed Forces (Service Complaints and Financial Assistance) Bill*, 4 June 2014, p1

term solution. Clause 4 would therefore enable financial assistance to be given to organisations that support the Armed Forces community wherever they are based.<sup>132</sup>

When the Bill was considered in Committee on 9 July 2014, Lord Rosser, the Shadow Defence Minister, moved an amendment requiring an annual report to be published setting out how financial assistance meets the conditions that can be set by the Secretary of State in clause 4(5).<sup>133</sup> Replying for the Government, Baroness Jolly said that an annual Armed Forces Covenant report was already required under the *Armed Forces Act 2006*, and that this would cover the issues raised in Lord Rosser's amendment.<sup>134</sup> Lord Rosser withdrew his amendment.

At Report stage on 29 July 2014, Lord Kennedy of Southwark (Labour) introduced an amendment that could bring in the establishment of a credit union for the armed forces under the scope of the Bill:

We owe a duty to our service men and women and their families. That duty extends to their financial well-being, and establishing a military credit union will go a long way towards helping that community. A community bank will understand them and their needs. This will not take a lot of money; it just needs support and commitment from the MoD to make it happen and to encourage its development.<sup>135</sup>

The Lord Bishop of Sheffield and Lord Deben (Conservative) supported the amendment.<sup>136</sup> Responding for the Government, Baroness Jolly said that including specific provision on credit unions in the Bill was "unnecessary":

The organisation of credit unions has always been, and must continue to be, the remit of the private and the voluntary sectors. However, the Ministry of Defence will support organisations with the wherewithal to put in place a credit union to support the men and women who have served this country with such distinction.<sup>137</sup>

However she did agree to arrange a meeting between Lord Kennedy and the Defence Minister, Anna Soubry. Lord Kennedy of Southwark withdrew his amendment although he said he was "disappointed" with the Government's response and might return to the issue.<sup>138</sup>

At Third Reading on 20 October 2014, Lord Kennedy said his meeting with the Defence Minister had been "very positive" and that a meeting had also taken place with forces charities supportive of a credit union for the armed forces:

(...) What I understand to be happening next is that the MoD will identify a number of credit unions that are the right size to be able to deliver financial services to the Armed Forces community. We should be in a situation by the end of this year or early next year to offer the Armed Forces community credit union facilities that will provide loans, savings and other financial products that will be available through payroll deduction...<sup>139</sup>

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<sup>132</sup> [HL Deb 23 June 2014 cc1032-3](#)

<sup>133</sup> [HL Deb 9 July 2014 cc260-1](#)

<sup>134</sup> [HL Deb 9 July 2014 c263](#)

<sup>135</sup> [HL Deb 29 July 2014 cc1546-8](#)

<sup>136</sup> [HL Deb 29 July 2014 cc1548-9](#)

<sup>137</sup> [HL Deb 29 July 2014 c1552](#)

<sup>138</sup> [HL Deb 29 July 2014 cc1552-3](#)

<sup>139</sup> [HL Deb 20 October 2014 cc433-4](#)



## Appendix 1: How the reformed complaints system will work

*The following explains how the new complaints system will work, as laid out in the Bill.*

Anyone who is currently serving or has served in the armed forces has a statutory right to make a complaint about an alleged wrong relating to his or her service. The complaint must be about an issue that can be brought through the complaints system and be made within three months of the alleged wrong occurring. The time limit can be extended in certain circumstances and an individual can now appeal to the Ombudsman if their claim is rejected at this first instance. The Ombudsman's decision on admissibility is final.

Once a complaint is accepted the Defence Council<sup>140</sup> will assign a complaint to a person, or panel of persons, who has the authority to deal with it and grant appropriate redress. In some cases the sole level of decision will lie with the Defence Council.

If the complainant is unhappy with the outcome of the investigation he or she can lodge an appeal. The Defence Council will assign a more senior level of person or persons to decide the appeal, who can grant appropriate redress if applicable. The new system removes one layer of appeal from the current system in order to streamline the process.

A complainant may now apply to the Ombudsman at each stage of the process: at the application stage, if they feel their complaint was wrongly rejected; when they receive the result of the investigation into their complaint and again when they receive the result of the appeal, if they lodge one.

The Ombudsman's role is to investigate any allegations that there has been maladministration<sup>141</sup> in the handling of a complaint; it is not to investigate the substance of the complaint itself. The Ombudsman will have the same powers as the High Court to call for and examine witnesses and request documents during his investigation. He will have the power to refer any individual who unlawfully obstructs his investigation to the High Court.

If the Ombudsman finds evidence of maladministration, he must produce a report with his findings to the Defence Council and make recommendations as appropriate. This could include a reconsideration of the complaint. The findings of the Ombudsman are expected to be binding on the Defence Council, but not the recommendations. It is for the Defence Council to decide on matters covered by any recommendation by the Ombudsman, but it cannot simply reject the recommendations because it disagrees with them.<sup>142</sup>

The office of the Ombudsman will continue to provide an alternative means for individuals to raise a complaint if they feel unable to approach the chain of command or if the commanding officer is the subject of the complaint.

The Ombudsman will continue the Commissioner's statutory requirement to produce an annual report on the efficiency, effectiveness and fairness of the complaints system and any other aspects of the system the Ombudsman considers appropriate.

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<sup>140</sup> Under Letters Patent the Defence Council, which is the senior departmental committee, exercises the highest level of command and administration of the Armed Forces under Her Majesty

<sup>141</sup> Lord Astor of Hever said the term maladministration is deliberately not defined. He explained at committee stage that "maladministration covers traditional grounds of judicial review, such as procedural impropriety and irrationality, but also wider concepts such as excessive delay, failure to give adequate advice, or rudeness."

HL Deb 9 July 2014 253

<sup>142</sup> HL Deb 9 July 2014 c256

## **Appendix 2: Rules about Ombudsman**

The Cabinet Office have published guidance on setting up new Ombudsman schemes in which they set out the characteristics of an Ombudsman:

10. There is a wide range of Ombudsman schemes in the United Kingdom operating in the public and private sectors. Some of the latter are entirely voluntary, some are statutory and some are 'approved' by Departments or regulators for the statutory compliance of suppliers/providers.

11. Ombudsman schemes are designed to be free to the complainant and user-friendly. Complainants do not need normally legal representation or other assistance to access Ombudsman schemes. Ombudsmen proceed by way of investigation and not by way of adversarial hearings. They provide a level playing field between the individual complainant and organisations. They often use a number of Alternative Dispute Resolution (ADR) mechanisms and offer advantages over, and sometimes alternatives to, potentially expensive litigation.

12. The term 'Ombudsman' is occasionally used to describe bodies which are internal to those complained about and therefore not wholly independent of them. The term 'Ombudsman' is not legally protected so its use cannot be prevented, but it is essential that Departments assess carefully the relationship between any newly created redress scheme and the Department/organisation over which it has jurisdiction to consider complaints. They should not describe as an 'Ombudsman' scheme any scheme that is not truly independent from the body to be investigated.

13. For the bodies complained against, the advantages of Ombudsman schemes are that they avoid the cost and publicity of litigation while offering effective redress to their users and customers. For private sector schemes, the costs are shared among their members. For public sector schemes, the costs are borne by the taxpayer.

14. Ombudsmen have the further advantage over litigation in that they can and do often advise on systemic change. They can consider all the circumstances which gave rise to the complaint and make recommendations for a change of practice or procedure in a particular institution, Department or across a whole sector of the economy, for the benefit of all future users. Ombudsmen acquire knowledge and experience of good practice and this further informs their recommendations.

15. Ombudsmen investigations are conducted in private. Ombudsmen can examine records, interview witnesses and use professional experts where appropriate. The procedure for investigations can be tailored to the circumstances of the case. Ombudsmen do not normally name complainants but may publish digests of their decided cases. Most publish reports in which they name organisations which are the subject of the complaint.

16. Ombudsmen provide remedies which are fair and reasonable in all the circumstances, and are not necessarily bound by a strict interpretation of the law or precedent. In the public sector and in some private schemes their recommendations are not binding but meet with nearly total compliance. This is secured by a variety of means – by law, by contract, by publicity, by a regulator or by the moral force and the standing of the Ombudsman. There is no appeal against Ombudsman decisions, other than Judicial Review (where applicable) or where schemes (like the Pensions Ombudsman) have an appeal procedure in place.

17. There will be other complaint-handling schemes with Ombudsman characteristics, but they will not be fully-fledged Ombudsman schemes.<sup>143</sup>

A number of other countries have Ombudsman for their Armed Forces, though each differs in practice. An international foundation based in Geneva, 'Geneva Centre for the Democratic Control of Armed Forces' (DCAF) provides a wealth of material on military Ombudsman internationally. This includes a handbook which gives substantial guidance on the functions of the Ombudsman including chapters on models, independence, complaints procedures, investigations, reporting and recommendations: [Ombuds institutions for the Armed Forces: a Handbook](#).

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<sup>143</sup> Cabinet Office, [New Ombudsman schemes: guidance](#), 21 September 2010