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Lt Gen James Swift
Chief of Defence People
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18 June 2021

Dear Lt Gen Swift

CLAUSE 10 – ARMED FORCES BILL 2021: SERVICE COMPLAINTS APPEALS

We write to express our serious concerns about Clause 10 of the Armed Forces Bill. It has been quite hard to engage wider public interest, including amongst MPs, on the potential implications of this particular clause, and we wanted to contact you directly in the hope that we may be able to persuade you to reconsider the MoD's position and its advice to Government on the need for the clause. The implications of the clause are very serious and, as three lawyers regularly acting for service personnel claimants, particularly in the Employment Tribunal, we wanted to draw our concerns to your attention. We are very concerned that the Ministry of Defence is giving insufficient consideration to the potential implications for service personnel and their right of access to justice.

As you know, Clause 10 amends the Armed Forces Act 2006 and is stated to be 'part of wider reforms to increase efficiency and speed up the process within the statutory service complaints system'.[1] The clause reduces the minimum time which can be set out in regulations for complainants to lodge appeals (from Level 1 to Level 2; and from Level 2 to the Service Complaints Ombudsman for the Armed Forces, SCOAF) from six weeks to two weeks and permits the possibility of restricting the grounds upon which an appeal can be brought.

Anything that will reduce a service person's right to appeal must be given the most careful scrutiny and the reasons given very closely examined. Central to this proposal is the purported imperative of increasing efficiency and speed. That suggests that one of the blocks in the service complaints system is the six-week appeal stage. As far as we are aware, this is not the case. That was also a point made by the former SCOAF, when she gave her evidence before the Armed Forces Bill Committee in March. [2] The bulk of the delay lies at stage one of the complaint process, before a first stage decision is made, and is largely outwith the control of the complainant.

The matter is particularly important because a service person's right of access to the court, the Employment Tribunal (ET), depends upon their having made and, if necessary appealed, a service complaint.[3] If they fail to

[1] Explanatory notes to the Bill, §73.

[2] 'Certainly, in my experience as the ombudsman—I am speaking on the basis of five years' experience—the delays are in the front part of the system, not the back. In other words, the delay is usually on the way to a level 1 decision and not from a level 1 to a level 2, to appeal, or from appeals to the Service Complaints Ombudsman. Therefore, if you reduce the time limit from six weeks to two, not only is that a drastic reduction—a two-thirds reduction right off the bat—but it also will not actually address the wrong. It will come across, in my respectful submission, as if you are trying to prevent people from exercising their right to appeal, although there is no attempt in the Bill to reduce the length of time that the matter takes to get to a level 1 decision'.

[3] See s121 Equality Act 2010 121 Armed forces cases (1)Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless— (a)the complainant has made a service complaint about the matter, and (b)the complaint has not been withdrawn. (2)Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1)(b) as withdrawn if— (a)the period allowed in accordance with service complaints regulations for bringing an appeal against the person's or panel's decision expires, and (b)either— (i)the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D(6) of the 2006 Act (review of decision that appeal brought out of time cannot proceed), or (ii)the complainant does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with.

appeal a service complaint, it is deemed withdrawn and they lose their right to bring an ET claim. That is why this clause is so potentially serious.

A typical service complaint of the kind that we often see tends to progress as follows:

a. The person usually tries to make the service complaint themselves initially and without professional or other support. They may be doing it at a time when they are extremely upset and sometimes in the aftermath of a sexual offence or other very distressing event;
b. The complaint is lodged either directly via the chain of command or via the Ombudsman;
c. Once lodged, an admissibility decision needs to be made. This part of the process is supposed to take two weeks. Sometimes, it can months or even longer. The CMJ is currently assisting a woman who made a service complaint that did not get an admissibility decision for a year and two months, for example;
d. If found to be admissible, the service complaint will then have to go through various stages including:
    i. appointing a 'Deciding Body' to oversee the complaint;
    ii. (in appropriate cases) appointing a 'fee earning harassment investigations officer' (FEHIO) to support the investigation;
    iii. appointing an Assisting Officer to support the complainant;
    iv. interviewing the complainant;
    v. identifying the respondents and potential witnesses;
    vi. interviewing and taking witness statements from respondents and witnesses;
    vii. considering evidence from the respondents and witnesses;
    viii. pulling together an investigation report and file;
    ix. disclosing that to the complainant and considering their comments;
    x. and then having the Deciding Body make a determination.

The above is supposed to happen within 24 weeks but frequently does not. The complainant then has up to six weeks to lodge an appeal if they wish to do so.

If they want to get outside help at this point, now a decision has been made, they have to find a legal advisor or independent person willing to get their head around a very complex matter – usually there is a large file of papers to review - in a short period of time and help them draft a response. It is already extremely difficult to find someone at all, let alone someone with sufficient expertise, who can help in time for the six-week deadline.

During all this time, the service person will be still working full-time, which may include long hours and being away from home if deployed on training commitments or operations, and finding the process incredibly stressful. Alternatively, they may be signed off sick through stress. They may be suffering mental health problems. They may be being ostracised and very unhappy inside their unit. In any case, six weeks is already a tight deadline in the circumstances and it can be very hard to engage with clients in the most safe and effective way as it is.

We have been very concerned at the priority that has been given to addressing so-called 'speculative appeals'[4], for which no evidence has been provided, at the apparent expense of the need to support complainants with meritorious complaints, on which very important ET claims depend, that are already having to function inside a system that has never been found to be 'effective, efficient or fair'.[5] We heard nothing in the evidence given before the Armed Forces Committee that addressed our concerns. Indeed, the MoD witness appeared to struggle to justify the proposal.

The proposed reduction in time for bringing an appeal will restrict access to justice for service personnel, is contrary to the principles of the Armed Forces Covenant and in circumstances where service personnel have very limited employment rights already.

In our view, the clause, while being presented as in the interests of service personnel, will have the very opposite effect and we respectfully urge the MoD and the Government to remove it from the Bill entirely.

Yours sincerely (signed electronically)

Emma Norton, Solicitor & Director, Centre for Military Justice
Keir Hirst, Solicitor, Director and Head of Military Law at Wace Morgan Solicitors
Ahmed Al-Nahhas, Partner, Solicitor-Advocate & Head of Military Claims, Bolt Burdon Kemp

[4] Explanatory notes to the Bill, §74.
[5] https://www.scoaf.org.uk/document-library/

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08 July 2021

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Dear Emma,

Armed Forces Bill – Clause 10 (Service Complaints)

Thank you for your letter dated 18 June 2021 regarding Clause 10 of the Armed Forces Bill, and the concerns you raise in relation to the changes proposed for Service Personnel when accessing the Service Complaints system.

As you are aware the Clause changes the minimum time limit which can be set out in regulations for submitting an appeal against a first level decision or making an application to the Service Complaints Ombudsman (SCO), from six weeks to two weeks. It also provides the ability for the Defence Council to set out the grounds on which appeals can be brought in regulations.

The Armed Forces Act currently provides for a minimum time limit for submitting appeals of six weeks, which is the time limit set in the current regulations. We believe that in most circumstances two weeks is adequate for someone to submit an appeal. For example, not all Service Personnel are engaged in the same kinds of work, some may be engaged in roles such as working in offices where a two-week deadline would be appropriate, thus keeping with other public-sector complaints systems. On the other hand, if someone is deployed on operational duties where it would not be appropriate to restrict their time to appeal to two weeks, or there are circumstances such as health issues where it would be just and equitable to allow further time to submit an appeal. In such instances we would not expect the two-week deadline to be applied – instead a longer timeframe should be allowed. Guidance for applying longer timeframes for Service Personnel to submit an appeal will be developed and agreed with the SCO following consultation with the single Services. Whilst the Clause reduces the minimum time that can be set out in regulations, it is not MOD's intention to automatically apply such a deadline without exception to all Service Personnel.

The Service Complaints system is unusual in that it currently allows appeals to be brought against decisions of the Decision Body where the person making the complaint is dissatisfied with the outcome for any reason. The intent is to bring the current system into closer alignment with MOD's civilian grievances system, which allows appeals to be brought only where there is new evidence or suggestion of a procedural error. A complaint without an appeal right will now be considered finally determined after a decision has been made by the Decision Body without the need for a full rehearing, leading to a quicker resolution without affecting the service person's ability to go to the

Service Complaints Ombudsman. Decision making on the permissibility of appeals will be supported by clear guidance agreed jointly by the MOD and the SCO to ensure that both parties are assessing against a common and reasonable set of criteria, whilst also giving Service personnel a clearer understanding of the grounds on which they can appeal and how.

The legislation will also ensure that Complainants have the right to go to the SCO for a review of a decision on whether a complaint meets the prescribed grounds of appeal. This will provide a consistent approach with the current system, which already enables complainants to apply to the SCO to review decisions on the admissibility of complaints and out-of-time appeals. For complainants who receive a negative admissibility decision and then choose to apply for an Ombudsman investigation, the time-limit for bringing the investigation will start running after the latest admissibility decision. This is to ensure that people who incorrectly think they have a right of appeal will continue to have an appropriate timeframe in which to access the SCO.

Finally, you also raised concerns regarding Service Personnel's right of access to Employments Tribunals (ET) as a result of these proposed changes. At present, members of the Armed Forces may only make a claim to an ET in limited circumstances, for example for issues relating to Equal Pay or Discrimination as set out in the Equality Act 2010. In such cases, a Service Complaint on the matter must usually have been made by the individual making the claim to the ET and have concluded without being withdrawn. The measures regarding appeal grounds will not interfere with the right to take certain service complaints to the employment tribunal under section 121 of the Equality Act 2010. MOD are making a consequential amendment to section 121 to ensure that only cases where the complainant is aware, they have a right of appeal and fail to properly progress it, will be caught by the deemed withdrawal provisions in section 121(2) of that Act.

I hope this response clearly sets out the reasoning behind the changes proposed in Clause 10 of the Bill, and provides you with the assurances that we remain committed to having a Service Complaints system that our people can have confidence in.

As I am only occasionally in the office, I have signed this electronically to ensure it reaches you in a timely manner.

Yours sincerely,

Lt Gen James Swift
Chief of Defence People