

ARMED FORCES BILL 2021

BRIEFING FOR COMMITTEE STAGE – HOUSE OF LORDS

The Centre for Military Justice produced a detailed briefing for the Armed Forces Bill in March 2021. That is available [here](#).¹

All of our concerns still stand.

This short further briefing aims to provide a short update and summary as to the key issues with the Bill.

Murder, Manslaughter, Rape and Sexual Assault by Penetration

In February 2020, [an independent review](#) by HHJ Shaun Lyons and Sir Jon Murphy (‘the Lyons Review’) recommended that murder, manslaughter, rape, sexual assault by penetration, child and domestic abuses cases should be removed from the military justice system where alleged to have happened in the UK, except where the consent of the Attorney General was obtained.² For a full analysis of why this recommendation is so important, see our full briefing.³

That recommendation was rejected on the day it was published by the Secretary of State for Defence. A [judicial review brought by three rape survivors](#) secured, among other things, a concession that the issue should be placed before Parliament for debate, which is how Clause 7 of the Bill came to be included in the Bill.

However, the clause as drafted simply requires there to be a protocol on the handling of such cases – it says nothing about what that protocol should contain and contains no presumption that the most serious cases should be handled in the civilian system. The clause does not therefore reflect the recommendations of numerous experts and politicians including HHJ Shaun Lyons, the former Chief Constable of Merseyside Police Sir Jon Murphy, Johnny Mercer MP and the Chair and members of the Defence Committee Inquiry on Women in the Armed Forces (see below).

Following first and second reading in the Commons, on 11 March 2021, the [Labour Party announced](#) that it would support an amendment to the Bill to the effect that rape and other serious offences should now be prosecuted by civilian, not military authorities, where alleged to have occurred in the UK.⁴ Despite important cross-party support for that proposal in principle, with Sarah Atherton MP (the Chair of the Defence Inquiry on Women in the Armed Forces) stating in The Times that ‘[sexual abuse in the Armed Forces should not be prosecuted by the military](#)’⁵ and, since leaving Government in April 2021, Johnny Mercer MP, who has stated that he always wanted murder, manslaughter and rape cases ‘to be taken out of the military system’,⁶ the amendment did not pass.

¹ <https://centreformilitaryjustice.org.uk/guide/briefing-on-the-armed-forces-bill/>

² The military or service justice system comprises three separate branches of the service police: the Royal Navy Police, the Royal Military Police and the RAF Police (the MoD police is a civilian police service). Prosecutorial decisions are taken by the Service Prosecuting Authority (which acts like the CPS and brings criminal proceedings). Defendants that are charged are tried in Court Martial before a Judge Advocate and a board (which is like a jury of fellow service personnel of the same branch and of a certain rank and above) (unless they are summary offences which may be dealt with by commanding officers). Since the Armed Forces Act 2006, the service police can investigate all allegations including the most serious offences such as rape involving service personnel both at home and overseas.

³ In particular pp 6-14 <https://centreformilitaryjustice.org.uk/wp-content/uploads/2021/03/FINAL-CMJ-Briefing-on-the-Armed-Forces-Bill.pdf>

⁴ <https://labourlist.org/2021/03/labour-pushes-for-civilian-court-trials-for-rape-and-serious-offences-in-military/>

⁵ <https://www.thetimes.co.uk/article/sexual-abuse-in-the-armed-forces-should-not-be-prosecuted-by-the-military-65kqps62t>

⁶ Tweet Johnny Mercer MP dated 30 July 2021: ‘The truth was that my name was on the bill, but my advice as to what the bill should/should not cover was routinely ignored in favour of SoS demands. I had no control over it, and wanted to improve it. On rape cases, again, SoS and I shared a different view. If it was left to me there would have been an entirely different

On 22 April 2021, the Select Committee on the Bill reported. The Committee acknowledged the concerns of those that gave evidence about serious shortcomings in the operation of the military justice system and the Government's rejection of the independent Lyons Review recommendation. The Committee also revealed that the Secretary of State for Defence had refused authority for service personnel to speak to the Committee, a decision the Committee described as 'disappointing.' The Committee also noted that it had 'faced difficulty securing documents and necessary visit approval from the Ministry of Defence'.

The Defence Committee Inquiry into Women in the Armed Forces reported on 24 July 2021. The inquiry revealed 'truly shocking evidence from female service personnel' of sexual assault and rape, 'some of which even more disturbingly involved senior officers acting as wrongdoers.' Women reported serious procedural failures in the handling of their criminal cases, inadequate responses from the Service Prosecuting Authority, disclosure of sensitive information by the service police to the chain of command and reluctance on the part of the chain of command to report or respond appropriately to sexual assaults. As the Committee said, 'when things go wrong, they go dramatically wrong'. Critically, the Committee formally recommended that rape and serious sexual assaults should be taken out of the military justice system.

While service women had been – exceptionally – permitted to give *written* evidence to the Defence Inquiry, our request for permission for service women (and three of the women we are supporting in particular) to *speak* to Parliamentarians directly and comment publicly on the final reports of both the Defence Inquiry on Women and the Armed Forces Bill Committee, was refused by the MoD, applying their policy that no service person may communicate publicly (including to Parliament and the press) without the MoD's prior consent.⁷ This meant that the very people most directly affected by the Defence Committee and Armed Forces Bill Committee findings on the handling of rape cases were not permitted to speak about their experiences or let the public know what they thought about the Committee findings.

In advance of the Lords Committee stage, we make the following points:

1. The Bill as drafted would not even require sudden deaths, let alone rapes, to be handed to the civilian authorities. That is an unforgivable omission and a terrible missed opportunity. Deepcut has been back in the news again recently.⁸ It was of course the failure to ensure that those deaths were handled by the civilian police that has produced a situation today where the families can still not be sure of the circumstances of their children's deaths. [Des James, the father of Pte Cheryl James who died aged 18 at Deepcut barracks said of the Bill](#), 'We would have been spared decades of pain and uncertainty if there had been a legal requirement that civilian police should handle the investigation into my daughter's sudden death at Deepcut barracks in 1995. I simply cannot understand why the Govt is not taking this once-in-a-generation opportunity to fix this.' The families of Private Sean Benton, Private Cheryl James, and Private James Collinson strongly support the Gresford amendment (see below) that would ensure the most serious crimes are tried in civilian courts where committed in the UK. This would bring the position in line with the original intention of Parliament when it passed the Armed Forces Act 2006, and in line with the recommendations of the Lyons Review.
2. Notwithstanding that the Bill would not require sudden deaths to be handled by civilian, not military police, it is nonetheless now standard practice for that to happen and there is policy to this effect. The reason for that is clear – the public would not accept a situation in which military authorities could have conduct of sudden death investigations on military property because

process and end state, in both cases....In my view (murder, manslaughter and rape cases) should have been taken out of the Military system and I made that clear internally.'

⁷ The MoD policy of banning service personnel from communicating publicly is currently the subject of judicial review and the MoD has agreed to review the policy.

⁸ <https://www.bbc.co.uk/news/uk-57428716>

they would not be seen to have the requisite independence or expertise. If that is accepted in principle for sudden deaths, it ought to be accepted for other very serious crimes such as rape.

3. The reasons why rapes and serious sexual offences should be handled by the civilian justice system not the military justice system include the following:
 - a. It was never Parliament's intention that such crimes should be tried in the military justice system. Indeed, when the Armed Forces Act 2006 was passed it was explicitly stated by Parliament and Government that rapes would continue to be tried in the civilian system in all but the most exceptional of cases – however that did not happen and service police have investigated increasing numbers of sexual assaults, including rape, every year;
 - b. Service personnel are citizens of the UK. They have not given up their rights, including the right to be tried in the most appropriate tribunal, simply by joining the Armed Forces;
 - c. Service police and service prosecutors simply do not have the requisite experience to conduct these cases – as the Lyons Review stated, they lack experience of the 'daily grind' of conducting these cases and, due to the size of the Armed Forces in the UK, there will never be a sufficient volume of cases to enable them to develop the experience they need to conduct these most sensitive and difficult cases. In addition, they see themselves as 'soldiers first', which can affect the service provided to victims;
 - d. There is serious under-reporting of sexual assaults generally in the military. If they knew that they could report their sexual assaults to a police force that was entirely unconnected to the military, we suggest that greater numbers of service personnel that have suffered serious sexual offences would come forward and report, which in the long-term would improve the culture of the Armed Forces and improve operational effectiveness;
 - e. Removing such cases from the military justice system would end the ability of Commanding Officers to obtain access to service police witness statements and make it less likely that the threat of disciplinary action against the victim may follow an allegation of rape; and would stop the practice of the suspect's Commanding Officer's assigning victim liaison officers to victims with all the attendant problems that this practice entails;
 - f. The victim would have access to a wider range of victims services which are founded upon decades of civilian expertise and which are run and staffed by real experts who do nothing but deal with sexual offending;
 - g. The current position undermines public confidence in the Armed Forces and in their system of justice, which is harmful to recruitment and operational effectiveness.
4. The people most directly affected by the issue under debate have been prevented by the MoD from speaking publicly about it. This amounts to a serious restriction on freedom of speech and means that the public has not had the benefit of hearing from those that have most to lose from the Bill as currently drafted.

For all these reasons we urge the Lords to support Lord Thomas of Gresford's amendment to Clause 7, which would ensure the most serious crimes including murder, manslaughter, rape, child abuse and domestic abuse are tried in civilian courts where alleged to have occurred in the UK. The amendment should also include allegations of sexual assault by penetration.⁹

Service complaints appeal rights being severely restricted

In order to access the Employment Tribunal (ET), service personnel must first make a 'service complaint'. The service complaints process is a statutory complaints process governed by its own rules and regulations. If their service complaint fails and is not appealed, then the ET loses jurisdiction and their claim cannot proceed as a matter of law. The process therefore already amounts to a serious

⁹ <https://bills.parliament.uk/publications/42875/documents/713>

restriction on service personnel's right of access to justice, the organisation that would be subject to criticism essentially being permitted to act as gatekeeper to the independent ET.

The service complaints system is badly broken – riven by delay, complaints of bias and incompetence and each year found by the Service Complaints Ombudsman for the Armed Forces to be neither efficient, effective nor fair - and is already heavily stacked against service personnel. If a service complaint is not upheld, the service person has a right of appeal. Currently, the time for lodging an appeal is six weeks. The Government proposes to reduce that to just two. This is vitally important because, if a person does not appeal their service complaint, which they may not be in a position to do in the narrow two week window now proposed – and certainly they will struggle to get legal advice in that time - the ET loses jurisdiction and their ET claim will fail.

This amounts to a serious further restriction on the right of service personnel to bring complaints about bullying, harassment and discrimination, or indeed on any matter. We have attempted to engage with the Ministry of Defence about this and our concerns have been rejected. The Defence Inquiry on Women has criticised the proposal, pointing out that there appears to be little evidence for the need for it.

Since preparing our original briefing, the CMJ has continued to deal with more service complaints appeals arising from extremely difficult issues that disproportionately affect women and minoritised people in the Armed Forces and it clearer to us than ever that the decision to reduce service complaints appeal rights in this way will have a profoundly damaging impact on service personnel's access to justice. Reducing the appeal time from six weeks to two, in circumstances where someone's right of access to an independent court depends upon it, is a shocking proposal and one that no-one that claims to support service personnel and veterans should wish to support. It is deeply disappointing that no amendment has been proposed that would remove Clause 10 from the Bill in its entirety.

We urge the Lords to remove Clause 10.

For the full briefing see [here](#).

CENTRE FOR MILITARY JUSTICE
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