CENTRE FOR MILITARY JUSTICE
Justice - Welfare - Law

WOMEN IN THE ARMED FORCES – FROM RECRUITMENT TO CIVILIAN LIFE

RESPONSE TO FURTHER CALL FOR EVIDENCE FROM THE HOUSE OF COMMONS DEFENCE COMMITTEE

25 OCTOBER 2023

Contents

Introduction

The Centre for Military Justice (CMJ) is a small, independent legal charity established in 2019 to advise current and former members of the Armed Forces or their bereaved families who have suffered serious bullying, sexual harassment, sexual violence, racism, other abuse or neglect. The CMJ also undertakes educational and outreach work within the armed forces sector, promoting the rule of law, human rights and access to justice. Supporting women that have experienced gender-based violence and other discrimination continues to be a priority area for us as we move towards the end of our 4th year of operation. [1]

The CMJ gave written and oral evidence before the original Inquiry. A copy of our original written evidence can be accessed here. On 25 July 2021, the Defence Committee published its final report on 'Women in the Armed Forces: From Recruitment to Civilian Life'. On 3 October 2022, the Defence Committee announced a new call for further evidence and a copy of the CMJ's submissions can be accessed here.

Call for further evidence 25 October 2023

The Defence Committee has now made a further call for evidence with a deadline of 25 October 2023, and this short submission summarises some of the key issues that are currently arising in our work.

[1] www.centreformilitaryjustice.org.uk

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SERVICE COMPLAINTS – A LACK OF INDEPENDENCE

The Defence Committee recommended that the MoD should establish a central Defence Authority, to provide a reporting and investigation system for bullying, harassment and discrimination, outside the Chain of Command and outside the Single Services.

This recommendation was not accepted by the MoD, although the MoD maintains that it was 'partially accepted'.

As the Committee will recall, the Wigston Review into Inappropriate Behaviours in 2019 was convened following a series of incidents that had been reported in the press (which included allegations of sexual assault). The Wigston Review made a series of recommendations which the MoD stated it accepted 'in full'. One of the principle recommendation that was widely lauded when the Review was published, was the creation of a new central Defence Authority for Culture and Behaviours. This new Defence Authority, that would be separate from the single services, would have responsibility for the investigation of the most serious complaints, injecting a much-needed degree of independence and expertise to the system.

In the report of Danuta Gray, published in December 2020, designed to review the progress of implementing Wigston, it was revealed that this key recommendation had not in fact been accepted after all, nor did the MoD intend to implement it. Instead (without any process of public or service consultation), the MoD had decided that the recommendation was now going to be met by the creation of an expanded 'diversity and inclusion' team within the Chief of Defence People's office. The handling of the most complex bullying, harassment and discrimination complaints would remain with the single services themselves. It is fair to make the observation that the MoD's response to this part of the Wigston Review was at best, opaque, and at worst, misleading.

The Defence Committee in its July 2021 report impressed upon the MoD the importance of now accepting this particular recommendation of the Wigston Review which would lend a degree of relative independence and expertise to the reporting and investigation handling of the most complex bullying, harassment and discrimination complaints, (which are disproportionately made by women and Black and Minority Ethnic personnel), taking them outside of the single service branches concerned.

For the second time, the MoD rejected it.

In defence of its position, the MoD relied upon the fact that it had instead (our responses in italics):

1. Created a Diversity & Inclusion (D&I) Directorate that was independent of the chain of command – *it is important to note that there already was a D&I team in existence before the Wigston Review, which was expanded following Wigston*. *It is also important to make the point that this D&I Directorate is now responsible for Service Complaints reform and Service Justice reform as well as unacceptable behaviours and D&I work, a huge brief requiring expertise across a very wide range of disciplines.*
2. Updated its Service Complaints policy - *we say more about this below, but we suggest that the principle changes have made things considerably harder for service personnel suffering bullying, harassment or discrimination, not easier, particularly the very significant erosion of rights of appeal in the handling of Service Complaints*.
3. Appointed independent members to Appeal Body boards for Service Complaints – *the services have for a long time been able to appoint independent members to Appeal Body*

boards for Service Complaints where they involve an allegation of discrimination. This is not new and it was disingenuous of the MoD to suggest otherwise.

4. Created a 'Central Admissions Team' (CAT) for admissibility decisions on Service Complaints, removing decisions on whether a complaint could proceed, from the chain of command itself. That has now been rolled out – *it has long been possible to request the Service Complaints Ombudsman for the Armed Forces (SCOAF) to make a referral (notifying the service of an intention to make a Service Complaint outside of the chain of command); and a Commanding Officer has for a long time not been permitted to make an admissibility or substantive decision on a Service Complaint if they are in any way implicated in it; and the CATs are now tasked with applying the new Service Complaints policy which, as we suggest below, has made it harder, not easier, for service personnel complaining of bullying, harassment or discrimination. Finally, CATs remain firmly embedded within the respective single services and the name is something of a misnomer.*

The Wigston/Defence Committee's recommendation remains important and outstanding and the MoD should be urged to accept it. The quality of the existing Service Complaints teams and their ability to deal with complex cases of bullying, harassment and/or discrimination, is decidedly mixed, with some decisions being extremely low in quality, revealing a poor understanding of such concepts such as discrimination and unconscious bias. In her recent evidence to the Defence Committee, the SCOAF estimated that in around 50% of all substantive investigations, and in 75% of all maladministration complaints, SCOAF had upheld the complaint in favour of the complainant, raising serious questions about the quality and procedures adopted in relation to the two decision-stages that those complaints had to pass through before reaching her office. [2]

Many people within the services recognise the value of the Wigston proposal. Anecdotally, we can report that many individuals have expressed, in private conversations with the CMJ, the view that complex bullying, harassment or discrimination complaints would be better handled away from the services themselves.

Some recent examples from our casework, since the Defence Committee reported in July 2021:

In a decision of a Decision Body from the summer of 2022 (the Decision Body (DB) is the panel appointed to consider a Service Complaint at first stage), in a case supported by the CMJ concerning a complaint of a lack of welfare and other support following a report of rape in the Army, the DB itself took the opportunity to say: *"This is a specialist area requiring an understanding of law, policy and processes. Neither the Decision Body nor the investigating officer had any experience in dealing with victims of sexual assault, the law relating to it or the MoD policy. Whilst every effort has been taken to ensure all areas have been properly and diligently covered, and that you have been treated with sensitivity and compassion, the conduct of this process would have benefited from an expert in this area."*

In another example, a Service Complaint (SC) was brought by a Black female private in the summer of 2020. Large parts of her Service Complaint were found to be inadmissible (on the grounds that some of the individual acts of alleged racism and sexism had taken place outside of the time limit for bringing a SC, in circumstances where she had put up with a lot of 'low level' conduct for a long time before complaining). Her remaining complaint was investigated by a DB and rejected in March 2021. She appealed – now with legal help - to an Appeal Body (the Appeal Body (AB) is the body appointed to determine an appeal from a DB) that ordered the original alleged acts should have been taken into account after all and ordered the entire complaint be investigated again by a new DB. In October 2022, she was informed that that DB was not able to reach agreement on her complaint. The matter had to be remitted to be heard again by a yet

[2] https://committees.parliament.uk/oralevidence/13720/html/, Q6

another DB. That new DB finally made a decision in April 2023, almost three years after making her SC. Her SC had raised potentially important issues of race and sex discrimination. It was partially upheld and a consolatory payment offered. (In fact the SC process continues today because part of the SC that was rejected has been referred to SCOAF, which, as of 9 October 2023, has yet to assign an investigator to the case). She has left the service during this period.

Another case on which we are advising concerns an SC made by a Black female alleging very serious sex and race discrimination that was first raised informally with her chain of command in 2021 and formally raised as an SC in March 2022. It has still not been determined at DB level. SCs are supposed to take no longer than 6 months. The complainant has had to deal with multiple caseworkers and there has already been a change of the senior officer appointed as DB. She is in the process of leaving the service as a result of her treatment and the failure of the Chain of Command (CoC) and SC process to support her.

In another recent example (not to do with gender but it is relevant in that it involves a discrimination investigation), a Black soldier's service complaint of discrimination was completely rejected at DB level, and at AB level, even with the involvement of an 'Independent Member'. However on the same facts, the Employment Tribunal had no hesitation in finding that he had been the victim of direct discrimination, harassment, and victimisation – none of which had been acknowledged by the SC process. The SC process had been a complete waste of time. He has since left the service.

As if further evidence were needed, the recent tragic case of Gnr Jaysley Beck shows the need for a genuinely independent process in which service women and men can have faith. The Service Inquiry into her death concluded that the harassment she had endured in the months before her death had almost certainly been a causal factor in the teenager's death. Of particular note from that SI is the fact that Jaysley had reported an alleged sexual assault by a much more senior (and we think, older) male who was a Warrant Officer, five months before she died – that incident does not appear to have been dealt with appropriately and was not reported to the police, seemingly contrary to policy. When she later became affected by the conduct of her line manager, Jaysley did not report that to anyone nor raise a complaint about it. Part of the reason for that, the SI has concluded, may have been the poor response of the Army to the earlier incident. Jaysley's family wonders, if there had been an independent body to whom she could have reported the behaviours, this might have made a difference in her case. It is striking that neither Jaysley nor any of the other female witnesses who gave evidence to the SI that they too had been subjected to 'vile' and 'degrading' behaviours from men at Larkhill Garrison reported the incidents or made complaints about them. After her appearance on Woman's Hour, Jaysley's mother wrote to the Defence Secretary about this issue. To date, she has received a response from the opposition front bench but no acknowledgement or response from the Secretary of State or from anyone in Government.

These are the kinds of cases we suggest would have been better and more competently handled by a central Defence Authority.

An alternative and better way forward – but one that has not been pushed hard by pragmatic campaigners to date because it was assumed that the MoD would be more comfortable with the Wigston model than this one – would be to expand the powers of (and, crucially, train and resource accordingly) the SCOAF's office to enable her to hold and investigate these cases from the outset. At present, she can only investigate a case after the single services have finished with it. By then, most complainants will have given up and years may have passed; and in any event she only gets to see a tiny proportion of cases because most are not referred to her. When asked why the MoD declined to act upon the Wigston recommendation, the Chief of Defence People relied upon the fact that there was already an independent body which he said was capable of injecting a sufficient degree of independence to the system, namely the SCOAF. On the MoD's own analysis therefore, there ought to be little objection to handing over such cases to the SCOAF in principle and it will

be interesting to know if the MoD might reconsider. (We re-emphasise that if this were to happen there would need to be significant changes at SCOAF – presumably the savings made by the single services in no longer having to have conduct of the more complex and sensitive investigations could be reallocated through MoD to the SCOAF).

Having a central Defence Authority or the SCOAF have conduct of these cases would:

1. Inject greater independence and (with appropriate resourcing and commitment) expertise into the complaints system;
2. Provide a central, independent method of cascading best practice and learning across the three services;
3. Save enormous amounts of time and resources for the single services themselves;
4. Protect the single services from the obvious criticism that they are marking their own homework;
5. Engender confidence, which would mean more people would complain, which, while undoubtedly an uncomfortable process, would mean poor behaviour would be more effectively addressed, leading to an overall improvement in culture and behaviours.

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SERVICE COMPLAINTS – HANDLING OF COMPLAINTS

The link between a Service Complaint and service women's right of access to a court

Clients continue to report intense frustration and dissatisfaction with the SC process, even if they ultimately result in a positive or partially positive outcome in that there may be an admission of some sort of wrong, an apology and/or an offer of a small 'consolatory payment'. The process is routinely experienced in very negative ways. The SCOAF continues to report that the SC process is neither 'effective, efficient nor fair'.

For service personnel who wish to exercise their right to apply to an Employment Tribunal (ET), they have no choice but to use the SC process – the law requires it.[3] If they have not made a SC in relation to the same matters (or even if they have made a SC but then fail to appeal it if it is dismissed), the ET immediately loses jurisdiction and their claim cannot proceed. In this way, the rights of service personnel are very heavily restrained and differ markedly from the rights of civilians.

In addition, a service person cannot claim constructive or unfair dismissal – they can only bring a claim before the ET where they allege discrimination on the basis of a protected characteristic within the meaning of the Equality Act 2010 (ie – on the grounds of sex, maternity, race, sexual orientation, gender reassignment, marriage/civil partnership, religion or belief, but not, notably, disability or age). In the CMJ's experience, lawyers acting for the MoD expend considerable time and energy seeking indefinite delays to the progress of ET claims to allow SCs to be concluded[4], and trawling SCs to try and make the point that a claim has not been adequately covered by an SC and so the ET lacks jurisdiction and the claim or parts of it must be struck out.

The CMJ is calling for the statutory requirement that a service person must 'make and not withdraw' a SC, as stipulated within s121 of the Equality Acy 2010, to be repealed – there is no good reason for it and it effectively means a service person has to litigate the same issues, twice, frequently being trapped within an SC process that has been described every year by the SCOAF as neither 'effective, efficient or fair'.

The rationale for the mandatory requirement to make and not withdraw an SC in order to bring an ET claim appears to be that the services should wish to try and resolve matters themselves with a service person without resorting to litigation – however, time limits being what they are, ET discrimination claims have to be issued within 6 months in any event (which is the same time limit for a discrimination SC), so those claims will still need to be issued anyway. There should be nothing to stop an SP using the SC process if that is what they wish to do, at the same time as bringing their ET claim, as this may well provide an opportunity for the services to address the underlying issues and for both parties to avoid litigation. The important point is that the ET's jurisdiction should not *depend* upon their having done so. The system presently gives the Respondent (MoD) in all claims the power to act as gatekeeper to the independent ET – that is highly unfair and improper and reflected in no other jurisdiction scheme. It has the effect of tipping the scales very firmly in favour of the MoD which is always the respondent party to such claims.

[3] S121 Equality Act 2010 excludes service personnel entirely from the jurisdiction of the Employment Tribunal unless they have 'made and not withdrawn' a SC.

[4] In every single ET claim on which we have advised, the first thing the MoD does post issue is apply for a stay of the proceedings pending the outcome of the SC. Sometimes the Claimant is perfectly happy to agree with an application for a stay – usually it is opposed on the grounds that there has already been inordinate delay and the Claimant does not want an indefinite stay behind a process that is accepted by the MoD as neither 'effective, efficient or fair'. The point is – the Claimant's right to bring her claim should not depend upon her having made or maintained a SC in order for an independent Tribunal to have jurisdiction. The tribunal's jurisdiction should not be fettered in this way.

The Committee recommended that Defence should adapt performance assessment systems to prevent the progression of Service personnel, particularly leaders, who have acted unacceptably.

Part of the MoD's responses to this recommendation was that Commanding Officers deemed by SCOAF to have fallen short in their handling of Service Complaints would now have consequences that will appear on employment records.

We explained in our submission dated 17 October 2022 why we did not think this was a meaningful concession and it did not address the shortcomings identified.

Earlier this month, CMJ asked SCOAF and the MoD via FOIA the following question:

> *'In its response to the Defence Committee Inquiry into Women in the Armed Forces, on 2 December 2021, the Ministry of Defence stated that 'Defence will work with the single Services to develop new measures to ensure Commanding Officers who, when found by the Service Complaints Ombudsman to have fallen short of expected standards in handling Service Complaints and receive appropriate, consistent and robust consequences, that appear on their employment records.' (See pp 14, 30 and Recommendations 8 and 29, here: https://committees.parliament.uk/publications/8059/documents/82951/default/)*
> *Since 2 December 2021:*
> > *1. on how many occasions has SCOAF found a CO to have fallen short of expected standards in handling a Service Complaint; and*
> > *2. on how many of those occasions has that been recorded on the CO's employment record?'*

SCOAF replied to state that they did not hold this information.

We asked a supplementary question:

> '*as a matter of logic, the MoD would need to be formally notified when a Commanding Officer had been found by the Service Complaints Ombudsman to have fallen short of expected standards in the handling of a Service Complaint, in order to consider whether to amend the CO's employment record (as per their assurance to the Defence Committee). If SCOAF does not have a record of the occasions this has happened, how can the MoD amend any employment records?'*

SCOAF replied:

> *'The only additional information that our managers are able to add is that the MOD have not had any formal engagement with SCOAF about this issue. In the absence of this, SCOAF's current reporting procedures do not capture such information.'*

Separately, the MoD FOIA team has declined to respond to the same request on the basis that the request for information would cost too much money to process. This indicates to us that the information is not being captured at all (because if it was, it would be cheap and easy to provide).

In light of the responses from the MoD and SCOAF, the CMJ is reasonably confident that no CO will to date have had their employment record amended due to the poor handling of a SC. This is a shocking omission given the assurances provided by MoD and the evidence from SCOAF that 75% of maladministration complaints brought to her attention are upheld. And we would add that if the MoD is concerned at the poor handling of complex SCs generally (as they should be), then the better response would be to act on the Wigston/Defence Committee recommendations and

send them out to a central Defence Agency or SCOAF in any event, not waste time pretending to commit to amending CO's (who are sitting as DBs) employment records.

The Defence Committee recommended that the Armed Forces Bill 2021 should be amended to retain the 6-week time limit for complaint appeals.

Time limit for an appeal

We explained in our last submission why it was so important that this recommendation from the Defence Committee should have been accepted. In answer to the concerns that were raised by the Defence Committee, the then CDP gave the Committee an assurance that:

> *'the Armed Forces Bill presently before Parliament does not itself set a minimum time limit of two weeks for Service Persons to submit an appeal, it provides Defence with the ability to set out in regulations a time period for appeals that must be at least two weeks, but which can be longer and can set out the circumstances where different time limits will apply.'*

Sure enough, in June 2022, the limit was then set by policy to just two weeks, which we think was entirely contrary to the spirit of the assurance given above.

It has consequently been an increasing aspect of our work that we have had to support service personnel making panicked and rushed applications to appeal, or else having to support them to make applications to appeal out of time.

As was explained in the original submissions to the Defence Committee by numerous sources, including the former SCOAF, the time period for lodging an appeal was not the cause of any significant delay in the SC system. The CMJ is very clear in our view that this measure was introduced with the primary objective of ensuring that fewer appeals went forward, which we are reasonably confident has happened, based on our experience.

We anticipate that with so few appeals now being permitted to proceed (either on the basis that they are too late or on that they do not fall within the prescribed grounds, see below), the overall time taken to process SCs overall will soon be said to have improved. We hope the SCOAF will not use that as a basis to find in future years that the system is now 'effective, efficient and/or fair'. Where efficiencies are introduced at the expense of fairness, that is not a meaningful improvement.

Grounds for appealing a SC

We also explained in the last submission that new prescribed grounds of appeal were being introduced for an appeal (as of June 2022). In our experience those prescribed grounds are being applied rigidly and are having the effect of disposing of meritorious complaints that need to be appealed (and prior to June 2022 would have been appealed). In her evidence to the Defence Committee, the SCOAF said the same:

> *The other key change in the reform was the restriction on the grounds of appeal that can be brought. That has resulted in far fewer cases being eligible to have their appeal heard. That has improved timeliness, because appeals take the longest out of any part of the service complaint process. If we are not hearing the appeals, they are not taking that long in the system. That is one of the key drivers behind why timeliness has improved, but I have real concerns that those changes are restricting the fairness of the system.*[5]

The result of this, according to SCOAF, is that the admissibility process may prevent a Service Person from pursuing a second-level decision within the service in respect of a DB decision which

[5] https://committees.parliament.uk/oralevidence/13720/html/ Q13

is wrong or flawed[6]. In her 2022 annual report, the SCOAF recommended that the grounds of appeal should be amended to include a material error of reasoning[7].

In addition, we are seeing complaints that are made up of a number of different parts that are all related (eg. multiple acts of alleged discrimination) being broken up so that only one or two parts of the appeal are permitted to go forward, usually on quite technical grounds, leaving the rest of the complained-about conduct invisible to an AB. When looking at patterns of discrimination, it is important to look at the alleged conduct in the round and it makes no sense to break things up in this way. This has the effect of making it less likely that an AB will find in favour of the complainant because they are only sighted of a partial account of the complained-of behaviour (see more on this below).

In anticipation of this submission, in September we requested of the MoD the figures for the number of DB decisions appealed prior to the changes of June 2022 and the figures for the year afterwards, and some related data concerning admissibility decisions. The deadline has passed with no substantive response (which we have chased).

The process of appealing an SC

The new process of appealing a SC is highly confusing and very messy. We have no idea how anyone with a complex, sensitive SC raising issues of sex or race discrimination is supposed to navigate the process without help – even with help it can be a minefield. In the last few months it is also apparent that there is a significant disagreement between the SCOAF, MoD and between the services as to how SC appeals should be processed.

After June 2022, the process for appealing a DB decision is now as follows:

1. SP receives their DB decision letter.
2. If the SP is not aware of any grounds of appeal, at this stage they can refer their complaint to SCOAF to investigate substantively, on maladministration grounds, or both.
3. If they *are* aware of any grounds of appeal, the SP has to use the appeal process, and has two weeks (reduced from six, see above) to appeal the decision. The policy JSP 831 states that the period begins with the day on which the Complainant is deemed to have received the decision; however the regulations stipulate two weeks from receipt – this is an important distinction especially with such a mobile population that often experiences delays in receiving communications and it should be made clear that it is two weeks from receipt).
4. The appeal can now only be made on the grounds of 1) material procedural error that would have been relevant to the outcome 2) material error as to the facts that would have been relevant to the outcome 3) new evidence that was not in fact available to the Complainant at the time that they first made their SC (not merely presented at the time), and that which would likely have made a difference to the outcome. In our experience, lay people understandably struggle to apply these categories to their cases.
5. The service itself then makes a decision on whether the appeal has been made 1) in time and 2) in accordance with the prescribed grounds of appeal.
6. There is currently a difference in approach between the services as to whether an appeal can be allowed in part or not (see below).
7. If it is rejected on time grounds, there is a right of appeal to SCOAF.
8. If it is rejected on the basis that it does not fit within the prescribed grounds, and almost all of the complaints we have attempted to appeal since June 2022 have been completely or largely rejected, the complainant can ask SCOAF to review that decision. (As above, our FOIA seeking data on the number of appeals allowed since 2022 remains outstanding).

[6] Defence Committee Oral Evidence: Work of the Service Complaints Ombudsman HC 1865, 24 October 2023 (https://committees.parliament.uk/oralevidence/13720/html/)

[7] Service Complaints Ombudsman for the Armed Forces, Annual Report 2022 (SCOAF Annual Report 2022)

9. If the appeal admissibility decision is overturned, depending on the service, either part of or the entire SC will go forward to be considered by an AB.
10. If only parts have been allowed as an appeal, the rest can in due course be referred to SCOAF – but not until the appeal of the allowed-parts are concluded by the AB so those parts are effectively stayed.
11. The AB makes its decision.
12. Once the AB concludes its work, the service person can refer their SC to SCOAF for a substantive, maladministration or undue delay investigation. That invariably takes place, if at all, years after the events in issue.

There is at present a disagreement between SCOAF and MoD and the services on how appeals should be handled.

SCOAF is of the view that if part of an appeal is admissible, the AB should nonetheless review the entire SC. That is also the practice of the RAF in our experience, that makes clear to complainants, if they appeal a DB decision, then the whole SC will be reviewed afresh by an AB (if admissible), even if parts of their SC have been upheld.

However, it is the Army's practice that they will only consider the parts of an appeal found to be admissible and not the entire complaint afresh.

We do not know how the RN is approaching this issue.

We raised this issue with the MoD and sought clarity – their response seems to be that it is at the discretion of the service as to whether to allow an appeal in whole or in part and, if allowed in part, whether to revisit the entire complaint – so there remains varying practice across the services and it appears that SCOAF's view is being disregarded by the Army.

POWERS OF THE SERVICE COMPLAINTS OMBUDSMAN FOR THE ARMED FORCES (SCOAF)

With appropriate resourcing, we would like to see:

1. The SCOAF have her own powers of investigation, at any stage of the SC process.
2. The SCOAF to have the power to conduct thematic investigations.

This would address the problem she identified in her evidence before the Defence Committee of 24 October 2023[8], that:

> '*one of the key deficiencies with my powers under the system at the moment is that I am tasked with reporting on whether the system as a whole is efficient, effective and fair. I can only see the details of cases that are specifically brought to me through application by those individuals. I am reporting on an entire system, but I see only the tip of the iceberg. In order to make the assessment of what is going wrong, what is going well, what could be done better and where improvements could be made, it would be important for my office to be able to see the wide variety of cases that come through the system, not just those of people who approach us with their applications. Last year, for example, 950 cases were closed through the service complaints system. We received applications to look into substantive matters on fewer than about 100 of those. It would be nice to believe that all those other people were very happy with the outcome of their complaint, but surveys and feedback tell us that that is not the case: 98% of individuals say that the underlying issue in their service complaint was not resolved. That figure is massively at odds with the number of people who apply to us. To have the power to look into cases that are not specifically applying to come to us would give us a much broader remit and a much stronger reporting base for talking about what needs to change within the system.*
>
> *On a similar note, expanding on that, there is the idea of own-motion investigations or thematic reporting. At this moment in time, we can only look at the things that people ask us to look at, so a lot of the questions today I can only answer from the experience of what we have seen. If we talk about things like why people do not complain or the experiences of people who might not get to access the service complaints system, those are all things that I am not currently tasked with or empowered to look at. With own-motion, automatic reporting, we would be able to look into that.'*

[8] https://committees.parliament.uk/oralevidence/13720/html/

THE SERVICE PROSECUTING AUTHORITY (SPA)

Prosecutor's Protocol

In response to the Defence Committee's report, the MoD explained that there would be a new duty placed upon the Director of Service Prosecutions and the Director of Public Prosecutions to agree a statutory protocol that would determine how rape and sexual assault cases (and other serious crimes) were to be taken forward. This had originally been promised to three clients of the CMJ in November 2020 in response to their judicial review claim, as part of the settlement of that claim. Almost three years on and it has still not been published.

A public consultation exercise was conducted in spring 2023 and the CMJ's response can be seen here. We made a number of proposed amendments to the draft protocol and wait to see if they have been accepted. We understand that it is likely to be accepted that all domestic abuse cases ought to be handled by civilian authorities. If that is the case, we do not understand why rape and sexual assault cases should be any different.

Inspections of the SPA

We also raised in our response to the draft protocol the serious issue that the Service Prosecuting Authority had not been independently inspected since 2010. This is in stark contrast to the regular system of unannounced rolling inspections that apply to the civilian CPS areas.

Further, inspections of the SPA are by invitation from the SPA, reflecting the system of inspection for the service police - which is also by invitation. It is a completely unacceptable system.

We understand that an inspection may at last shortly be announced. It is important to note that the current Chief Inspector of the CPS, is the former Director of the SPA, Andrew Cayleigh KC. With no disrespect to Mr Cayleigh, this raises a serious concern about independence and the potential for a perception of bias. If an inspection of the SPA is forthcoming, it will be important for the current HMCPSI to be completely removed from the inspection process in both operational and oversight terms.

In any event, arrangement must be made to remove what HHJ Lyons described as the 'cosy' inspection arrangements for service police and the SPA generally. They must be governed by the same inspections processes as apply in the civilian system. There can be no possible justification for inspections to be at the invitation of the very institution being inspected. We hope the Defence Committee will recommend that the inspection arrangements be overhauled and reformed.

POLICING

Defence Serious Crime Unit

The Special Investigations Branches (SIBs) of the single service policing branches, were combined into a single tri-service Defence Serious Crime Unit (DSCU) in early 2023. It is too soon to say what impact this is having on outcomes for serious sexual offences.

The following observations and recommendations about the prospective DSCU were made by one of the independent civilian judges responsible for recommending its establishment (our response in italics):

1. The DSCU must have a first right of refusal on the handling of all serious crime.

2. The DSCU must have a civilian deputy Provost Marshal – *we understand that this has not happened.*

3. The DSCU should have a strategic policing oversight board that includes senior civilians – *we understand this is not established yet.*

4. Civilian police detectives could be employed to work full time at the DSCU - *we do not know to what extent this has happened or been accepted.*

5. The Provost Marshal (PM) must have sufficient seniority as compared with the other Provost Marshals - w*e note that the current PM of the DSCU is a Colonel where the PM of the RMP is a Brigadier, a superior rank. However the PM of the DCSU is responsible for more serious crimes.*

6. There should be annual reporting on the work of the DSCU.

7. The 'unified career model' whereby service police and prosecutors are usually only in post for a couple of years before having to move on, should be reviewed for them – *this is hugely important. The constant churn of staff handling investigations and prosecutions is deeply problematic for both the handling of the case and the victim's experience. We do not know what if any arrangements have been made to address this point.*

8. DSCU staff must not fall under the chain of command of the single services for reporting or disciplinary purposes.

9. The DSCU must have a significant focus on victim care and support – *CMJ is aware of the Victim & Witness Care Unit now providing help and support to victims of crime. Staff appear to be highly engaged, pro-active and experienced in the few occasions we have come across them.*

Tri-services policing protocol

We have seen cases since the 2021 inquiry where the person accused of a crime (that could be characterised as a gender based crime, such as stalking, harassment, or rape) has been a member of the service police and not been dealt with according to the Tri Services Policing Investigations protocol. That protocol was set in place following the case of the late Cpl Anne Marie Ellement who was a soldier within the Royal Military Police who reported being raped by two RMP colleagues

and whose rape report was investigated by the RMP themselves, including friends of the accused. The protocol requires that a separate branch of the service police investigate in such cases to avoid a risk of bias. Awareness of the existence of the protocol seems to be patchy and it is not applied consistently.

Additionally, it is not clear what are the arrangements that will be in place now the DSCU has amalgamated all SIBs. Where an SIB staff member is accused of a crime, what arrangements are in place for investigating him/her?

Service Police Complaints Commissioner (SPCC)

The SPCC is now operational, however she will not be dealing with alleged incidents or failings that pre-date the establishment of her office. That is regrettable. There are matters on which the CMJ is presently advising and which are presently being addressed through the service police's internal professional standards departments. Our clients would like to have the option of bringing those complaints to the SPCC if the outcome of those internal complaints are unsatisfactory or if there are matters that ought to be brought to her attention.

REPORTING MATTERS TO THE SERVICE POLICE

Adding offences to Schedule 2 Armed Forces Act 2006

There is no legal requirement on a Commanding Officer to refer the offences listed below to the service police (pursuant to s113 of the Armed Forces Act 2006). They are not listed in Schedule 2 to the Armed Forces Act and so are not required to be referred (to the service police) by law:

a. Common assault where there is a domestic abuse context (and this may still be dealt with summarily by a CO on the basis that a CO can deal with a common assault/battery).
b. Actual Bodily Harm where there is a domestic abuse context (ditto, albeit permission is required before a CO can deal with this offence summarily, though it remains within their powers).
c. Disclosing private sexual photographs and films with intent to cause distress ('revenge porn') (s. 33 Criminal Justice and Courts Act 2015).
d. Possession of extreme pornographic images (s.63 Criminal Justice and Immigration Act 2008).
e. Controlling or coercive behaviour in an intimate or family relationship (s.76 Serious Crime Act 2015); and
f. Voyeurism: additional offences ('up skirting') (s.67(A) Sexual Offences Act 2003).

Not requiring Commanding Officers to refer such matters to the service police seems entirely at odds with the current measures to require the services to deal appropriately with these kinds of offences that disproportionately affect women. The Defence Committee should urge the MoD to amend the law to add those offences to Schedule 2.

We understand that the new Prosecutors Protocol will require domestic abuse offences to be handled by civilian authorities. That may be said to address points a) and b) above. However, there is a potential loophole if that is proposed, which is that as long as COs are not required to refer such allegations to the service police in the first place, a case may never reach the stage where a prosecutor has to consider it at all. Put simply, there is still nothing to stop a CO from treating a battery or ABH as matter that he/she may deal with summarily, as long as it is not included in Sch 2. This is a point CMJ has been raising for years and needs to be addressed.

Reporting criminal offences to the service police generally

The CMJ suggests there needs to be a central website or portal (which is accessible to people both in and outside the services) whereby criminal offences can be reported to the service police online. The present system is confused and patchy. We have had several occasions to support

people to report and each time have had to rely on former points of contacts and messages being passed on. This is not appropriate. The system for reporting should be clear and easy to use.

COURT MARTIAL

Court Martial rules need amending

One of our clients received psychological therapy. Her therapist was served with a production order ordering her to produce notes of her sessions with the client to the service police. The client was given no notice of this. This meant that - potentially – her entire therapy record could be disclosed not only to the prosecution but also of course to the defence. That caused considerable distress - clearly having her alleged assailant trawling through her most intimate and sensitive therapy notes would amount to a further and very serious violation.

There is important case law (reliant on the Human Rights Act)[9] that affords protection to victims in such circumstances which has been used to good effect in the civilian system but which does not seem to have found its way into the military system yet.

The (civil) Criminal Procedure Rules, Rule 17, addresses this situation and in light of the case footnoted below, requires a production order to be served not only on the person doing the producing (the therapist or doctor), but also the subject of the material (the victim), where the court so directs. The general position is that the complainant herself should be notified. They are to be given notice and then permitted 10 days to notify the court if there is any objection.

An equivalent provision in the Armed Forces (Powers of Stop, Search, Seizure & Retention) Order 2009 (Sch 1) does not contain such a requirement. Thankfully in the above case we were able to assist the therapist to obtain her own legal advice and to support the client to make a decision on what she could agree to disclose (and what she objected to disclose) ensuring a more proportionate disclosure. CMJ has raised this issue with the JAG directly.

[9] https://www.mentalhealthlaw.co.uk/R_(TB)_v_The_Combined_Court_at_Stafford_(2006)_EWHC_1645_(Admin)

SURVEYS

The Defence Committee recommended that MoD commit to tri-service sexual harassment surveys annually.

CMJ cannot see that any surveys have been published since the 2021 sexual harassment surveys available here.

POSITIVE DEVELOPMENTS:

According to SCOAF, the use of Central Admissibility Teams (CATs) for processing the initial stage of a SC appears to be resulting in more complaints being made. That is a positive development and suggests that even the smallest measure of semi-independence (from the CoC, albeit not the service itself) can produce positive results. It is logical to assume that greater measures of independence (such as those proposed by the Wigston/the Defence Committee on the handling of serious SCs) would lead to even more people coming forward.

The DSCU's Victim & Witness Care Unit seems to be staffed with experienced, pro-active and supportive staff.

We understand that there are moves afoot to introduce a system of victim's advocates for sexual crime, in the Court Martial. This would presumably follow the Northern Ireland pilot set up by former LJ Gillen. We would support this. If that is to happen, it needs to be properly funded and genuinely independent. Victims' advocates, if they are to be appointed, should not sit inside the DSCU.

Tri-service boards are being introduced across the court martial on a 6 month trial basis. This is a step in the right direction. It will be important to monitor the potential effect on the rape conviction rate for cases completed at court martial over this period. Greater use should and could be made of civilians sitting on military boards, as long as the MoD refuses to accept that serious sexual offences should generally be dealt with in the civilian system.

25 October 2023
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