Armed Forces (Service Complaints and Financial Assistance) Bill: Government Response to the Committee’s Fifth Report of Session 2014–15

Tenth Special Report of Session 2014–15

Ordered by the House of Commons to be printed 17 December 2014
The Defence Committee

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

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Tenth Special Report

The Defence Committee published its Fifth Report of Session 2014–15 on the Armed Forces (Service Complaints and Financial Assistance) Bill (HC 508) on 23 October 2014. The Government’s response was received on 16 December 2014 and is appended to this report.

Appendix: Government response

The Government is grateful for the Committee’s detailed consideration of the Bill and for its report. The reforms to the armed forces service complaints process and the creation of the Service Complaints Ombudsman that will follow from the Armed Forces (Service Complaints and Financial Assistance) Bill (“the Bill”) mark a step change in how the complaints system will operate. There are important issues about independence of the role and oversight of the process that are made in the report, and we are largely in accord with the Committee’s aims behind the recommendations it has put forward. The Committee’s desire to preserve the chain of command’s integrity is also particularly welcomed. We also acknowledge and are grateful for its comments on wider policy and practice matters included in the report.

Before turning to the specific conclusions and recommendations made in the report it might be useful to set out the Government’s position on two general issues that are raised in it—the independence of the Ombudsman and the scope of their powers. The Government is fully committed to creating a new Ombudsman who is not only independent but is perceived to be so, whether through the process by which they are recruited or in the extent to which they have discretion as to how to exercise their duties and powers. We are confident that the Bill achieves this. We maintain that what we have in place should give internal and external interested parties confidence that the post holder has no ties to or is constrained by the Government.

To inform the debate at Second Reading, it would be helpful if this response could be made public as soon as possible by the Committee.

Our response to the specific conclusions and recommendations made is as follows:

We recommend that the Bill be amended to state that a person should not be eligible to be appointed as Ombudsman for a period of five years after leaving the regular or reserve forces. Such a stipulation 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. (Paragraph 19)
It is important that the Ombudsman is both independent and seen to be independent of the armed forces. We do not agree, however, that an amendment is required to the Bill to achieve this. We acknowledge the Committee’s concerns about former members of the Services being appointed to the role but these are unwarranted. There are no reasonable grounds for suggesting there will be actual or apparent bias simply because they once served, regardless of how long ago that might have been. The amendment would also limit our pool of candidates.

Careful consideration is already given to any recent armed forces experience as part of the independent recruitment process, precisely for the reasons that the Committee is concerned about. As additional safeguards, the candidate for Ombudsman will be subject to a pre-appointment hearing by the HCDC.

We agree with the MoD and our witnesses that the Service Complaints Ombudsman should be appointed for a minimum of five years. It is essential that there is sufficient time for the Ombudsman to familiarise themselves with the role and to become fully effective. We welcome the Minister’s statement that the Ombudsman appointment cannot be renewed and agree with several of our witnesses that it would be inappropriate for the Ombudsman to be eligible for reappointment. We believe that these elements of the appointment need to be included on the face of the Bill. (Paragraph 25)

Security of tenure for the Ombudsman is an important part of independence and certainty both for the post holder and for those involved with the complaints process. The first Ombudsman will serve a five year non-renewable term. This strikes the right balance in length of term—it ensures that the person appointed will have the time to get to grips with and perform the role effectively, yet not remain in post so long as to become complacent. There is also no risk of the post holder being affected by a desire to be reappointed. We have not put this on the face of the Bill as it would remove all possibility for flexibility. These terms will however be set out in the appointment letter, which we judge is the most appropriate approach.

We are convinced that there should be a degree of independent scrutiny and input into the content of the regulations for the procedure for making a complaint and determining the admissibility of Service complaints. We recommend that the Bill should be amended to require the Defence Council to consult the Service Complaints Ombudsman, when appointed, before making regulations under this section of the Bill. We welcome the publication of draft regulations by the MoD. However, we believe it would be helpful if more detailed draft regulations were published in advance of the Bill’s Second Reading in the House of Commons and for this Committee to be consulted on them. (Paragraph 29)

We agree that a degree of independent scrutiny and input is helpful, but we do not think it is necessary to make specific legislative provision for the Ombudsman to be consulted on the Defence Council regulations which set out procedural matters regarding the internal redress system. First, we have already consulted the Commissioner informally
on all the regulations and we will continue to do so with the new Commissioner. Second, should the Ombudsman in future have concerns with the internal process, they will be able to make comment in their annual reports. Finally, it is important to highlight that along with informal consultation, the Defence Council regulations will now be subject to the agreement of Parliament as the regulations will be made by statutory instrument. This is a new and important change from the old system: the previous Defence Council regulations were not subject to any parliamentary process.

A further draft of the regulations is attached.

While we recognise the differences between, and the uniqueness of, each of the Services, we call on the MoD to consult the Ombudsman, when appointed, on the establishment of a central tri-service Service complaints unit and to inform this Committee of the outcome of the consultations. (Paragraph 33)

The Government recognises the importance of consistent handling of service complaints, particularly with the independent scrutiny the Ombudsman will bring, and we will be working with the Services to achieve that as far as possible. Internal processes are continually under review by the Services and MoD. This enables best practice to be shared and improvements made, as part of which a consistent approach can be introduced where it is possible to do so given the different environments and command structures within which the Services operate as part of their day to day functions. There are no plans for a tri-Service complaints handling unit: each Service should remain accountable for the welfare of its personnel and handling complaints is an important aspect. It will of course be open to the Commissioner, and then to the Ombudsman, to suggest in their annual report ways that the efficiency of the system might be improved.

We call on the MoD to provide us with the findings of the Defence Internal Audit on the accuracy of the Department’s and Services’ systems for recording Service complaints. (Paragraph 34)

The Commissioner requested a further audit of how the internal recording system is being used, which will follow on from the last audit conducted in 2012. We will share the findings with the Committee when the current audit has been finalised, which is scheduled to be in the first quarter of 2015.

We also agree with the Commissioner that the details of the number of complaints withdrawn, the nature of those complaints and the reasons for withdrawal should be provided to the Ombudsman and this should be in a form that disaggregates withdrawn complaints from those informally resolved. (Paragraph 34)

We are investigating what it may be possible to capture on the Joint Personnel Administration system, which is the HR administration system for the armed forces and is also used for recording service complaints. We are also working with the Commissioner on this in the context of her next annual report and if it can be provided now we will do so.
We agree with the Commissioner that the Ombudsman should be able 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. (Paragraph 41)

The Government is clear, and the Commissioner agrees, that the Ombudsman’s investigations should not be a general case review. Our legal advice is that the amendments proposed here would require the Ombudsman to look for any maladministration in every case. The complainant is at the heart of the system and they must identify what they say went wrong in the handling of their complaint, with appropriate support if necessary. The existing system has been beset by delay; we do not want this to happen, or worsen, in the reformed system, especially during the Ombudsman’s investigation stage.

Whilst the complainant must make the allegation of maladministration, we accept that there may be circumstances in which it is right for the Ombudsman to permit an amendment to the initial application if a new ground of maladministration emerges during the course of the Ombudsman’s investigation. That will be made clear in the revised draft regulations, and no amendment to the Bill is necessary.

However, we believe the Ombudsman should also be able to investigate the substance of the original complaint, once the Service’s internal process has been completed, and see no reason to believe that this would undermine the chain of command. (Paragraph 42)

We have given very careful thought to this and are satisfied that what we have provided for in the reformed system is appropriate for the Ombudsman. It strikes the right balance between the responsibility of the chain of command to get to the bottom of allegations and concerns, and the need for a strong external check to hold us to account for doing so fairly and effectively. We believe firmly that the welfare of members of the armed forces is the responsibility of the chain of command. It is therefore for the chain of command to put things right where there are wrongs that affect their personnel, and as a result affect unit cohesion and ultimately operational effectiveness, regardless of the subject matter of those allegations or concerns. We also note that the current Commissioner, Dr Atkins, has commented that she does not see a need for an amendment of this kind at present.

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. (Paragraph 45)

We agree with the point being made here but amendment to the Bill, as recommended, is not necessary. The legislation already provides that if an application is made to the Ombudsman about a decision to rule a complaint as inadmissible because it is out of time or to refuse an appeal on the same grounds, the Ombudsman will be able to overturn that decision. If a complaint or an appeal is made out of time, this can still be permitted if in all the circumstances it is just and equitable to do so. We agree entirely that the complainant should not be penalised for the actions of others.

We call on the MoD to ensure that the processes set out in the Joint Service Publication for the new Service complaints system are as straightforward as possible. The new Ombudsman should be consulted during this process and this Committee informed of the outcome. (Paragraph 47)

We agree that any policy or guidance about the new process should be concise and easy to understand for those accessing the system and for those administering it, so that they know what is expected of them and how to carry out their function properly. As is usual when we amend policy on service complaints, the Commissioner will be consulted throughout.

We are concerned that, as currently drafted, the Bill does not make it clear that the regulations are intended to set out the parameters for the Ombudsman’s investigative process whilst the detailed procedural rules will be a matter for the Ombudsman. This has the potential to undermine the independence, or the perception of independence, of the Ombudsman. (Paragraph 52)

The amendment proposed under this recommendation would remove the power for the Secretary of State to make regulations about the procedure to be followed by the Ombudsman in their investigations. We do not accept, however, that setting out the basic framework in the regulations undermines the Ombudsman’s independence and therefore do not accept this amendment. The legislation is designed to ensure an effective and speedy system for the redress of service complaints with independent oversight. Delivering this system is the Secretary of State’s responsibility and he will be answerable to Parliament for its effective operation.

Some of the Ombudsman’s powers would not have legal effect without being set out in subordinate legislation, for example time limits. Everyone needs to understand how the Ombudsman’s investigations will operate. The Bill provides the Ombudsman with a very broad power to determine their procedures, subject to the limited matters set out by the Secretary of State.

In response to our report we call on the MoD to explain whether it believes that the existing provisions of the Data Protection Act are inadequate for the purpose of maintaining the privacy of complainants. We also note that the MoD told us that it did not envisage imposing any other obligations, apart from those of confidentiality,
under new Section 340(7)(c). We have drafted an amendment 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. (Paragraph 57)

In common with the work of other Ombudsmen, personal or other sensitive information relating to complainants and others needs to be protected from wrongful disclosure by third parties. Appropriate safeguards will be included in the regulations, a draft of which is attached. These safeguards will be designed to protect personal information and matters of national security. We do not, therefore, accept further provision is required on the face of the Bill.

We welcome the MoD’s clarification that any findings of the Ombudsman relating to maladministration or injustice are binding on the Department. However, we are concerned that, as currently drafted, new Section 340M does not adequately reflect this intention. (Paragraph 63)

The Ombudsman’s findings following an investigation into alleged maladministration will be binding if the Ombudsman finds there has been the alleged maladministration and if so, whether injustice has, or may have, been caused. The current Service Complaints Commissioner has acknowledged this, and the courts shared this view when they recently considered the legal effect of findings made by the Local Government Ombudsman. It is not necessary to make specific provision on the face of the Bill and no specific provision is made in other ombudsman legislation.

We also recommend that the Ombudsman’s recommendations should be binding on the Defence Council. 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. (Paragraph 63)

Recommendations are not binding but they will have some legal effect. The courts have recognised that, for example when looking at the recommendations of the Local Government Ombudsman, there may be a number of ways of responding legitimately to a failing. The recommendations may raise wider questions of policy, resources or costs or it may be that responsibility lies with another government department to implement the recommendations. The Defence Council will not, however, be able to reject recommendations because they do not agree with them or they do not like the original finding. To be defendable in any subsequent judicial review claim, the Defence Council will have to give good written reasons for rejecting a recommendation.

Additionally, if the Ombudsman is not happy with a refusal to accept a recommendation they will be able to make this public in their annual report and will be able to challenge the Defence Council in the courts.

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. (Paragraph 73)

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. (Paragraph 74)

The Bill does not preclude the Ombudsman from writing a report or commenting on any underlying concern or pattern of behaviour (a thematic issue) that has given rise to a complaint. We would encourage the Ombudsman to highlight any thematic issues they come across, and to make these concerns known quickly and publicly if they consider it appropriate, so that these matters can be addressed and put right. A statutory power is not needed to enable the Ombudsman to do this.

But we do not want the Ombudsman to investigate these matters, for two important reasons:

- This would significantly change the Ombudsman’s role, taking them away from making the Service complaints system better, and in particular, holding the chain of command to account;
- The Ombudsman would take on a more specialist investigative role, covering much wider matters and requiring particular expertise and powers which other bodies are better placed to carry out.

The Bill also provides that the Ombudsman must produce an annual report. The report can look widely at the complaints system, the sort of cases it handles and the kind of failings in the system the Ombudsman has identified.

We note the concerns expressed by witnesses concerning the investigation of complaints against the Service Police. We have serious concerns that complaints regarding the Service Police are made to the chain of command which could lead complainants to have a lack of confidence in making such a complaint and in the independence and fairness of its investigation. We recommend that the chain of command should be required to notify the Ombudsman when it receives a complaint regarding the Service Police and that it should specify the nature of such a complaint. (Paragraph 77)
We also call on the MoD to ensure that where complaints are made to the Ombudsman about the Service Police, that he or she has expert assistance from qualified professionals to review such cases. (Paragraph 77)

We recognise the sensitivity around complaints that involve the Service police, and the need that many see for special measures for how they are handled and overseen so as to give confidence. In the new system there will need to be an independent member involved in any case reaching appeal that involves a complaint against a service policeman, as now.

The change proposed in the report would add a further level of oversight by the Ombudsman which is not considered necessary given the oversight they will already have under the new system. Service policemen are no different from other members of the armed forces in relation to service complaints—members of the service police will be able to make service complaints themselves and can be the subject of such complaints. There is one narrow exception to this in that service complaints will not be able to be made, as now, about decisions made by a service policeman following an investigation with regard to whether to refer the case for a charging decision. There is good reason why such matters are excluded: the chain of command should not be able in the service complaints system to interfere with prosecutorial decisions and there are other mechanisms for challenging such decisions through the courts, either during service proceedings or by way of judicial review. If there are concerns about how other complaints against Service policemen have been handled, the complainant will have access to the Ombudsman just as in all other cases dealt with under the service complaints process. This is a powerful new right which delivers oversight and should give confidence.

It will be for the Ombudsman to determine whether they need expert assistance in connection with any particular investigation they conduct and from where they should get it.

We agree that there is an anomaly in the Ministry of Defence Police coming under the Independent Police Complaints Commission’s (IPCC) system while Service Police do not. In response to our report, we call on the MoD to set out a timescale for when it is intended that the Service Police should come under the auspices of the IPCC system. (Paragraph 77)

The creation of the Ombudsman will bring a number of significant improvements to the complaints process under which complaints against Service Police may also be made. The nature and extent of external oversight for complaints about Service Police is currently under consideration, and it is too early at this stage to give a timescale for the completion of that work.

December 2014
The Defence Council, in exercise of the powers conferred by section 340B(1) of the Armed Forces Act 2006(a), makes the following regulations:

Citation and commencement

1. These Regulations may be cited as the Armed Forces (Service Complaints) Regulations 201[] and come into force on [date to be inserted].

Interpretation

2. In these Regulations—

   “the Act” means the Armed Forces Act 2006;

   [“the Secretary of State regulations” means]

   “in writing” includes communications -

   (a) transmitted by electronic means;

   (b) received in a legible form; and

   (c) capable of being used for subsequent reference;

   “Ombudsman” means the Service Complaints Ombudsman;

   “service complaints process” means the process for the redress of service complaints under Part 14A of the Act or under any previous process for the redress of individual grievances under Part 14 of that Act or under any of the Army Act 1955(b), the Air Force Act 1955(c) and the Naval Discipline Act 1957(d).

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(a) 2006 c.52. Section 340B was inserted by section 2 of the Armed Forces (Service Complaints and Financial Assistance) Act.

(b) 1955 c. 18. [footnotes to be completed]

(c) 1955 c. 19.

(d) 1957 c. 53.
Specified officer

3.—(1) Subject to paragraphs (2) and (3), the specified officer is the complainant’s commanding officer, unless the complainant has ceased to be subject to service law. If the complainant has ceased to be subject to service law, the specified officer is:

(a) the person who was the complainant’s last commanding officer or that officer’s successor in post; or

(b) such other officer as may instead be appointed as the specified officer by the Defence Council.

(2) Subject to paragraph (3), if the officer who would be the specified officer in accordance with paragraph (1) is the subject of the service complaint, or is alleged in the complaint to be implicated in any way in the matter or matters complained of, the specified officer is his or her immediate superior in the chain of command.

(3) If the officer who would be the specified officer in accordance with paragraph (2) is also the subject of the service complaint, or is alleged in the complaint to be implicated in any way in the matter or matters complained of, the specified officer is an officer appointed by the Defence Council who:

(a) is of the same rank as, or of equal rank to, that officer; and

(b) is not so subject or alleged to be implicated.

Procedure for making a service complaint

4.—(1) A service complaint must be made in writing to the specified officer.

(2) The complaint must state—

(a) how the complainant thinks himself or herself wronged;

(b) whether the complainant’s commanding officer or his or her immediate superior in the chain of command is the subject of the complaint or is alleged to be implicated in any way in the matter, or matters, complained about;

(c) whether the complainant considers that the complaint is of a description prescribed in [Secretary of State regulations] under section 340E(2);

(d) if the complaint is not made within the period referred to in regulation 5(3)(b) the reasons why the complaint was not made within that period;

(e) the redress sought;

(f) the date on which the complaint is made.

(3) The complaint must also state one of the following:

(a) the date on which, to the best of the complainant’s recollection, the matter complained about occurred or probably occurred;

(b) that the matter complained about occurred over a period, and the date on which, to the best of his or her recollection, that period probably ended;

(c) that the matter complained about is continuing to occur;

(d) that the complainant is unable to recollect the date referred to in sub-paragraph (a) or (b).

(4) A service complaint may only be made by one complainant.

Action on receipt of a service complaint and admissibility [in addition, provision possibly to be made regarding the validity of a complaint]

(2)—(1) On receipt of a service complaint, the specified officer must as soon as reasonably practicable decide whether the complaint is admissible in accordance with section 340B of the Act. If the specified officer decides that the service complaint is admissible, he or she must notify the complainant in writing and refer the complaint to the Defence Council as soon as reasonably practicable.
(3) For the purposes of section 340B(3)(c) of the Act, a service complaint is not admissible if—
   (a) the complaint does not state an alleged wrong;
   (b) subject to regulation 6, the complaint is made more than three months beginning with the date on which the matter complained about occurred; or
   (c) the complaint is substantially the same as a complaint brought by the same person which has either been decided previously under the service complaints process or is currently being considered under the service complaints process.

(4) In determining the admissibility of a service complaint, the specified officer must decide whether it is admissible in accordance with each of sub-paragraphs (3)(a) to (c).

(5) If the specified officer decides that any or all of paragraphs 3(a) to (c) apply to the matter, or (as the case may be) to all of the matters complained of, he or she must inform the complainant in writing that the service complaint is not admissible, stating the reasons for the decision and informing the complainant of his or her right to apply for a review of that decision by the Ombudsman.

(6) If the specified officer decides that the service complaint is not admissible because any or all of paragraphs 3(a) to (c) apply (as the case may be) to some, but not all, of the matters complained of, he or she must:
   (a) treat the remaining matters as an admissible service complaint; and
   (b) inform the complainant in writing that the other matters are not ones about which an admissible service complaint may be made, stating the reasons for the decision and informing the complainant of his or her right to apply for a review of that decision by the Ombudsman.

Period for making a service complaint: further provisions

5.—(1) Certain matters, such as housing or pay and allowances, can be complained about using one of a specific set of internal complaints processes, known as ‘special to type’ processes. Provision to be made here as to the relationship between those processes and the service complaints system for the purposes of calculating time limits.

(2) If a matter is or has been capable of being pursued as a claim under the Equality Act 2010(a)
   a service complaint may be made about the matter at any time on or before the end of the qualifying period for a claim under that Act. The end of the qualifying period must be determined in accordance with section 129 of that Act.

(3) A service complaint may be made on a date after the end of the period in whichever of regulation 5(3)(b) and paragraph (1) applies to the complaint, if in all the circumstances it is just and equitable for the specified officer to permit this. This paragraph does not apply to a complaint within paragraph (2).

Ombudsman’s review of admissibility

6.—(1) On receipt of an application for a review of the specified officer’s decision that a service complaint is not admissible, the Ombudsman must determine whether the service complaint is admissible and notify both the specified officer and the complainant in writing of his or her determination giving reasons for the determination.

(2) The Ombudsman must not consider an application under paragraph (1) made more than four weeks beginning with the day the complainant is notified of the specified officer’s decision, unless the Ombudsman considers it is just and equitable to allow the complainant to apply outside that period.

(3) A decision by the Ombudsman in relation to admissibility is binding on the complainant and the specified officer.

(a) 2010 c. 15
(4) Where under paragraph (1) the Ombudsman determines that the service complaint is admissible, the specified officer must refer the complaint to the Defence Council as soon as reasonably practicable.

Application of these regulations where further matters raised by way of complaint

7. If the complainant raises an additional matter by way of complaint at any time after the specified officer has made a decision on the admissibility of a service complaint, these must be made, and dealt with, as a fresh service complaint.

Decisions on a service complaint

8.—(1) Subject to any requirement by regulations made by the Secretary of State under section 340E(1)(b), on receipt of a referral of a service complaint from the specified officer, the Defence Council must decide as soon as reasonably practicable whether the complaint is to be dealt with-

(a) by a person or panel of persons appointed by the Council; or

(b) by the Council themselves.

(2) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must as soon as is reasonably practicable –

(a) decide whether the complaint is well-founded; and

(b) if the decision is that the complaint is well-founded –

(i) decide what redress (if any), within the authority of the person or persons on the panel or (in a paragraph (1)(b) case) the Defence Council, would be appropriate; and

(ii) grant any such redress.

(3) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must notify the complainant in writing of the decisions made under paragraph (2), giving reasons for the decisions.

(4) If the decisions made under paragraph (2) are made by a person or panel of persons appointed under paragraph (1)(a), that person or panel of persons must inform the complainant of the right of appeal under regulation 10(1).

(5) If the decisions made under paragraph (2) are made by the Defence Council under paragraph (1)(b), the Defence Council must inform the complainant of the right to apply to the Ombudsman to investigate any allegation of maladministration in connection with the handling of the service complaint.

Procedure for bringing an appeal

9.—(1) Where a decision under regulation 9(2) is made, by a person or panel of persons appointed under regulation 9(1)(a), the complainant has a right to appeal to the Defence Council against that decision.

(2) An appeal under paragraph must be brought in writing to the Defence Council.

(3) The appeal must state [requirement to give reasons for the appeal? Further consideration being given to how exactly appeals will be brought].

(4) In a case to which regulation 11(2) applies, the complainant must state the reasons why the appeal was not brought within the period specified in paragraph (5).

(5) Subject to regulation 11(1) and (2), an appeal cannot be proceeded with unless it is brought within six weeks beginning with the day on which the complainant received notification under regulation 9(3) of the decision appealed against.

Decision whether to proceed with an appeal

10.—(1) On receipt of an appeal under regulation 10(1), the Defence Council must decide as soon as reasonably practicable whether the appeal can be proceeded with.
(2) An appeal may be brought on a date after the end of the period specified in regulation 10(5) if in all the circumstances it is just and equitable for the Defence Council to permit this.

(3) If the Defence Council decides that an appeal cannot be proceeded with, they must inform the complainant in writing, giving reasons for that decision and informing the complainant of the right to apply for a review of that decision by the Ombudsman. [further provision under consideration as to possible grounds for refusal to allow an appeal to proceed – see regulation 10(3) also].

Ombudsman’s review of a decision not to proceed with an appeal

11.—(1) On receipt of an application for a review of the Defence Council’s decision under regulation 11(1) that an appeal cannot be proceeded with, the Ombudsman must determine whether the appeal can be proceeded with and notify both the Council and the complainant in writing of his or her determination, giving reasons for the determination.

(2) The Ombudsman must not consider an application under paragraph (1) made more than four weeks beginning with the day the complainant is notified of the decision under regulation 11(1), unless the Ombudsman considers it is just and equitable to allow the complainant to apply outside that period.

(3) A determination by the Ombudsman in relation to an appeal is binding on the complainant and the Defence Council.

Determination of appeals

12.—(1) Where the Defence Council, or following a review, the Ombudsman, decides that the appeal can be proceeded with, subject to [any requirement by regulations made by the Secretary of State under section 340E(1)(b)], the Defence Council must decide, as soon as reasonably practicable, whether the appeal is to be dealt with –

(a) by the person or panel of persons appointed by the Council; or
(b) by the Council themselves.

(2) The person or panel of persons appointed to consider the appeal, or as the case may be, the Defence Council must, as soon as reasonably practicable–

(a) decide whether the complaint is well-founded; and
(b) if the decision is that the complaint is well-founded –

(i) decide what redress (if any), within the authority of, as the case may be, the person, or the persons on the panel, or (in a paragraph (1)(b) case) the Defence Council, would be appropriate, and
(ii) grant any such redress.

(3) The person or panel of persons appointed to consider the appeal, or as the case may be, the Defence Council, must notify the complainant in writing of the decisions under paragraph (2), giving reasons for the decisions and informing the complainant of the complainant’s right to apply to the Ombudsman to investigate any allegation of maladministration in connection with the handling of the service complaint.

Procedure with respect to decisions and determinations

13.—(1) For the purposes of making a decision under regulation 9(2), or a determination under regulation 13(2), the person or panel of persons, or (as the case may be), the Defence Council, may request the complainant, or such other person as they consider appropriate, to supply information or produce documents.

(2) In respect of a request under paragraph (1), the person or panel of persons, or (as the case may be), the Defence Council may impose any such time limit for the supply of the information or production of other documents, as they consider reasonable in the circumstances.
(3) Should the information or documents requested under paragraph (1) not be supplied or produced within the time limit under paragraph (2), the person or panel of persons or (as the case may be) the Defence Council may proceed to reach a decision or determination based on the information or documents available.

Delegation of functions by the Defence Council

14.—(1) Subject to paragraph (2), the Defence Council may delegate to any person, to such extent and subject to such conditions as the Council consider appropriate, any of the Council’s functions under these Regulations.

(2) The Defence Council must not delegate its functions:
(a) in a case within regulation 9(1)(b), of making a decision under regulation 9(2); or
(b) in a case within regulation 13(1)(b) of making a decision under regulation 13(2).

[insert here]

on behalf of the Defence Council
EXPLANATORY NOTE

(This note is not part of the Regulations)

[to be completed]
Attachment 2

Draft Regulations laid before Parliament under section 373 (3) of the Armed Forces Act 2006 for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

201[ ] No. 0000

DEFENCE

Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 201[ ]

Made - - - - ****201[ ]
Coming into force - - ****201[ ]

The Secretary of State, in exercise of the powers conferred by section 340A(4), [340E(1)] and 340N of the Armed Forces Act 2006(a), makes the following regulations:

In accordance with section 373(3) of the Armed Forces Act 2006 a draft of this instrument was laid before, and approved by resolution of, each House of Parliament.

Citation and commencement

1. These Regulations may be cited as the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 201[ ] and come into force on [date to be inserted].

Interpretation

2. In these Regulations—
   “the Act” means the Armed Forces Act 2006;
   “appropriate officer” has the same meaning as in section 340N(2) of the Act;
   “the Service Complaints Regulations” means the Armed Forces (Service Complaints) Regulations 201[ ]
   [“independent member” shall be interpreted as in accordance with section 340E(4) of the Act; to be retained if provisions are made under 340E]
   “in writing” includes -
   (a) transmitted by electronic means;
   (b) received in a legible form; and
   (c) capable of being used for subsequent reference.
   “Ombudsman” means the Service Complaints Ombudsman.

(a) 2006 c. 52. Sections 340A, 340E and 340N were inserted by section 2 of the Armed Forces (Service Complaints and Financial Assistance) Act 201[ ]
Excluded complaints

3.—(1) A person may not make a service complaint about a matter within the Schedule.

(2) [Provision to be made here to exclude complaints about any aspect of the handling of a complaint or about the result: these are a matter for appeal and application to the Ombudsman]

Appointment of person or panel of persons by the Defence Council under the Service Complaints Regulations

4.—(1) The following persons shall not be appointed by virtue of section 340C(1)(a) of the Act (the appointment of a person or panel of persons to decide complaints):

(a) a person who is the subject of the complaint or is, in the statement of complaint made in accordance with regulations made by the Defence Council under section 340B(2)(b), alleged to be implicated in any way in the matter, or matters, complained about; or

(b) an officer of the Naval Chaplaincy Service, the Royal Army Chaplains Department or the Royal Air Force Chaplains Branch.

(2) The following persons shall not be appointed by virtue of section 340D(2)(d) of the Act (the appointment of a person or panel of persons to determine appeals):

(a) a person who is the subject of the complaint, or is, in the statement of complaint made in accordance with regulations made by the Defence Council under section 340B(2)(b), alleged to be implicated in any way in the matter, or matters, complained about;

(b) a person who was appointed by virtue of section 340C(1)(a) to decide the complaint, or who was otherwise involved in the investigation or consideration of the complaint for the purposes of deciding the complaint; or

(c) an officer of the Naval Chaplaincy Service, the Royal Army Chaplains Department or the Royal Air Force Chaplains Branch.

Independent persons

5.—(1) Where the Defence Council acts for the purposes of section 340D(2)(d) of the Act in relation to a service complaint, they shall act in accordance with paragraph (3) by virtue of section 340D(2)(d) if the service complaint includes a statement by the complainant making an allegation within paragraph (2)

(2) The allegations referred to in paragraph (1) are:

(a) allegations of discrimination;

(b) allegations of harassment;

(c) allegations of bullying;

(d) [allegations concerning the exercise by a service policeman of his statutory powers as a service policeman].

(3) the Defence Council must appoint –

(a) a person who is independent, [or of a description specified in paragraph []]; or

(b) a panel that includes at least one independent member, [or of a description specified in paragraph []].

(4) In this regulation, “discrimination” means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of part-time employees.

Notifications to the Ombudsman

6. Where in accordance with section 340N of the Act, the Ombudsman refers to the appropriate officer a communication that alleges that a person subject to service law has been wronged, the
appropriate officer shall within 21 days of the occurrence of any of the following events notify the Ombudsman of that occurrence—

(a) that he or she has informed the person that the communication has been referred;
(b) that the person has been made aware of the matters referred to in section 340N(3)(b) of the Act;
(c) of the decision of the person that he or she wishes to make a service complaint in respect of the alleged wrong;
(d) [decision against admissibility because of time period and that the complainant informed of the right to go to the Ombudsman];
(e) [decision against admissibility because of excluded matters and that the complainant informed of the right to go to the Ombudsman];
(f) of the withdrawal of a service complaint made in respect of the alleged wrong;
(g) of any decision under regulations under section 340C (decisions on service complaints and whether complainant informed of right to appeal or go to the Ombudsman);
(h) of a decision under regulations [regarding decisions on whether an appeal can proceed and whether complainant informed of the right to go to the Ombudsman];
(i) of an appeal decision under regulations under section 340D (determinations of appeal and the complainant informed of the right to go to the Ombudsman);
SCHEDULE [Updating of content and references required]

Regulation 3

1. Subject to paragraph 2, a matter is within this Schedule if it—
   (a) is or was capable of being the subject of a complaint under the internal disputes resolution procedures established for the armed forces in accordance with section 50 of the Pensions Act 1995(a);
   (b) is or was capable of being the subject of an appeal to the Discretionary Awards Panel;
   (c) is or was capable of being the subject of an appeal to the Discretionary Awards Appeals Panel;
   (d) is or was capable of being the subject of a review under rule D8 of the scheme set out in the Armed Forces Pension Scheme Order 2005(b);
   (e) is or was capable of being the subject of an appeal to a service appeals panel under paragraph 59 of the Criminal Injuries Compensation (Overseas) Scheme(c);
   (f) is about any decision made under the scheme set out in the Armed Forces and Reserve Forces (Compensation scheme) Order 2005(d);
   (g) is about any decision made under the scheme set out in the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 2006(e);
   (h) is or was capable of being the subject of an appeal under section 141 of the Act:
   (i) is or was capable of being subject of an appeal under the Courts-Martial (Appeals) Act 1968(f);
   (j) is a decision of a judge advocate under any provision in or made by virtue of the Act;
   (k) is a decision of the Director of Service Prosecutions, or of a prosecuting officer exercising a function of the Director of Service Prosecutions, under any provision in or made by virtue of the Act;
   (l) is a decision of the court administration officer made in exercise of a function of his under a provision in or made by virtue of the Act;
   (m) is a decision of a service policeman under any provision in or made by virtue of Chapter 1 of Part 5 of the Act;
   (n) is a decision of a commanding officer under Chapter 1 or 2 of Part 5 of the Act;
   (o) is a decision under—
      (i) section 152 of the Act (review of summary findings and punishments);
      (ii) section 177 of the Act (review of service compensation orders);
      (iii) section 251(3) or (4) of the Act (time for payment of, or directing payment by instalments of, a fine or service compensation order);
      (iv) section 267 of the Act (power of court to remit fine); or
      (v) section 276 of the Act (compensation for miscarriages of justice);

(a) 1995 c. 26
(c) The Criminal Injuries Compensation (Overseas) Scheme is a non-statutory, Ministry of Defence scheme under which lump sum payments may be made to members of the armed forces and their eligible dependants who in certain circumstances are killed or injured overseas as a result of a crime of violence.
(d) S.I. 2005/439, amended by S.I. 2006/1438.
(e) S.I. 2006/606, to which there are amendments not relevant to these regulations.
(f) 1968 c. 20.
(p) is or was capable of being the subject of an appeal to a reserve forces appeal tribunal under section 81(4), 83(4) or 84(3) of the Reserve Forces Act 1996(g);  
(q) is a decision of the Security Vetting Appeals Panel in relation to the complainant;  
(r) is or was capable of being the subject of an appeal by the complainant to the Security Vetting Appeals Panel; or 
(s) is an allegation of negligence in the provision by the Ministry of Defence of medical, dental or nursing care.

2. Nothing in paragraph 1 shall prevent a person making a service complaint about any thing referred to in regulation 5(2) which he or she alleges has occurred in connection with a matter specified in paragraph 1.
EXPLANATORY NOTE

(This note is not part of the Regulations)

[to be completed]
The Secretary of State, in exercise of the powers conferred by sections 340H(2), (5) and (8), 340I(2) and (5) and 340L(5) and (7) of the Armed Forces Act 2006, makes the following regulations:

Citation and commencement

1. These Regulations may be cited as the Armed Forces (Service Complaints Ombudsman Investigations) Regulations 201[] and come into force on [date to be inserted].

Interpretation

2. In these Regulations—

   “in writing” includes communications—
   (a) transmitted by electronic means;
   (b) received in a legible form; and
   (c) capable of being used for subsequent reference;

   “the Act” means the Armed Forces Act 2006;
   “the Ombudsman” means the Service Complaints Ombudsman.

Provision of information in application to Ombudsman

3. An application to the Ombudsman under section 340H of the Act must:

   (a) state the maladministration which the complainant alleges occurred in connection with the handling of the complainant’s service complaint;
   (b) state any injustice which the complainant considers he or she has or may have suffered as a result of the alleged maladministration;
   (c) state any facts in support of the alleged maladministration under paragraph (a) and any resulting injustice under paragraph (b);
(d) if the complaint is one in respect of which there has been a decision in writing by the Defence Council in accordance with regulations under section 340C of the Act, attach a copy of that decision;

(e) if the complaint is one in respect of which there has been a determination in writing of an appeal in accordance with regulations under section 340D(1) of the Act, attach a copy of that determination;

(f) state the date on which the complainant was notified of the decision under paragraph (d) or of the determination under paragraph (e);

(g) if the application is not made within the period specified in regulation 6(1), the reasons why the application was not made within that period.

Amendment of application and making supplementary application

4. The complainant may with the permission of the Ombudsman (which permission shall not be unreasonably withheld) at any time—

(a) make a supplementary application;

(b) amend any information in the application under regulation 3 or in a supplementary application.

Withdrawal of application

5. —(1) The complainant may, by notice in writing to the Ombudsman, withdraw his or her application at any time before the completion by the Ombudsman of the investigation under section 340H(1) of the Act.

(2) Upon receiving a notice under paragraph (1), the Ombudsman should send a copy of the notice to the Defence Council.

(3) On receipt of a notice under paragraph (1), the Ombudsman must consider, having regard to that notice, whether to begin, continue or discontinue an investigation.

Time limits: applications to the Ombudsman

6.—(1) Except as provided for in paragraph (2), the application may not be made after a period of six weeks beginning with the day on which the complainant is notified—

(a) in a case within regulation 3(d), of the decision referred to in that paragraph;

(b) in a case within regulation 3(e), of the determination referred to in that paragraph.

(2) An application may be made after the end of the period specified in paragraph (1), if the Ombudsman considers that in all the circumstances it is just and equitable to permit this.

Requirements for information, documents and evidence

7. Where the Ombudsman requires a person to provide documents or other information, he or she may:

(a) require those documents or that information to be provided within such period as the Ombudsman considers reasonable in the circumstances;

(b) specify the form or manner in which the documents or other information must be provided;

(c) proceed with the investigation and the preparation of a report under section 340L of the Act if the documents or other information is not provided within that period, or are not provided under paragraph (b).
Action following receipt of an application

8.—(1) If the Ombudsman decides not to conduct an investigation, the Ombudsman must inform the complainant and the Defence Council in writing of his or her decision and the reasons for it.

(2) If the Ombudsman decides to begin an investigation, he must send a copy of the application to the Defence Council as soon as reasonably practicable.

Investigation procedure

9.—(1) The Ombudsman must give:

(a) the Defence Council, and

(b) any other person alleged by the complainant to have been responsible for maladministration in connection with the handling of the service complaint,

an opportunity to comment on any allegations contained in the application.

(2) If the Ombudsman decides to hold an oral hearing for the purposes of the investigation, the oral hearing must be conducted in private, unless the Ombudsman considers that it is [necessary] to hold all or part of the hearing in public.

(3) If the Ombudsman decides to hold an oral hearing in public, the Ombudsman may impose such restrictions on attendance at, or the reporting of, that hearing, as he or she considers reasonable.

(4) Subject to paragraph (2), an investigation by the Ombudsman must be conducted in private.

(5) The Ombudsman may decide that a person may be represented, [including by a legally-qualified person], in the investigation if the Ombudsman considers that is—

(a) necessary for the fair determination of the investigation; or

(b) necessary to protect the rights or interests of any person.

(6) The Ombudsman may pay to any person who attends a hearing to give evidence or supplies documents or other information for the purposes of an investigation—

(a) such sums as the Ombudsman may determine in respect of expenses properly incurred by the person; and

(b) such allowances as the Ombudsman may determine by way of compensation for the loss of the person’s time,

subject to such conditions as he may determine.

Reports of investigation: preparation and confidentiality

10.—(1) If the Ombudsman sends a draft copy of the report to any person for comments, he or she must take into account any comments he or she receives from that person, refer to those comments in the final report and state in that report his or her response to those comments.

(2) Clerical mistakes in a report prepared by the Ombudsman under section 340L of the Act, or errors arising in a report from an accidental slip or omission, may be corrected by the Ombudsman by certificate under his or her hand.

(3) The Ombudsman must send a copy of a report prepared under section 340L of the Act to—

(a) any person who may, in the opinion of the Ombudsman, be affected adversely by any of the findings or recommendations in the report, and

(b) [persons who communicated an allegation to the Ombudsman in accordance with section 340N of the Act, where the report relates to a service complaint which was made in respect of that allegation].

(4) The Ombudsman must send any certificate under paragraph (2) to the Defence Council, the complainant and [any person to whom a copy of the report must be sent under paragraph (3)].

(5) If a report prepared by the Ombudsman under section 340L of the Act—

(a) mentions the name of any person other than the Defence Council [or the Army Board, the Admiralty Board or the Air Force Board], or
(b) includes any particulars which, in the opinion of the Ombudsman, are likely to identify any such person and which in the Ombudsman’s opinion can be omitted without impairing the [effectiveness] of the report, or

(c) includes any information which, in the opinion of the Ombudsman, it would be against the interests of national security to publish,

that information must not be included in a version of the report sent to any persons in accordance with section 340L(6) of the Act, unless the person or, for information referred to in sub-paragraph (c), the Secretary of State consents.

(6) If the Ombudsman sends a copy of a report to a person in accordance with section 340L(6) of the Act, the Ombudsman may impose any obligation of confidentiality on that person which the Ombudsman considers necessary and lawful in the circumstances.

(7) Marker for disclosure of information: we may need to provide for the Ombudsman to be able to disclose any information gathered for the purposes of an investigation where that information is required by another body or a court in accordance with statutory duties or for the purposes of litigation. We will consider whether this will then not permit the disclosure of any information which is prejudicial to the safety of the State or otherwise contrary to the public interest, or information which must be protected under other statutory or common law regimes.

Subsequent applications to the Ombudsman

11. This regulation would set out any circumstances in accordance with section 340H(8) of the Act in which a second application may be made to the Ombudsman relating to the same complaint. These are likely to be rare, and we want to consider this further before proposing any firm rules. The sort of circumstances we have in mind here are:

(a) where the final decision stage of the internal redress process is effectively re-run following a finding of maladministration and recommendation by the Ombudsman, i.e. because there needed to be an independent panel of persons to consider the complaint; or

(b) where the Ombudsman does not consider all of the allegations of maladministration the first time round, because for example it is sufficient to deal with just one of those allegations, e.g. it was obvious that the decision-making body needed to be changed to re-consider the complaint, and those other alleged failures are not in the event corrected by the new body, the applicant may be able to apply again to the Ombudsman for an investigation.

Guidance

12.—a) The Ombudsman may publish guidance from time to time about the practices and procedures that the Ombudsman will adopt in carrying out his or her investigations.

(2) Before publishing guidance under paragraph (1), the Ombudsman must consult any persons the Ombudsman thinks appropriate.

Anna Soubry
Parliamentary Under Secretary of State
Ministry of Defence