



Defence Committee

Oral evidence: [Armed Forces \(Service Complaints and Financial Assistance\) Bill](#), HC 508

Tuesday 8 July 2014

Ordered by the House of Commons to be published on 8 July 2014.

Written evidence from witnesses:

- [Lieutenant Colonel \(retd\) Jeremy Field MBE](#), former Head of Army Service Complaints Wing at HQ Army
- [Reverend Nicholas Mercer](#), former Command Legal Adviser for HQ 1st (UK) Armoured Division in Iraq War 2003
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Members present: Rory Stewart (Chair), Mr Jeffrey M. Donaldson, Mr James Gray, Mrs Madeleine Moon, Sir Bob Russell and Derek Twigg

Questions 1-66

Witnesses: **Lieutenant Colonel (retd) Jeremy Field MBE**, former Head of Army Service Complaints Wing at HQ Army, **Reverend Nicholas Mercer**, former Command Legal Adviser for HQ 1st (UK) Armoured Division in Iraq War 2003, and **Sara Ogilvie**, Policy Officer, Liberty, gave evidence

Q1 Chair: Welcome, everyone, and a particular welcome to our three witnesses today. We are lucky to have Lieutenant Colonel Jeremy Field, former head of the Service Complaints wing of HQ Army; Rev. Nicholas Mercer, former Command Legal Adviser for HQ 1st Armoured Division in the Iraq war; and Sara Ogilvie, who is a policy officer from Liberty. Thank you all very much for coming.

May I start off with a relatively straightforward question? We are hoping to move at a fair clip—we have a lot of questions to put to you—so I beg the patience of witnesses to be relatively brief in response, although by all means follow up with written evidence. Thank you also to Colonel Field and Mr Mercer for your written statements.

Is the model for a Service Complaints Ombudsman, as agreed by the Ministry of Defence and the Service Complaints Commissioner, a compromise to accommodate the concerns of the service chiefs about preserving the chain of command?

Rev. Nicholas Mercer: Yes, in my view it is a compromise. I think we stand alone as a European nation that has a Service Complaints Ombudsman—as it is soon to be—or

Commissioner that oversees the investigation, rather than independently investigates it. Certainly the reports that I have read on different nations and how they carry out their complaint inquiries say that we stand alone, so it is a compromise, and it is slightly strange that we stand apart from other European nations.

Q2 Chair: Just to clarify a little bit more, the Geneva Centre for the Democratic Control of Armed Forces, in its 2011 report, again states that the UK is unique and that the Ombudsman simply oversees the internal complaints-handling system, which is the point that Mr Mercer made. Does the role need to be expanded and, if so, in what way?

Lieutenant Colonel Field: I agree that the system as proposed is indeed a compromise. The difficulty comes in what powers an Ombudsman is going to have over the chain of command. Where is the crossover and who, ultimately, will have supremacy in deciding a service complaint? Certainly in my experience, the Commissioner had too little power to do anything more than to poke and prod and to shake a stick every now and again. I was on the inside of that. If you had had an Ombudsman with a lot more authority and power over, perhaps, the investigative or even decision-making process in some of the complaints, that would have helped to move things along.

Sara Ogilvie: If I may add to that, we really welcome the Bill, but we are disappointed, as I am sure you know, because we think that the system will only work if people use it. I completely agree that one of the problems is that the powers are not there. I would like you to pay attention to the details as well, because you can give the Ombudsman any powers you want, but if we cannot see that we have got an independent Ombudsman who can act without external fetters and ties being put on their discretion, people will not have confidence, so I urge you to look at both those things.

Chair: Very good. Now to Derek Twigg.

Q3 Derek Twigg: Do any of you have concerns about the method of appointment for the Service Complaints Ombudsman, given that it is a recommendation by the Secretary of State for Defence?

Sara Ogilvie: Somebody has to appoint the Ombudsman, and the Secretary of State makes a recommendation to the Queen—fine; we accept that. But the question is, who chooses that person who is going to be recommended? It seems incredibly odd to us that the Secretary of State would be able to make that decision on their own. If you look at best practice among other ombudsmen, you can see that although the Secretary of State for the relevant subject area might be involved, they will do so with reference to other interested or skilled parties. In particular, there is an increasing trend towards parliamentarians being involved in that process, and I do not think it is out of order for your Committee to suggest that perhaps you would have a role in selecting that person.

Q4 Derek Twigg: Are you saying this Committee should have a role?

Sara Ogilvie: I think you could certainly play a role as part of that panel. I do not think that that would be out of turn at all.

Lieutenant Colonel Field: I do not disagree with that.

Rev. Nicholas Mercer: The Geneva report refers to institutional and operational independence. The institutional independence talks about who makes the appointment and a host of other factors, so it comes under the heading: Does this look institutionally independent from the chain of command? If the Secretary of State is doing the appointing, there are some safeguards in the regulations in terms of who can be appointed, I accept that, but it does not look as separated as it might otherwise do.

Derek Twigg: So you agree that that is not the best way to go about it.

Rev. Nicholas Mercer: Yes.

Q5 Derek Twigg: And do you think there should be a role for this Committee in that as well?

Rev. Nicholas Mercer: Possibly.

Q6 Derek Twigg: What about the term of appointments? It is not statutorily laid down. It is a five-year term, but do you think the person should be able to reapply for the job after five years?

Sara Ogilvie: Again, I think this is one of the details that it is really important to put in the legislation, rather than leaving it to the particular terms of appointment. That is the first thing I would say. This should be set out in legislation.

Derek Twigg: It should be statutory.

Sara Ogilvie: It should be statutory, and that is best practice across ombudsmen. On whether it should be five years and renewable, the most recent ombudsman legislation we have in the UK, more or less, is on the Public Services Ombudsman for Wales. That is a seven-year non-renewable term. That would be my preference. If you are having a five-year term and you can then renew it, you have to be really clear about the processes for that renewal. If the Ombudsman wants to apply for a second term, they can effectively get it on the nod if they have not done something wrong, but they have to completely reapply for their role. Again, we come back to the question of who appoints them and whether undue power is in the hands of the Secretary of State. As I am sure I do not need to point out—but I will anyway—it is really important that we get this right, because that possibility for renewal could completely undermine the way the Ombudsman makes her decisions or seeks to make recommendations to the Defence Council and others.

Rev. Nicholas Mercer: If I can draw on my Church experience, the Church army would say you should not put someone into a parish for less than five years, because you will not achieve anything in that time. That is a possible view to take. But there is another

possibility, of course. If someone gets on really well with the chain of command, and the Secretary of State knows that, and they come up for a second appointment, 10 years is a long time if they get two consecutive terms. So there is a danger there, rather like American Presidents having two four-year terms.

Q7 Derek Twigg: So are you in favour of one term, then?

Rev. Nicholas Mercer: I don't know. I am just flagging these points up. I just want to highlight some dangers.

Q8 Derek Twigg: Because that pertains to what happens in terms of the first question I asked about the Secretary of State making the appointments. If that was not the case, would that—

Rev. Nicholas Mercer: That would go some way to mitigating that possibility.

Q9 Derek Twigg: Colonel, do you want to come in?

Lieutenant Colonel Field: I certainly think that one term of five years initially is quite right, but I am not convinced that having two terms of five years, making it 10, would be correct. There may be an option to extend it by a year or two, but certainly no more than that. I think 10 years in an ombudsman's position is too much. On the current Commissioner's experience, she did need the two initial terms—I think three years and then a further three years—to achieve what she did.

Q10 Derek Twigg: As you are clearly aware, if you are a serving service person—regular, reserve or in the civil service—you are not going to be allowed to be appointed as the Ombudsman. What about former service personnel or former civil servants? Should they be allowed to apply for the job and be appointed, or should there be a limit on the time since they left civil service or the armed forces?

Rev. Nicholas Mercer: One remark I heard that resonated was that people who take on the job will have to have the ability to stand outside the service and see it from the complainant's eyes. If you have former officers, they will have been part of the chain of command, which is useful in that they know the ins and outs of the armed forces and of the system, but can they see it from the complainant's viewpoint? I think we need some fresh thinking and a fresh approach.

Derek Twigg: That is an interesting point, because Ministers would not be appointed on that basis if they had to have experience within the armed forces. That does not happen at the ministerial level.

Rev. Nicholas Mercer: Of course. That is a good point.

Lieutenant Colonel Field: Exactly the same answer, only I think there is room to have ex-military people within the Ombudsman's department, but I do not think that the Ombudsman himself or herself should be ex-military.

Sara Ogilvie: We just have to judge everything that will be in the system from the perspective of whether it will encourage a serviceman or servicewoman to make a complaint. If I was in their position and the person at the top of the system was someone who had previously been really involved in the armed forces, I would not have that confidence, even though they were not part of it at that time.

Q11 Mr Gray: Can we turn to the question of who can make a complaint? At the moment under the SCC system, I think I am right in saying that any serving person or their family can complain to the Commissioner. Is your reading of the Bill that that would apply to the Ombudsman as well?

Sara Ogilvie: Our reading of the Bill is that that power does not apply. We think it is simply a person who is subject to service law or was formerly subject to service law.

Q12 Mr Gray: So your interpretation is that a family could not complain even when the person is still alive.

Sara Ogilvie: We take this as a regression of the current powers.

Q13 Mr Gray: I think there is some debate about that, but that might be worthy of clarification. I think the Government's intention is probably to make it for any serving person and/or—

Sara Ogilvie: I would be surprised if it was not, but this brings us back to the details. There are a lot of things that we think should be in the Bill that are not there, or if they are implied, they are not clear enough. We should get this right.

Mr Gray: But those are things that can be brought into the Bill during its passage through Parliament.

Sara Ogilvie: Certainly.

Q14 Mr Gray: One thing that is definitely missing from the Bill is that at the moment the family of a deceased serviceman can complain, but I think they cannot under the Bill as currently drafted. Do you think that that is right?

Sara Ogilvie: We certainly do not think that that is right at all. If an issue, incident or series of incidents gives rise to a complaint, it is probably even more important that you look at those incidents after someone has died, if that has been a consequence or is related, than to do so when they are alive. Complaints bring great value to the individuals concerned, but when you think how closely the likes of service personnel and their families are all tied

together into that, it is often important for the family members that they can understand what happened. In a sense of traditional legal standing, family members should be able to make that complaint. The wider benefits of complaints, such as learning, putting things right and identifying systemic problems do not go away simply because someone has died. It seems like a positive thing that the armed forces could do.

Q15 Mr Gray: Presumably you would agree, Lieutenant Colonel Field.

Lieutenant Colonel Field: No, on this particular occasion I do not. Returning to the first question, a third party can currently make a service complaint. They used to be made to me with no problems at all. We would then have to ask whether the individual wanted to make a complaint themselves. If they did, we then processed it. There was an ability for a third party to complain, but we did not take the third party's complaint and deal with it directly.

Q16 Mr Gray: Before you go on, were there occasions on which a third party, such as a family member, complained, but it turned out that the serviceman actually did not want to complain?

Lieutenant Colonel Field: Yes, there were examples of that, but what the reasons were was always difficult. They may not have wanted to create any waves or whatever. They might have said something to their families when at home, and the family then contacted me or whoever it was, such as their local Member of Parliament.

Q17 Mr Gray: So at the moment if a family member wants to complain, the Commissioner goes back to the serviceman and says, "Do you want to complain?"

Lieutenant Colonel Field: Yes.

Mr Gray: And you proceeded only if the serviceman did, whereas in the Bill as drafted, you couldn't even do that. Is that right?

Lieutenant Colonel Field: Not as I understand it, no—there is a change there. We have no issues with a third party making a complaint, because then at least we know that there was an issue. I would speak to the commanding officer and say that he doesn't have to take the issue as a service complaint. As the commanding officer he could look at something—whatever is wrong and whatever the complaint is—and it does not have to be a service complaint by an individual. There may be an issue in the regiment or battalion that needs looking at.

The other point, which is important, is that the service complaint system is a workplace grievance system, in essence. The problem I think you will have in looking at the deceased is that you will not necessarily have the complaint from the individual and you cannot ask them all sorts of questions. A system that works quite well and is sat alongside the Service Complaints wing in Andover is service inquiries. We would often move a service complaint into the service inquiries field if it wasn't really an issue that a service complaint

could deal with. The advantage of a service inquiry, of course, is that it is on a slightly different standing. All the evidence is given under oath, for example, and lessons can be learned far more than from a service complaint. I agree that things like death in service, or whatever it is, can be investigated, but I think the service complaints system is the wrong vehicle for that and I think a service inquiry is better.

Q18 Mr Gray: There is also the coroners service. Most service deaths would be subject to an inquest.

Lieutenant Colonel Field: Yes, I believe they can be.

Sara Ogilvie: Obviously there will be things that are not about death in service. I am sure you know the case of Anne-Marie Ellement, who committed suicide after being a victim of bullying for a couple of years following an allegation of rape that she made. After she died, her family was not able to make a complaint about the bullying and harassment that she underwent. We managed to get an inquest, but it was the second inquest that produced evidence about the bullying and we got it only after fighting really hard. There is not an obvious route at the moment for family members to make that sort of complaint, and as we are setting out a statutory scheme, it seems to make sense to make obvious provision for that in the legislation.

Q19 Mr Gray: One all on the issue of deceased servicemen—Mr Mercer, you have the deciding vote on this.

Rev. Nicholas Mercer: I would go with Sarah. It should be available. The changes to the Ombudsman and the Commissioner have been made after deaths. Deepcut triggered the Service Complaints Commissioner, and Corporal Ellement's case—if it didn't trigger it, the timing was very close—has brought about the Ombudsman. I think it would be wrong to exclude it.

Q20 Mr Gray: Would you agree that if there is an inquest into the death of a serviceman on active service, which is perhaps different from suicide, there will be a coroner's inquest as soon as the body is returned to the UK, and if the Ombudsman was holding an inquiry in parallel, they could come to a different conclusion from the coroner's conclusion?

Sara Ogilvie: Certainly under the coroners scheme, the Ombudsman would not have the power to investigate someone's death. At the moment it would have to be about whether there was maladministration previously. We will get on to whether we would like you to strengthen the powers in the Bill, but even if they were strengthened, that duplication wouldn't exist under the current powers.

Q21 Mr Gray: Maladministration could be. In many service deaths it is alleged that they were because the MOD did something incorrectly.

Sara Ogilvie: That is something people might want to argue, but I don't think it would fit within the statutory scheme.

Q22 Mr Gray: So you don't think there would be any conflict between the two.

Sara Ogilvie: I don't think so, but I will double-check with my legal colleagues who know this better than I do, and let you know.

Rev. Nicholas Mercer: The Service Complaints Ombudsman must make recommendations to Parliament, and I think that is another reason why it should be left open—so that they can be incorporated.

Q23 Mr Gray: One last thing. Nowadays, servicemen often work in coalition with other nations—and, indeed, for contractors. If someone is seconded to the American forces or is working for Capita on some sort of contract, how would that work? How would the Ombudsman interact with the contractor or the overseas force?

Sara Ogilvie: I certainly think the rights of the servicemen and women involved should not differ depending on—I don't mean the whims of the armed forces, but decisions as to whether they work for Serco or are sent to work in combination with other troops. I think it would be more than easily within the capacity of the Ombudsman to work out protocols with other organisations for dealing with that sort of thing; but on a specific point, in relation to some of the powers in the Bill with regards to disclosure of information and contempt of court, those should apply equally to private contractors as they would to the armed forces proper.

Q24Chair: Just to clarify, if somebody has left the armed forces and is working for Control Risks, or Aegis, or ArmorGroup in an environment such as Iraq or Afghanistan, do you feel that that individual should be able to have recourse to the Service Complaints Commissioner in response to a complaint relating to the armed forces?

Sara Ogilvie: Relating to the armed forces when they were in the armed forces or as part of their new—

Chair: As part of their new role. So you have moved on; you have left the military and you are now working for ArmorGroup or Control Risks, but you might be working alongside the armed forces. You could be providing security for a vehicle convoy or providing security at a gate, for example, at an armed forces establishment.

Sara Ogilvie: I will be honest with you: it is not something that we have thought about. Thinking it through very quickly, those individuals presumably do have rights to access employment tribunals and the other things that this system is supposed to cover, but I can double-check that, and if that is not the case, it is probably something we should think about further and perhaps get back to you on.

Rev. Nicholas Mercer: I think it is obvious: it would be an employment tribunal. They would be released from the fetters of the armed services provisions.

Q25 Sir Bob Russell: I would like to ask questions about new section 340B—the procedure for making a complaint and determining admissibility. The English language is wonderful; I am just predicting that there are going to be problems in future when we have reference to the Defence Council being confused with the lawyer defending somebody, but in this case, it is not the lawyer, but the Defence Council. Do any of you have concerns regarding the provisions in new section 340B for the Defence Council to make regulations about the procedure for making and dealing with a service complaint?

Sara Ogilvie: The interesting thing here is trying to find the right comparator. So if you see the service complaints system as analogous to an internal grievance process, you probably think it makes sense for the employer to set out what the regulations and processes are, although even in the real world—the civilian world—that would normally be done in agreement with the unions or with the relevant representative bodies, so it would not be a completely unique sight on it. But if you see this as analogous to employment tribunals, absolutely no way would you have the employer setting the rules for that. I accept that this is a bit of a hybrid system, but I think we perhaps need something a bit more sophisticated than just the Secretary of State making regulations on their own.

Q26 Sir Bob Russell: So are you saying that it is better than what we currently have, but that it could be improved still further?

Sara Ogilvie: I certainly think there is scope for independent advice and views on this. If you look at the way, for example, courts make their procedural rules, they set up an independent committee. There are options that we could explore that would be better than this, yes.

Q27 Sir Bob Russell: Colonel Field, should there be a tri-service uniform complaints handling system, and would it be helpful to have a single, centralised complaints office?

Lieutenant Colonel Field: It was certainly my view, as I ran the complaints department for four years, looking at the three services, and we did differ in approach and style. I had a centralised system, where they all came to me, so I could see every single complaint and I could then identify if there were any hotspots or particular issues. In addition, of course, because we are now working in a tri-service environment, the Army are getting Air Force and Navy complaints if they are under our command, and similarly with the others. It becomes quite apparent, in my view, where the systems diverge, when you come up to the top level and go to the Army Board, the Air Force Board and the Admiralty, that there is a fundamental difference in the way the three services approach that. I think if you had a centralised service complaints department, all that can be brought together and you can certainly have representatives from the three services in it. When we looked at this some time ago, I believe the real sticking point was the chain of command wanting to relinquish their own individual control of the complaints within their organisations.

Q28 Sir Bob Russell: Thank you. Reverend Mercer, should there be an independent element to the making of these regulations, and if so, how would it work?

Rev. Nicholas Mercer: Yes, I think there should, because I come back to my point about organisational and institutional independence from this; so yes, I would like to see an independent voice in it.

Q29 Sir Bob Russell: That is pretty definite. I wonder whether I can ask this question to the three of you. The Bill envisages that complaints will usually follow a two-stage process: complaint and an appeal if required. Does this change simplify the complaints system?

Rev. Nicholas Mercer: If I can start the ball rolling on that one, it is welcome that a layer is being stripped out of the complaints system. I used to describe it as the princess and the pea: the pea was the issue and there were about nine mattresses of administration layered on the top, so you lost sight of the original issue. But I think the proposed Ombudsman's power to investigate maladministration now adds another layer back in, potentially, because you are going to have the investigation into the issue and then an investigation into the maladministration layered on top of it.

Q30 Sir Bob Russell: Can I put this one question to the two of you, so that you can each give your response? How should the Defence Council assess whether an individual appointed to hear a complaint or appeal has the appropriate power to grant redress?

Sara Ogilvie: That, for me, is a really tricky one. I am sure you will be able to get a more considered view from someone who has worked in the system, but it seems obvious to me that when you do not know what the outcome of a case will be, and when you do not know what recommendations you will want to make, it could be very difficult for you to identify someone at the start. That is why having an ad hoc, case-by-case system has not got a lot to recommend it, frankly.

Lieutenant Colonel Field: Having operated the system, I would look at the complaint to see what outcome the complainant wanted and then work out who had the power to grant it. In some cases, the only people who had it were the Army Board—if you were looking for compensation, for example. Again, all three services differ, because they all have different powers; and therefore you would have to look at what the person wanted and who could grant it. The trouble is that they often wanted a number of options, and different people had the power to grant that; but of course the whole thing has to be investigated in the first place, so there is no point in sending complaints straight to one of the service boards if it has not been investigated in the first place, because they will not have the material to work on. My worry is that you are going to push complaints decision-making up the chain of command, because that is the only level that can make it. When I was serving, there was certainly evidence of more cases going to the Army Board year on year.

Q31 Sir Bob Russell: Thank you. Ms Ogilvie, may I put this last question to you? Will this Bill impact on access to employment tribunals for unlawful discrimination, and—second question—should access be expanded to cover bullying and harassment?

Sara Ogilvie: To deal with the first part of the question, I think the Ombudsman—I will double-check this—would be able to consider issues that would also go to an employment tribunal. That is within the power, so it is possible, but given that she cannot actually investigate the substance of the complaint, I think that people would probably, in a lot of cases, still go to employment tribunals. I am not really sure there is a direct correlation there.

I think the second part of your question was—

Q32 Sir Bob Russell: Should access be expanded to cover bullying and harassment?

Sara Ogilvie: Access to the employment tribunal?

Sir Bob Russell: In the Bill. Should access be expanded to cover bullying and harassment in the Bill?

Sara Ogilvie: Oh, the powers to consider the substance of complaints. That is certainly something that we would recommend. We think that the substance of any complaint should be within the power of the Ombudsman to investigate. Bullying, harassment and discrimination are among the most serious stuff that we see.

Q33 Mrs Moon: Would you agree that bullying and harassment ought to be expanded as a right of access to an employment tribunal?

Sara Ogilvie: It is not something that Liberty has a position on, but I think we would be favourable towards that. I will come back to you to confirm that.

Lieutenant Colonel Field: As I understand it at the moment, there is a limited right under the Equalities Act 2010 to go to an employment tribunal, but that is only in very specific cases. Having done a number of those, where the Army went to an employment tribunal, there is a very good case to say that anybody alleging bullying and harassment should be able to go to a tribunal. However, as I understand it, by law we are currently not allowed to do that, so there would need to be a change to the Employment Rights Act 1996—in fact, clause 192; I looked it up. It is there and it just needs to be agreed, and then the service personnel could go to an employment tribunal on far wider areas. That could lead to their not putting in a service complaint, because they would have this employment tribunal route. If you look at the numbers of complaints of harassment, bullying and discrimination in the Army alone, they are the majority of the cases. Therefore, if they went to an employment tribunal—that is the way they could be done—they would not go through a service complaints system.

Rev. Nicholas Mercer: I am in agreement with my two colleagues here: that should be a reason to go to an employment tribunal. If you look at the cases we've had, and the fact

that people are so mistrustful of the institution of the armed forces, if that was a direct access route, it would take some pressure off the Ombudsman, because it makes up quite a high proportion and there is a resourcing issue in all of this. For those who find themselves in that unfortunate position, it could take some pressure off them, not thinking that the chain of command was dealing with their case. I think it would also help in things like production of documents and witnesses, the closing of ranks and recrimination, because that would then become a contempt.

Sara Ogilvie: Can I just add a final comment on that? There has been agreement that it is a good idea, but it seems incredibly unlikely that we would be able to get that change made for this legislation. I urge you not to ignore the changing-the-powers and the details issues that we also have, in favour of looking at that long-term change. We would still need a medium-term solution.

Q34 Mrs Moon: New section 34OE of the Bill talks of the use of independent members in a number of circumstances in decisions, service complaints and appeals. Should there be criteria for the inclusion of independent members? Should there be a clear set of circumstances in which independent members would always be sitting?

Lieutenant Colonel Field: Certainly in the current system, service complaint panels, which sit in lieu of level 3 Army Board, Air Force Board and Admiralty Board, do have the ability to have an independent member. There aren't that many of them—I think about half a dozen—but I think it gives a different perspective when you are dealing with harassment, bullying and discrimination cases. If you were to have an independent on those sorts of cases, it would certainly look more independent, because those people do give a different perspective than the chain of command will often give to those sorts of cases. I think they are very useful.

Q35 Mrs Moon: You said there were only half a dozen. How many would we actually need? Have you any idea what that would need to expand to?

Lieutenant Colonel Field: They are on call, so theoretically they are not paid until they asked to go and do something, so you could have as many as you like, I suppose. I don't know how they are paid. They are paid when they turn up: they get so much to read the case, so much to sit on the case and so on. You could have quite a few, and I think it would have to go on how many harassment, bullying and discrimination cases that you have as historical precedents and see how many independent members you had and how many you would need. The trouble is trying to get hold of them in a timely fashion. It is exactly the same as investigating a service complaint and trying to get an investigator in a timely fashion. That has always been a problem.

Q36 Mrs Moon: In coming to a finding, if there are three on a panel, is it a majority decision? How is the decision divided? Does it have to be a majority or does it have to be consensual and all three have to agree with the decision?

Lieutenant Colonel Field: I am aware of at least one case where there was a minority report issued by one of the independents who did not agree with his two military colleagues at all. I suppose it depends on how it wants it to be written. It is always useful to have that view, but clearly whatever the case was—and I can't remember the details now—there must have been quite an interesting debate going on to actually look at submitting a separate, in effect, minority report.

Sara Ogilvie: I'm afraid I don't know the answer to your second question, but in terms of whether there should be predefined cases for which there should be independent members, this is not something that we briefed on. The background is that the European Convention on Human Rights requires that if you are determining a civil claim, which in this context is core employment tribunal matters, then you would need to have independent members. My understanding of reading the human rights submission is that the Ministry of Defence does not think that the current European Court of Human Rights caseload requires them to define sets of cases. We will keep our eye on that, but certainly it seems a bit short-sighted in terms of efficiency, if you know that there are certain kinds of cases where you are going to need an independent member, not to do that.

Rev. Nicholas Mercer: I am in favour of as much independence as we can get. There is something in our submission that suggests that the Ministry of Defence has not been as forthcoming with independent panel members as might have been envisaged when the last Act was passed. If something can be done to ensure that independent service panels are part of the legislation and used, then shortcomings, as Colonel Field has highlighted, will be overcome.

Q37 Mrs Moon: Can you envisage a situation where there might be three independents, rather than one independent and two chain of command?

Rev. Nicholas Mercer: Well, I would have a completely independent system so, yes, I can. In the halfway house, which seems to be what is envisaged here, yes, I can certainly see two out of the three, and you would have civilian members on courts martial in certain prescribed cases.

Q38 Mrs Moon: Going back to the initial making of the service complaint, should there be a time limit? Must it have taken place within the previous three months, as is currently the case, or should that be expanded to six months?

Rev. Nicholas Mercer: As I understand the regulations at the moment, it is three months, but you can waive that if it is just and equitable to do so. We live in a climate of historic abuse at the moment. It seems rather difficult to reconcile three months with claims going back 30 or 40 years. I am not saying we should reopen those, but in that sort of culture perhaps the parameters could be expanded.

Q39 Mrs Moon: Colonel Field, sometimes someone may have experienced a number of incidents, perhaps in relation to bullying and harassment, and they reach the final straw

and then they make the complaint. Under the system when you were operating, were you able to take into consideration the history prior to the making of the complaint or does that fall? Can you only look at the one incident which leads to the making of the complaint or can you look at previous incidents as well?

Lieutenant Colonel Field: No, the investigator would look at it in the round, but the advice to the investigator from us would be that obviously that was the final straw and to investigate that, but also what led up to it, so they can go back. It all depends on what the complainant puts in their statement. They can talk about anything. People complained to me about issues that occurred in the 1970s and 1980s when they were subject to service law; but of course, that was not made within the three months. That does not stop a commanding officer—a deciding officer—accepting that complaint for investigation, except that it is very difficult, because people have moved, left, died and all sorts of things. Most of them, as I remember, were looking at some sort of compensation. That is very difficult to predetermine so far ago.

As to three months, that seems to be the norm, and under the new legislation, if the three month-window is rejected and the “just and equitable” is not there, then they can appeal to the Ombudsman on that matter. In my experience it was relatively cut and dried on the three-month rule, and commanding officers could look at the evidence if they wished to. But they do not have to do it necessarily through the vehicle of a service complaint. If there is something that is outside the time limit, I would certainly speak to the deciding officer and say, “Look, you can investigate this outwith the service complaint in your power as commanding officer of the unit.”

Q40 Chair: We are here as a Committee to try to look at the legislation going through Parliament, so we have some technical questions relating to the Bill, but just to draw back for a second and bring in Parliament and the public more generally, can each of you in as few sentences as possible give us a brief sense of what you think is wrong with the Bill? Could you add to that a glance at the other side of the picture and tell us why you think the MOD would be proposing this kind of Bill? I shall be bold and start with Sara and work our way down.

Sara Ogilvie: We think there are two bigger-picture problems. The first, which we have described briefly, is that the Ombudsman can only investigate maladministration. She cannot investigate the substance of the complaint. Secondly, we are concerned that the recommendations are not binding. We think that these are problems because—I come back to what I have been saying all along—if you want to make a service complaint, and it is going to be a bit inconvenient, and you might have to make a bit of trouble, what are the factors that are going to stop you from doing that? It can be, “Oh, what’s maladministration?”; “Going to this Ombudsman, they might not even be able to deal with my complaint. What’s the point in that?” Or, you get over that hurdle, and then you think, “So I have come here and gone through this process, but I can’t guarantee that something is going to happen at the end of it.” Those are huge disincentives, and that completely undermines the system.

I have heard that the reason—it has been alluded to—is because the Ministry of Defence thinks that those powers would undermine the chain of command. I think that that is just wrong. Responsibility for handling complaints will remain with the relevant armed forces. In each complaint, they will still have two opportunities to hear the complaint, to gather evidence, to decide on the course of action and to see what happens there. So they still will retain vast responsibility for the majority of the system.

For that little tier that is changing at the end, the difference would be the MOD saying, “Look. We want to get things right. We think that, in most cases, we can sort it out ourselves. But we accept that, like every institution and every other organisation, we won’t be correct 100% of the time. So we are willing to listen to other people and to accept that, from time to time, we won’t have done the right thing. The reason we do that is because we believe in the welfare of our troops.” In any other sort of institution, that would be seen as a positive and a strengthening, rather than a weakness.

That is probably more than you wanted.

Q41 Chair: That’s terrific. Colonel Field, comment briefly on the big picture, and on what would be the MOD’s response.

Lieutenant Colonel Field: I don’t particularly disagree with any of that. The bigger picture in terms of service complaints is the process. It is far, far too complex and slow. It has two separate publications. Each is 150 pages or so, so if you are using both of them—one for service complaints, and one for bullying, harassment and discrimination—you are following something almost like 300 pages of process. Inevitably, things are going to go wrong.

I tried and failed in my time to get it significantly simplified. The whole process, right at the start, needs to be as simple as it can be. There is no good getting all the powers at the top at the Ombudsman, which is excellent, and then the whole thing at the bottom not changing. The bottom must change, with a simplified process. That is the key to the success of a service complaint moving up.

Rev. Nicholas Mercer: The system that was brought into law a few years ago has not been effective. I think everyone agrees that it is ineffective, overloaded and beset by delay. People have said that the system has not worked well. An internal memo from the armed forces said that people don’t trust it; it is as simple as that. The rank and file—in fact, relatively senior officers—don’t trust the system.

What have you done to amend that? You have changed “Commissioner” for “Ombudsman”, and the Ombudsman can now look at maladministration. Well, you could do that under the old system, because you could redress the investigation within the redress itself, so nothing really has changed, to be perfectly frank. I don’t think this will command any greater confidence than the last one did.

Why the United Kingdom has to stand alone in being the only European system where someone oversees the internal investigation, I do not know. Also, this rather archaic system is still in place so that, if it is about race and gender, you can go to an employment tribunal, while the rest go to this antiquarian system that is gathering dust. For instance, an officer has

a right of appeal to Her Majesty the Queen. Where does that stand in a modern, 21st century system? It just doesn't. It is time for a change, not just tinkering every time there is a death.

Q42 Chair: If you put yourself in a position of a senior military officer or senior civil servant in the MOD defending this legislation, what would they say in response to that? What's wrong with their response?

Rev. Nicholas Mercer: Well, I think the chain of command wants to keep a control on it. I think it is as simple as that. They will do their Ministers' bidding.

Q43 Chair: Very good. Now back to the technical questions. Thank you very much.

One of the curiosities is that the Bill says that applications should be made to the Ombudsman in writing. This may be a ludicrous question, but doesn't that exclude complaints by e-mail or other forms of technology, or should I just forget about the fact that it says "in writing"?

Sara Ogilvie: It definitely could do. It depends on how the Ombudsman chose to interpret it. Frankly, we shouldn't leave that up to an Ombudsman to decide.

Q44 Chair: Okay, very good. So we need a bit of clarity on "in writing".

The big question, which is the one that you have kept coming back to, everybody, is this whole question around maladministration and service failure. We have been through a system that seems to have happened with many other ombudsmen across our system—the prisons ombudsman is one—where they start looking at maladministration and then they move on to service failure. Presumably, I don't need to ask you to comment on that, but I am going to give you a brief opportunity to talk about it. I have a sense of where you are going.

Sara Ogilvie: I would just say that the ombudsman institution has evolved over time and, as that has happened, the ombudsmen that have existed for years and years have picked up more powers. As we create new ombudsmen such as the most recent ombudsmen we have created in Scotland and Wales, they start off with this service failure power. It makes sense, frankly. In this particular context, given that the MOD and the armed forces are already willing to let the Ombudsman in to do investigations, it seems a little bit silly not to let them look at everything.

Lieutenant Colonel Field: One of my worries is that, with such an amount of process in the two JSPs, maladministration will crop up time and time again, particularly if you have not got what you want. There is no way that anybody can follow 300 pages of process exactly, all the time. The Ombudsman will need to understand that they might start slowly but, over the course of time, as we found out, the number of complaints that will then be maladministered and appealed will get more and more. The worry will be that the Ombudsman will not be able to cope with the volume of complaints coming in because they have not achieved what they set out to.

Q45 Chair: Sorry, I may be being slow, but are you arguing that inclusion of service failure, along with maladministration, will limit the number of maladministration cases that the Ombudsman would have to deal with?

Lieutenant Colonel Field: No, I am not. I am saying that from the complainants' viewpoints, if there is a service failure of any description—even, for example, not getting the 30-day updates on time, which is a real problem—it is maladministration against the process, and therefore they will appeal on all of that. Those appeals will get more as more complaints go on.

Q46 Chair: So that is a point about the volume increase in maladministration appeals, but it is not, presumably, an objection from you to the idea of the Ombudsman's powers being expanded to include service failure.

Lieutenant Colonel Field: Not at all, no.

Rev. Nicholas Mercer: I have just put in a complaint to the legal ombudsman, so I have been through another ombudsman process. It was fantastic. The ombudsman did not look through the procedure by which I engaged with a firm of solicitors. They looked at the issues. I was given eight weeks to solve it with the solicitors, then it was handed to the ombudsman and he cracked it in 90 days. It was fast, efficient, they got straight to the point without any hassle and everyone had confidence in it. I do not see why we cannot seek to achieve something like that.

On maladministration, put yourselves in the victims' shoes. Let's say you were Corporal Ellement and you put in a complaint about bullying and harassment and you were not satisfied with the investigation. All that the Ombudsman could do is look at the procedure for the investigation. I am afraid it is just going to add to the mental trauma; it does not do anything.

There is another aspect: the Defence Council is not required to take account of the findings of the Ombudsman, potentially. Where does it leave the complainant if that happens at the end of the process? Does it have to go to judicial review? Where do we get to? We get to a legal cul-de-sac, where you are left with a potential bill of £100,000 to go to the High Court, with a reduction in the admissibility of application for judicial review. I do not know where it takes you and I can see that happening in contentious cases.

Q47 Chair: Three final ones from me before I hand back to Madeleine Moon. They are technical issues around the drafting of the Bill: first, the idea that the Ombudsman should have the power to initiate thematic investigations; secondly, the need to state more clearly in the Bill the Ombudsman's discretion to override time limits; and thirdly, the idea that a single application form, used across all three services, could be submitted simultaneously to the chain of command and the Ombudsman, and that the chain of command should inform the Ombudsman of withdrawn complaints and the reasons for them. What are your views on those three?

Sara Ogilvie: I think thematic investigations are good. We do not have any objection to them. They can achieve great things, but it is important that you don't put the cart before the horse. It would be weird to have the power to do thematic investigations if you cannot investigate the substance of the complaint in the first place—"We will listen to the substance of your complaint if there are lots of you, but not if there is one of you". So we think it is good, but it is important to get the main power in there. We have heard, in the House of Lords, that discretion is supposed to be there with the Ombudsman. Well, write it clearly in the legislation, for goodness' sake. In theory, the single application form sounds like something we would support, but I imagine that the practical consequences might need further thought.

Lieutenant Colonel Field: On the latter point, there is no issue at the moment with the complainant putting the complaint to the Commissioner, so that the Commissioner has it, logs it and then sends it to the three services. There may be more confidence in the system if under the new system all complaints go to the Ombudsman in the first place, and then come back out again with any comments and recommendations.

Rev. Nicholas Mercer: If you think about a young private soldier with a reading age of 11, it has to be made simple. Wherever a complaint is lodged, however expressed, it should be able to find its way into the system. I am conscious that we are in danger of excluding people with limited literacy skills.

Q48 Mrs Moon: Is it appropriate that, under the Bill, the Secretary of State makes the regulations that set out the procedures to be followed by the Ombudsman? The Ombudsman is supposed to be monitoring overarchingly, but only according to the rules set by the Secretary of State. Is that appropriate?

Sara Ogilvie: It seems completely perverse, not only in principle but in the way it is set out in the Bill. Basically, on the one hand it says that the Ombudsman can do what they want, but on the other hand only within the context of what we say they can do. We understand the need for the Ombudsman to have processes and to have a set way to conduct cases and so on, but that is for the Ombudsman to decide, not the Secretary of State. The point of creating an independent body is that they get to work out what works best for their processes. This is a completely inappropriate power and it won't help.

Lieutenant Colonel Field: I have to say that I don't disagree with that at all.

Rev. Nicholas Mercer: Can we see the regulations in advance to scrutinise them and make our objections? With this way of drafting legislation, where it has clauses referring to regulations to be passed from time to time by the Secretary of State, of course you don't see them. The Act is passed and then the regulations follow. Where is the parliamentary scrutiny and the opportunity to comment on those regulations? There is also a matter of process.

Q49 Mr Gray: We realise that that is certainly true. None the less, it is then subject to parliamentary process, so it is precisely the same system as it is at the moment. There is no way of passing it through without Parliament looking at it.

Rev. Nicholas Mercer: Okay.

Mrs Moon: In fact, the regulations are due to be published tomorrow, I understand.

Rev. Nicholas Mercer: Are they? Okay. We could have seen them then, if we had come on Thursday.

Sara Ogilvie: They are, but I reiterate the fact that there is no place for this broad type of regulation in this scheme. If there is power for the Secretary of State to make regulations, what they are intended to do should be really prescribed and set out exactly. The schemes that we have here are incredibly broad. Basically, the Secretary of State can make regulations about stuff that the Ombudsman is going to do that undermines the whole purpose of the scheme. Even if we can look at them in advance and even if they go through some procedure, it is not appropriate, I am sorry.

Q50 Mrs Moon: The regulations are also to decide on obligations, including confidentiality that may be imposed on those who receive the Ombudsman's report. What is your assessment of the impact of such powers on the independence of the Ombudsman, if she or he writes a report and is then told that only three people can see it? Is that appropriate?

Sara Ogilvie: This issue is particularly pertinent when you do not allow the Ombudsman to make binding recommendations. The Ombudsman's value is that she is persuasive, because she is weighty, because she is trusted and because if you don't do what she says she will go public and everyone in society will know what you have done. Again, this arrangement completely undermines that. If the Secretary of State is able to say "You are allowed to send this report only to certain people", that cuts out so much of the value of the scheme that it is incredibly worrying.

It has been suggested to us separately that this was intended to protect the confidentiality of those involved. The Data Protection Act already provides that and would impose obligations on the Ombudsman. The way this proposal is written it imposes obligations on the person to whom the report is sent. That is again completely inappropriate and not the right way to go about things at all.

Lieutenant Colonel Field: The Commissioner herself at the moment sends certain reports out; and of course they are appropriately redacted, but you can still see the essence of the complaint, how it was handled, badly or otherwise, and the outcome. That has been useful. Examples of case studies are in her report every year and they are very handy. The Commissioner herself at the moment has the power to call a closed case back to her office and go through it to see whether the process was done correctly. If she has any issues, she can raise them with the chain of command. She has that power at the moment, so I very much hope that is carried through to the Ombudsman.

Rev. Nicholas Mercer: I agree with my colleagues on this.

Q51 Mrs Moon: Colonel Field and Reverend Mercer, given your military experience, do you think that the Ombudsman's recommendations being binding would undermine the chain of command? Is that a genuine or realistic fear?

Rev. Nicholas Mercer: I don't think it would undermine the chain of command. The chain of command can be questioned in all sorts of ways: it can be questioned in employment tribunals, in coroners' courts or in courts-martial. That has not undermined the chain of command; in fact, I think it would go some way to reinforcing the chain of command, because this affects the troops' morale and confidence. If they see a fair system being operated, where there is no place to hide, that will bolster morale for the rank and file in the armed forces. In other words, it would have the opposite effect.

Lieutenant Colonel Field: There are clear examples, because there is no contract of employment. You have terms when you go into service and they are changed quite frequently. You suddenly find yourself on a changing career course and are then disadvantaged. One problem is that they often won't change their minds back again. If the Ombudsman said, "Those terms of service—the way you wrote and did them—were for all the wrong reasons," that would hold them to account far more. One of my frustrations—when I saw a sudden TACOS change, I would go to find out why they did that, because I knew we would have dozens of complaints as a result. There were often no grandfather rights to it, so a whole raft of people were disadvantaged. Therefore, if the Ombudsman had the authority and power to say, "You've made the wrong decision there," or, "Why have you made that decision?" that would hold them far more to account.

Sara Ogilvie: I wasn't asked, but I just want to butt in to say that accountability of public institutions is so important at the moment. I won't go into all the cases I could cite, because you know them, but I don't see why the armed forces need to sit outside that. We expect accountability for all those other institutions, because we believe in them and want them to work well. It is the same for the armed forces; it is not a threat.

Q52 Mrs Moon: The Bill's impact assessment says that the total number of staff for the Ombudsman will need to rise from nine to 20. Given your comments about the numbers that would potentially come their way, will that be sufficient?

Lieutenant Colonel Field: I think it depends on who those 20 are and what they will be doing, to be honest. When I started Service Complaints, we had a handful of people. When I completed it four years later, we had about 35 or 40 people. If you're going to oversee the maladministration of a complaint, you need people who will achieve that and investigate those issues. I think it will start off slowly but the numbers will increase over time, as they will have to if the Ombudsman is going to keep the thing moving forward. Otherwise, there will be complaints about the Ombudsman that the delay is caused in his or her office. That is a worry—it is not a worry now, but as the thing builds up and people realise they can appeal to the Ombudsman on certain commissions, those will have to go to the Ombudsman and they need the staff to understand and deal with it. So yes, you need to increase staff in due course, as the volume increases.

Rev. Nicholas Mercer: One wouldn't want it to be like the Passport Office. I understand from Colonel Field that, at any one time, there are currently about 1,500 live

cases. That is a big case load which must be properly resourced. The other dimension to this is the impact on people's careers. These things go on for years. You're stuck and literally holed beneath the waterline while four or five years chug on. That is completely unacceptable: everything vanishes and all your ambitions can be scuppered by the delay that currently besets the system. I would like to see it properly resourced, so that things can be dealt with in as speedy a fashion as possible. I don't know what number that is, as that's very hard to judge.

Sara Ogilvie: I think your Committee, in discussions with the Service Complaints Commissioner, has identified the problem of her feeling discouraged from making applications to the Ministry of Defence for further resources. It would be a great pity if that were to transfer to this system as well.

Q53 Mr Gray: I am troubled by the conversation in general a little bit. If you don't mind me taking it back a stage, is there not a perfectly good argument that the chain of command is well used to dealing with all kinds of complaints? The whole question of an Ombudsman or Complaints Commissioner merely triggers off the—in every armed service, there are always people who are fed up and don't like it and don't like their immediate chain of command. Why can't we just leave it, as it always was, to the chain of command to sort those things out? Senior officers have always the best interests of the men and women under them at the forefront of their minds. Is this not simply creating an organisation which will stimulate the barrack-room lawyer in almost every service person around?

Sara Ogilvie: The first thing I would say is that people are fed up across all areas of life—I'm fed up half the time and I don't complain about that; I just get on with it. However, if there was a real problem that I wanted to make a complaint about, I would expect to do that through an appropriate process that could help me put things right; not necessarily because I was angry—maybe it would include because I was angry—but just to help my life get back on track.

Unfortunately, with as much respect for the chain of command as I have, we have seen that things don't work for people who try to make complaints in the armed forces. All the evidence that is there tells us that people don't have confidence in it and that complaints are not handled properly. We get calls from people all the time asking for information and advice because things have gone wrong. If things were working, perhaps you would have a better argument, but they are not working at the moment.

The other thing I would say, very quickly, comes back to—

Q54 Mr Gray: Hang on. You said things are not working at the moment; actually, with 200,000 servicemen and a large number of civilians and contractors and others, by and large it is working pretty well at the moment. What we are talking about here are extreme complaints—a handful of them. Most complaints—most grievances, most difficulties—are dealt with perfectly satisfactorily by the immediate employer, aren't they?

Sara Ogilvie: And there's no reason why they would have to then escalate through the process, if they had been dealt with adequately, but it is still important that we have a back-

stop for those cases that do go wrong and it is important that there is that institutional independence that was referred to earlier, because quite simply, when you are involved so deeply in something, you cannot guarantee the independence and impartiality that is required, and those are the kind of cases where things tend to go wrong. Yes, hopefully things will be put right in the earlier processes, but just because most of them are put right—we think: we don't know that—does not mean you should not have an avenue for those who still have problems.

Q55 Mr Gray: But the armed forces are different, aren't they? I have just come back from a tour of the battlefields where, among other things, we heard about soldiers in the first world war being shot for falling asleep on guard. Of course, that would not happen now, but at that time they viewed that as essential for discipline. If you are setting up a general whingeing organisation, surely we are fundamentally undermining the whole notion of military discipline by saying, "You can go to this nice Ombudsman. It'll be great: they'll take up your case." The chain of command's fundamental structure will thereby be undermined. Is that not a reasonable argument?

Rev. Nicholas Mercer: Other European armies have an independent—

Mr Gray: Oh, we don't like European armies.

Rev. Nicholas Mercer: I know there is an aversion to the word "Europe", but it works perfectly well in other systems. It does not affect them, so why should it affect us? Why should we be different?

Q56 Mr Gray: Because, for example, the German army and the things they are allowed to do and are not allowed to do are completely and utterly different to the British army. I'm afraid to say that I'm not sure that advancing the German army or even the French army as an example of best practice is necessarily likely to win many arguments.

Rev. Nicholas Mercer: But every time there is a change in armed forces legislation—the courts martial system, the summary appeals system—there are cries from the chain of command that this will undermine it, and it never does. It works perfectly well and this is just the last bastion: it's the last one to go.

Mr Gray: The last straw.

Rev. Nicholas Mercer: It is, and it's worked very well. We have an Army that works very well and is effective operationally, and it hasn't undermined the chain of command one iota, and I don't think this is any different.

Lieutenant Colonel Field: I think we need to give the context and the number of complaints that are made. We were looking at between 0.5% and 0.8% of the strength of the Army making complaints, so certainly less than 1%. Dr Susan Atkins thought that we should be having about 5% of the Army complaining, given the size, complexity and the type of organisation. I think that would have sunk us, to be honest with you, but 0.8% is a very small number of people complaining. I used to get complaints when they said, "I've tried to resolve

it through my chain of command, but no one's listening." They would often put a complaint in because they had tried everything else and this was the last straw—or whatever it might be—for them to put a complaint in.

Q57 Sir Bob Russell: Colonel Field, from your experience of the command chain, is there a danger that the Ombudsman system may encourage a malcontent to make trouble by lodging a complaint that is exaggerated or, indeed, imagined?

Lieutenant Colonel Field: I don't think so. The six years of the Service Complaints Commissioner do not seem to have proved that. In fact, I can't think of any complaints that were determined to be incorrect in one way or another; they were all motivated for a correct reason. They might have got carried away with that complaint and it might have led to something else and something else in turn.

The problem you've got is when there isn't a decision one way or the other, and because of the length of time it takes to investigate, people may perceive that the chain of command is against them. I certainly was quite frequently frustrated that the chain of command would not make a decision, because I quite often ended up in an employment tribunal because of it. But if they make a decision, at least you know whether they are going to uphold the complaint partially or completely, and then it can go through, on appeal if necessary, to a higher level. But it was actually trying to get all those pieces in place—the investigation, which took far too long, and then the deciding officer—and more often than not, the deciding officer was wanting the legal service to hold them by the hand.

The number of lawyers that I had in Service Complaints Wing went from one to eight in four years, because no commanding officer, or deciding officer, in a complaint would take a decision without legal advice, and therefore in every letter they wrote they said, "Can you check it?" They were terrified of some reaction to it. That, of course, slowed it all down. So I had to have eight lawyers in the end, in a system which is not supposed to be a legalistic system.

Sara Ogilvie: If I could just add, on the issue of vexatious claimants, most justice systems end up with a malcontent—people who want to pursue complaints even though the process has come to an end. If you ensure that the Ombudsman has sufficient discretion to deal with those cases appropriately, then that should not pose a problem—every system has them; as long as the judge or the Ombudsman can deal with them, then that is fine. So that is another reason not to tie her hands.

Q58 Mrs Moon: Going back very quickly to something you said there, Colonel Field, about the chain of command not wanting to make a decision without having it reviewed by lawyers, how often was the complainant supported by a lawyer?

Lieutenant Colonel Field: Rarely, because the system requires that if they do have legal advice, they have to pay for it. The only assistance they get is an assisting officer, who can be anybody they choose except somebody who may be involved with the complaint, and family members usually. They themselves could be a sergeant; it could be a lieutenant, a captain—they don't know the system particularly well

themselves and secondly they are beholden to the chain of command because they are in the same chain of command. I know Dr Susan Atkins was quite keen on all complainants having an assisting officer, or at least being asked if they wanted one, but their level of understanding of the service complaints system was quite woeful in some cases. But if they wanted legal advice, they had to pay for it.

Technically, though, it is not a legal system; it is a grievance system, which should be resolved by mediation or investigation. It should not necessarily involve lawyers at that level, except that right at the start I always had a lawyer checking, in case the service complaint involved potential criminality. We thought several did, so we passed them to the police to investigate, and certainly one case went through the court martial system. So that worked. So I needed legal advice on whether what the complainant said could reveal that a potential criminal act had occurred, and we would stay the complaint and send it off for police investigation, and quite often it came back as, “Yes, there is a case to answer, and we will put it up for the Service Prosecuting Authority.”

Q59 Sir Bob Russell: Colonel Field, the reason I asked my question earlier about the malcontent was because employment tribunals were originally set up in order to remove the legal confrontation from the system, but we now have an employment tribunal that has become another forum for legal confrontation. Do you think that that could happen here as well, with it becoming a legal minefield?

Lieutenant Colonel Field: In the four years I ran the complaints wing for the Army, there was no evidence that more people were wanting to turn to lawyers—partly because many of them did not understand the labyrinthine service complaints process in the first place and because, of course, it was very expensive.

Sir Bob Russell: But you indicated how many lawyers you needed to take on.

Lieutenant Colonel Field: This was purely because the chain of command was becoming so risk-averse to making any decision without having a lawyer look at it, and if we sent them to the regional lawyers, they were taking far too long. So the decision was taken that I would have additional legal support to speed up the complaints, so that we could advise commanding officers. We never told them what to do or what decision to come to, but we said, “This is the balance of this and the balance of that,” and the deciding officer had to make up their mind.

I was very clear in the way that I ran the complaints department: I did not and would not take sides, and neither did the lawyers. The legal advice did go to the commanding officer, but we didn’t tell them what decision to make.

Q60 Mrs Moon: If you had to pay a fee to make a complaint, would that help to dissuade people from making meritless complaints?

Sara Ogilvie: All fees do is stop those who think that they may not be able to afford it from making a complaint. If a person really wants to make a complaint badly enough—if

they are sufficiently vexatious or upset about things—they will find that money, so I don't think that would work as a tool.

Lieutenant Colonel Field: There is a paragraph in the instructions about how to deal with vexatious complainants. I do not think that there should be a fee; but of course, the trouble is that, because it's free, it means that if your complaint is not upheld at the lower level, you can appeal without any reason. You can just say, "I appeal."

I used to try to get the complainant to say what they are appealing about. I would say, "Just because you didn't like the decision doesn't make it wrong. It hasn't gone your way and you're appealing, but what are you appealing specifically about?" Of course, all they had to do was say, "I wish to appeal"—one line, full stop. Then we would have to go through the appeal process right up to the Army Board.

Rev. Nicholas Mercer: I don't think there should be a fee, because some people at the very bottom of the Army would be prohibited by that—depending on whether they are skint in any given month, to put it bluntly. There is another side to the vexatious litigant, which is the threat of punishment against those who make service complaints. People have been threatened with disciplinary action for making complaints. They are told, "Go and roll the dice, and if you lose, I'm going to take AGAI action"—administrative action—"against you." That is a really pernicious threat and is sometimes used by those who have something to hide. If anything can be done, through regulations or whatever, to stop that, that would be very welcome indeed.

Q61 Mrs Moon: The impact assessment says that the Bill's provisions will be reviewed in three to five years. What do you think the criteria for effectiveness should be?

Sara Ogilvie: The first thing I would say is that that sounds like the usual statutory review that you get with new Bills. I doubt very greatly that it would look towards criteria for effectiveness, so perhaps that is something that your Committee will have to look at separately rather than through the usual process.

As the service complaints commissioner herself has alluded to, it is really difficult to work out whether a complaints system is effective or not, because if you get more complaints, you do not know whether that is because there are more problems or because more people have confidence in your system. That is why you need a qualitative investigation to look at that rather than just numbers.

Lieutenant Colonel Field: Yes, it is very difficult. Were we successful in the fact that I started with 100 complaints and ended up with 1,400? You could argue that I was very successful. However, when the Commissioner came in, she went out and visited units, and we used to go and visit units and we took out leaflets and so on. We publicised it; we didn't hide it, so I think there was a greater knowledge. Certainly one of the things that I did was to ensure that all new soldiers going into the recruit environment were briefed on the service complaints system during the recruit process, so from a leaflet they knew, right from the word, go that if they had any issue, they could put in a service complaint.

Rev. Nicholas Mercer: Assessing how well it has gone, first of all, from the Ombudsman, when at the end of their tenure someone says, “It’s ineffective, overloaded and beset by delay,” that’s not exactly a ringing endorsement. If you look at the stats, 54% say, “I’m not going to put one in because nothing will happen,” 52% say, “It will affect my career,” and 28% of the service rank and file fear recrimination. Well, the survey could be done at the end of it, to see how it is perceived, so it can be looked at from both ends, and in the round, obviously.

Mr Gray: The 1,400 cases are presumably per annum.

Lieutenant Colonel Field: No, that is currently what is being worked on at any one time at different levels, as per the Commissioner’s last report.

Q62 Mr Gray: But overall, how many of them would be upheld, how many would be dismissed and how many would be uncertain?

Lieutenant Colonel Field: At each of the three levels, sometimes about a third were upheld, a third were partially upheld and a third were not. As it got higher towards the Army Board, we found more of them were upheld than were upheld at a lower level. The Commissioner puts the stats in her report; but it means that the system to that extent works, because if you appeal it and it goes to the Army Board, particularly if they are having an oral hearing, which they will do, you stand a better chance of getting your case upheld. So keep plugging away, all the way up to the top, for however long it takes.

Q63 Mrs Moon: What is not in the Bill that in your opinion is an opportunity lost?

Sara Ogilvie: Where to begin? Hopefully you have received our “Military Justice” report, which contains six recommendations. I appreciate that it might be outside the Bill’s long title to include the criminal stuff, but given that this is about complaints, is there not perhaps an opportunity to explore the oversight of complaints about military police services? That seems to tie in. Our other complaints are with modifications that need to be made to the military justice system more generally. We would welcome the opportunity to discuss that further.

Lieutenant Colonel Field: I was quite keen on mediation. It is something that I set up. I thought mediation was quite a useful tool. I know that they are looking at mediation in all sorts of other aspects. Perhaps there is a need to look at putting something in that you should mediate a lot of these problems where it is possible to do so. We often found—not so much with the Army, I have to say, but certainly the other two services when I was dealing with them—that mediation was very well used.

Rev. Nicholas Mercer: A couple of things. One is: what happens if the Defence Council don’t agree to abide or don’t disagree with the finding of maladministration? Where does that leave us? Where does that leave the complainant? It hasn’t been investigated properly; the Defence Council say, “We don’t care” or whatever they say—probably in more polite terms. Where does that leave the complainant? What does he do? He is in a legal cul-de-sac.

One of the things that the Service Complaints Commissioner has referred to is the reluctance of the Ministry of Defence to hand over documents. Then there is tampering with documents. We have just heard about the case of Carol Howard, the policewoman, and the tampering of documents by the police. That also goes on in the armed forces. Let's say they are ordered to hand over the documents and refuse to do so for various reasons. Freedom of information is beset with exceptions. Where does that leave the complainant, if they can't get the document that is essential to their case? Do they then have to go into court? Who pays for it, and so on and so forth? I don't think those questions have been answered. I welcome it, but I can see it becoming a legal battleground with some of the more difficult cases.

Q64 Chair: Thank you very much. We are really now in the last two minutes. The US military fought very hard against these kinds of proposals. So finally, what is your analysis of that and what is your sense of the very powerful arguments made by the US military against this form of ombudsman, and why we should follow a different path from the United States?

Rev. Nicholas Mercer: Put simply, I don't think we should.

Q65 Chair: Do you want to reflect on the American system and the American experience?

Rev. Nicholas Mercer: It is a generic question, isn't it? I think the answer is obvious, and this is simply a halfway house. We should go the whole hog and make it independent. Why we should take the model from across the Atlantic I don't know. I have worked with European armies and in the European force in Bosnia, and it worked perfectly well there. There is no reason why we should not follow suit.

Q66 Chair: Colonel, what are the strengths of the American system?

Lieutenant Colonel Field: I am not an expert on the American system, I have to be honest. I looked at other models, but not the American model in particular. The Service Complaints system is in the last-chance saloon. They have to get it right with the Ombudsman, and if they do not do that this time round—they have had six years, if not more—you have to look at the model and make the Ombudsman completely independent and have all the complaints going in the Ombudsman's direction for investigation and decision making.

Sara Ogilvie: I think it is really useful to look at other examples of how things are done elsewhere and to look at how far we have come. Ultimately, the thing that should be front and centre of our minds is: what system do we need in place to ensure that servicemen and women are confident in making complaints? I do not think we have seen evidence that the American system works, and we should try to set our own path on something that delivers effectively for servicemen and women.

Chair: Thank you all very much indeed. Have a very good afternoon. That was an excellent and very precise session. Thank you.

