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Defence Committee

Tri–Service Armed Forces Bill

Second Report of Session 2004–05

Report, together with formal minutes, oral and written evidence

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Discipline among Service personnel is crucial to maintaining Operational Effectiveness. The disciplinary systems of the three Armed Services are currently underpinned by three separate Service Discipline Acts. The Government's Strategic Defence Review, published in July 1998, announced that there would be an 'examination of the need for a single tri-Service Discipline Act'. But it has taken until now for concrete proposals to emerge.

The Government plans to introduce a Tri-Service Armed Forces Bill in the 2005–06 parliamentary session. The Ministry of Defence (MoD) asked us to consider its proposals as set out in a memorandum of October 2004 and an updating memorandum of January 2005. We were not provided with any draft clauses, and a number of the proposals need to be developed further. However, we have sought to provide an initial response to the proposals where we could. MoD plans to start consulting on the Bill in mid 2005, prior to introduction in the autumn. This appears to be a challenging timescale if the outcome of the consultation is to be properly reflected in the Bill before it is introduced.

Substantial changes are proposed to the current court martial system, including the creation of a standing court and a single prosecuting authority. The changes are intended to improve both the speed to court martial, and the nature of court martial. Although, in principle, we support the proposed changes to courts martial, there is still much work to be done on the detailed provisions.

The Commanding Officer (CO) is at the heart of the discipline system. Currently, the COs in the three Services have different powers in terms of the cases that can be dealt with summarily and the punishments available to them. A harmonised level of powers has been agreed which, in the case of the Royal Navy, will result in more cases having to be dealt with at court martial. In the other two Services, COs may have to deal with more cases summarily. To achieve the desired results, MoD will need to ensure that Army and RAF COs in particular are fully supported and trained.

MoD's proposals also cover a wide range of other areas, including redress of complaints arrangements and Boards of Inquiry. Many of the proposals need to be developed further. We disagree with MoD over the attendance of next of kin at Boards of Inquiry. We believe that the presumption should be that they should be allowed to attend.

The Government told us that it is committed to proper and effective parliamentary scrutiny of the Tri-Service Armed Forces Bill. The form of this scrutiny will depend to some extent upon the progress with the Bill's preparation and the parliamentary timetable over the coming months. However, we recommend that it comprises a select committee stage, during which witnesses from MoD and the Armed Forces could be examined, and a standing committee stage, at which the bill would be subject to line by line examination in public.

1 Introduction

Background to the inquiry

1. The Government's Strategic Defence Review, published in July 1998, announced that there would be an 'examination of the need for a single tri-Service Discipline Act'.[1] On 13 June 2003, the then Parliamentary Under-Secretary of State for Defence, Dr Lewis Moonie MP, wrote[2] to our Chairman about a project to replace the three Service Discipline Acts with a single Tri-Service Act (TSA). On 23 April 2004, Dr Moonie's successor, Mr Ivor Caplin MP, wrote[3] to the Chairman to update him on progress with the project, and said that he hoped that the next five-yearly Armed Forces Bill, due in the 2005–06 session, would be the vehicle for the Tri-Service legislation. The Bill is expected to be large, in the order of 350–400 clauses.[4]

2. On 28 June 2004, Mr Caplin again wrote[5] to the Chairman, noting that he was keen 'to expose our ideas in a coherent fashion at an early a stage as possible to those most closely interested'. He proposed that a memorandum (subsequently referred to as the Memorandum) on the Bill be submitted to the Committee in the autumn, setting out the key principles underpinning the legislation and providing details of the main policy proposals. He hoped that the Committee could consider the proposals, take evidence, and produce a report in early 2005 to assist the Ministry of Defence (MoD) with its work.

3. We received the Memorandum[6] on 6 October 2004 and a further memorandum on 8 January 2005.[7] We held two sessions of oral evidence, one with MoD's Tri-Service Armed Forces Bill Team on 27 October 2004, and one with Mr Caplin, on 2 February 2005.

4. We are grateful to the specialist advisers who have assisted us in our inquiry: Rear Admiral Richard Cobbold, Professor Christopher Dandeker, Air Vice Marshal Professor Tony Mason and Brigadier Austin Thorp. We are also grateful to the assistance provided by the Committee Office Scrutiny Unit.

Our inquiry

5. MoD states that its Memorandum 'describes the main conclusions we have reached about criminal and disciplinary matters and outlines our developing thinking in other key areas, notably Boards of Inquiry and redress of grievance procedures'.[8]

6. The detail of the Bill's provision will be significant, but in many areas cannot be ascertained from the information provided to date. For example, it is proposed that the Act

1 *Strategic Defence Review*, Ministry of Defence, July 1998, Cm 3999, para 133

2 Ev 35

3 Ev 35

4 Ev 37

5 Ev 36

6 Ev 36–54

7 Ev 70–74

8 Ev 36

would re-define service offences which are described as very old, and clarify existing areas of uncertainty. The information in the Memorandum relating to these and other important matters is sketchy. Annex B to the Memorandum lists the subject headings which are likely to appear in the Bill, but none of the draft clauses have been provided with the Memorandum. **While we were content to consider the proposals set out in MoD's Memorandum, the sketchy nature of some of the information, and the lack of any draft clauses, limits the extent to which we have been able to reach substantive and unqualified final conclusions.**

7. In this inquiry we have limited ourselves to examining MoD's proposals for inclusion in the Tri-Service Armed Forces Bill, as set out in its memoranda. The proposals are principally intended to update and harmonise existing arrangements, for example, in respect to courts martial and Boards of Inquiry. **We have not attempted any consideration of more fundamental issues such as the need for a military system of law, or the underlying principles of the existing arrangements. These issues will, however, need to be considered in future procedures relating to the Bill. We recommend that our successor Committee pursues this matter.**

Consultation exercise

8. The Memorandum states that the Tri-Service Bill team undertook visits to a number of Service establishments where discussions were held with all ranks. Discussions were also held with representatives of the Armed Forces of the United States, Canada, Australia and New Zealand, all of which have forms of harmonised Service legislation. Responses to questionnaires were also received from the French, German and Dutch defence ministries. Where appropriate, other stakeholders such as welfare and families' organisations and trade unions were consulted.[9]

9. At the evidence session on 2 February 2005 we asked about the level of consultation as we were concerned that, during our recent visits to Cyprus and Northern Ireland, few of the Service personnel we spoke to had much knowledge of the proposals which are likely to feature in the Bill. Mr Caplin told us that he 'would expect very few of our current serving members of the Armed Forces to know what we are doing at the present time… there will be significant internal and external consultation and public relations campaigns once we get the Bill a bit further on'.[10] However, Mrs Jones, Head of the Armed Forces Bill team told us that 'Work really started in earnest… back in about 2001. Most of the work involved a great deal of consultation with the Service themselves at the beginning because this is an enormous change for the Services to move to a single Act'.[11]

10. Mr Morrison, MoD's legal adviser provided some clarification on the issue of consultation:

> We spent at least 18 months visiting units and commands both in Britain, Northern Ireland, Kosovo, Germany, Cyprus and elsewhere. We discussed at all ranks, from the senior command to open meetings with all ranks… This was not obviously

9 Ev 38

10 Q 115

11 Q 113

> consultation on the Bill, it was asking them about their views of discipline, the way discipline worked, their views of the other Services' disciplinary arrangements.[12]

He added:

> It was not consultation in the sense that we were not putting to them our proposals and saying "What do you think of those?" I was trying to draw a distinction between that sort of exercise, which is the next stage, and the sort of, if you like, consultation or fact-finding which was making sure that we understood how people at all ranks saw the problems.[13]

11. Mr Caplin saw our inquiry 'as part of the consultation process', but added that MoD 'have a very, very demanding timetable… Long consultation is unlikely but some consultation is necessary'.[14] He anticipated 'being able to start consulting around mid year… We will have formulated more proposals; we will talk through the chain of command where we are and then go out and do some consultation. That should be in good time for the introduction of the Bill in the autumn'.[15]

12. **We consider it very important for MoD to consult with those who will be affected by the proposals in the Tri-Service Armed Forces Bill—the men and women of our Armed Forces. MoD plans to 'start consulting around mid-year'. However, given that the timetable for the introduction of the Bill is autumn 2005, we are concerned that this might lead to less time than is needed for a proper consultation exercise to take place. We consider this issue further in the context of parliamentary scrutiny in Chapter 4 below. We look to MoD to ensure that proper consultation is undertaken and, where appropriate, the outcome of the consultation is reflected in the proposals in the Bill.**

Timetable for the Bill

13. Mr Caplin told us that 'there is an enormous amount of detailed work going on to ensure that we make the most of the opportunity we have now'.[16] He added that 'although there is a lot of work to be done, officials are very clear that we have a timetable to meet'.[17]

14. We asked Mr Caplin how confident he was that the Bill will be introduced in the autumn of 2005. He told us that:

> I am confident… Recently I have had further discussions with the three Service Principal Personnel Officers and we have discussed the introduction of the Bill. We are confident about meeting the target that the House has asked us to meet which is to introduce this in the next session of Parliament. We aim and expect to be able to do that.[18]

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12 Q 118

13 Q 119

14 Q 120

15 Q 121

16 Q 105

17 Q 107

18 Q 110

15. **The Government plans to introduce the Tri-Service Armed Forces Bill in the autumn of 2005. However, as MoD recognises, there is a great deal of work to be done. We look to MoD to keep us updated on the further development of the proposals in the Bill by way of regular reports.**

2 The case for a Tri-Service Armed Forces Act

The Service Discipline Acts

16. The disciplinary systems of the three Armed Services are underpinned by the three Service Discipline Acts (SDAs): the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957.[19] The current SDAs 'last only for a year at a time',[20] but may be renewed each year for a maximum of five years by Order in Council. Before the end of the fifth year, the Acts must be renewed by primary legislation—the quinquennial Armed Forces Act, the last of which was in 2001. The quinquennial Act renews the SDAs as well as providing an opportunity to make any necessary amendments to the existing legislation.[21]

17. The SDAs enable offences allegedly committed by persons subject to naval, military or air force law to be dealt with by the Services. They apply worldwide to members of the Armed Forces and, overseas, to certain categories of civilians (including their families) accompanying them. All offences against Service discipline and against the law of England and Wales may be tried, except for certain offences (such as murder, rape and war crimes) committed in the United Kingdom.[22]

The Service Discipline System

18. The guiding principle relating to discipline within the three Services is that command and responsibility for discipline should be aligned. The Commanding Officer (CO) of a Unit is at the heart of the discipline system. Any alleged offence is reported in the first instance to the CO who is responsible for ensuring that the matter is investigated. The CO can consider whether:

- To dismiss the allegation;
- Where the CO has jurisdiction, to deal with the case summarily; or
- To refer the case to higher authority.[23]

19. In considering the second of these options, the CO has to consider whether the case is appropriate for summary disposal, i.e. for the CO to hear and decide. The CO and Service legal advisers have to take into account the limited range of punishments at the CO's disposal and the complexity of the case.

20. The summary hearing before the CO is not considered compliant with Article 6 of the European Convention on Human Rights (ECHR) for a number of reasons, including the CO's lack of independence, and the absence of legal representation for the accused. The

19 Ev 44

20 Ev 45

21 Ev 45

22 Ev 45 (see also Ev 69–70)

23 Ev 45

overall system however is considered to be compliant, because of the accused's right before any summary hearing to elect trial by court martial, with the court martial having only the powers of punishment of a CO; and the accused's right after a summary hearing to appeal to the Summary Appeal Court (SAC). Both courts martial and the SAC are considered to be ECHR-compliant.[24] There are a number of differences between the arrangements for summary hearing in each of the Services, and particularly between the Royal Navy on the one hand and the Army and RAF on the other. A Royal Navy CO is able to deal with a much wider range of offences than his counterparts in the other Services and to apply more severe punishments.[25]

21. The procedures at a court martial are broadly similar to those of the Crown Court, though courts martial deal with a wider range of offences since they also cover the sort of offences that would be dealt with by a magistrates court. The Judge Advocate performs most of the functions of a Crown Court judge, but there is a panel of Service officers and warrant officers instead of a jury. The 'panel decides finding'[26], and the Judge Advocate and panel together decide the sentence. There is a right of petition to the Defence Council and, if that is denied or out of time, the right to appeal to the Courts Martial Appeal Court. In addition, there is a procedure known as Service Review whereby all court martial convictions are reconsidered by the Service Review Authority on behalf of the Defence Council, both for legal correctness and appropriateness of sentence, whether or not a petition has been made. This procedure can lead to the conviction being quashed or to sentences being varied, but not to any increase in sentence. After a number of changes to the system, pursuant to adverse judgments of the European Court of Human Rights, courts martial in all three Services are now considered to be ECHR-compliant. Again, there are some differences between the Royal Navy on the one hand and the Army and RAF on the other.[27]

Benefits of a Tri-Service Armed Forces Act

22. Mr Caplin told us that the Tri-Service Armed Forces Bill:

> will give Parliament a real opportunity to improve the existing provisions. The piecemeal amendments over the years have brought about useful changes and they have helped us to keep Service law in line with developments in civilian law but the result is an incoherent whole which does not reflect and support as well as it could the way in which our Armed Forces operate in a modern world.[28]

23. He added that 'A modern and fair system of Service law… is as important to supporting operational effectiveness as having the best trained and equipped forces as possible. A harmonised approach to Service law is about enhancing operational effectiveness'.[29]

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24 Ev 45

25 Ev 45

26 Ev 45-6

27 Ev 45-6

28 Q105

29 Q105

24. MoD sets out the arguments for creating a Tri-Service Armed Forces Act in its Memorandum as follows:

- A single system of Service law would be more appropriate for Services that are increasingly deployed on joint operations and for which they train together. Within joint commands and units the basic principle should be that Service personnel should be subject to the same systems and the same rights and penalties, except where a special rule applying only to the member of one Service is essential.
- As the attachment regulations[30] do not apply to fully joint units, the commanders of such units do not have disciplinary powers over all those under their command.
- In joint units with a single Service lead, there is a reluctance to use existing attachment regulations which, to an extent, enable all personnel to be subject to the lead SDA. A principal difficulty is the difference in COs' powers under the individual SDAs. The effect is that personnel tend to be returned to their own Service for disciplinary action
- Although many of the disciplinary provisions in the individual SDAs are essentially the same, the existence of the separate Acts makes the use, interpretation and amendment of the legislation more complicated and perpetuates different interpretations on a single Service basis.[31]

25. The Memorandum states that:

> Against this background, maintaining separate legislation for each of the Services or disciplinary systems with substantial difference between them makes little sense. The increasing number of joint organisations and operations and the uncertainty and potential for delay and discontent that can arise from applying separate systems within such structures and environments require a new approach. Bringing procedures into a single system of law that will by definition operate equally well in single, bi- or tri-Service environments is therefore a key objective.[32]

26. We asked whether consideration had been giving to improving or strengthening the attachment regulations rather than moving to a joint system. Mr Miller, Director General, Service Personnel Policy, told us that this had been considered. However, Mr Morrison, MoD's Legal Adviser, said that 'using the attachment regulations does not get rid of the basic problem that members of each Service are subject to different procedures, powers, penalties and so on'.[33]

27. MoD considers that a further benefit 'of a revised structure for command authority will be to extend to joint organisations, such as the Defence Procurement and the Defence

30 The Army Act 1955, the Air Force Act 1955, and the Naval Discipline Act 1957, allow personnel from one Service to be temporarily attached to either of the other two Services. The main effect of attachment to a Service is that the person attached is subject to that Service's disciplinary system, while also remaining subject to that of his/her own Service.

31 Ev 38

32 Ev 38

33 Q10

Logistics Agencies, the ability to administer discipline to their personnel'.[34] We asked about the implications for these organisations. Mr Miller said that 'What we would expect is that the introduction of the single system of Service law under the TSA would make it easier for disciplinary arrangements as they apply to Service personnel operating in those structures to be simplified and to be effectively discharged'.[35] MoD subsequently explained that a 'revised structure for command authority could apply to personnel serving in all parts of the MoD and the system would be flexible enough to be applied to new organisations or changed structures in the future'.[36]

Parliamentary interest in a Tri-Service Armed Forces Act

Consolidation of Service law

28. Our predecessors have taken a close interest in the issue of a Tri-Service Armed Forces Act and the time taken to introduce a Bill. In February 2000, they commented that:

> The consolidation recommended by the Select Committee [on the Armed Forces Bill] in 1996 has not taken place… We regard the consolidation of Service law as an urgent matter and recommend that the MoD address this matter with more urgency than has been the case hitherto. The Government itself acknowledged the possible benefits of a tri-Service Discipline Act in the Strategic Defence Review and we also expect to see early progress in this area.[37]

29. The last Select Committee on the Armed Forces Bill in 2001 also examined the issue of a single Service discipline act and commented that:

> Our predecessors in both 1991 and 1996 recommended that each of the three Service Discipline Acts should be consolidated. They regarded this process as desirable because of the number of amendments which had been made to the Acts since they were first passed in the 1950s, with sections inserted and repealed, resulting in what our colleagues in 1991 described as 'frankly a mess'. The 1996 Committee found it unacceptable that two years' work had been carried out on consolidation by a senior draftsman from Parliamentary Counsel but that the process had been left uncompleted when the secondment to the Law Commission came to an end. They recommended that the necessary time and resources be made available to allow for consolidation before the next Armed Forces Bill came before Parliament. The Defence Committee has also, more recently, recommended that the MoD address consolidation of Service law as a matter of urgency.[38]

30. The Secretary of State for Defence told[39] the last Select Committee on the Armed Forces Bill that it would be 'an enormous process' to draw up a single discipline Act which

34 Ev 39

35 Q 11

36 Ev 63

37 Fourth Report from the Defence Committee, Session 1999–2000, HC 253, *Armed Forces Discipline Bill [Lords]*, para 28

38 Special Report from the Select Committee on the Armed Forces Bill, HC 154-I, Session 2000–01, para 16

39 Special Report from the Select Committee on the Armed Forces Bill, HC 154-I, Session 2000–1, paras 17–18

reconciled the different cultures and traditions of the three Services, but he believed it was 'common sense' to work towards this. In his view, although it was a priority for the MoD, it would take years rather than months to prepare a Bill, because of the complexity of the issues and the legal technicalities which it would need to address. The Committee noted that there were 'only two MoD officials working on the proposed Bill (one of whom was on sick leave at the time)'.[40] Mr Miller, Director General, Service Personnel Policy told the Committee that the team would be significantly enhanced later that year (2001) and that he was working to the timetable set out by the Minister for the introduction of such a Bill in five years' time.[41] The Committee did not accept that 'it is necessary to wait until the next scheduled review of the Service Discipline Acts, in the 2005–06 Parliamentary Session', and recommended that 'the Ministry of Defence devote sufficient resources to the preparation of a tri-Service Discipline Bill to ensure it is brought before Parliament within three years'.[42]

Harmonisation of Service law

31. During this inquiry, we asked why it was taking so long to get a Tri-Service Bill before Parliament. Mr Miller, told us that consolidation was identified in the 1990s as being an issue and that it was thought at the time to be 'a tidying-up exercise'.[43] However, what was looked at subsequently:

> was the need to have a single system of Service law, so rather than simply tidying up three separate Acts, to recognise that particularly as joint organisations, joint operations became more important, it was desirable that all Service personnel should be under the same legal system… That led us to decide that a single Act was appropriate, and that is where we are now; that is really what harmonisation… sets out for our aim.[44]

32. On the issue of progress, Mr Miller said that it was not until 2001, when it was recognised that harmonisation and the single Act was the 'way ahead'[45] that MoD 'started to build up the team and to get to grips with the scale and complexity of the task we were setting ourselves'.[46] Mrs Jones, Head of the Armed Forces Bill Team, told us that, from the early 1990s, a lot of work went into consolidating the three discipline Acts. However:

> That work was overtaken by two things… one was the need to make changes to the Armed Forces' legislation that arose out of the Human Rights Act in 1998… And the second thing was… the Strategic Defence Review, which changed the emphasis from consolidation… to a complete review of the Service Discipline Acts.[47]

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40 Special Report from the Select Committee on the Armed Forces Bill, HC 154-I, Session 2000–01, para 18

41 Special Report from the Select Committee on the Armed Forces Bill, HC 154-I, Session 2000–01, para 18

42 Special Report from the Select Committee on the Armed Forces Bill, HC 154-I, Session 2000–01, para 19

43 Q 1

44 Q 1

45 Q 2

46 Q 2

47 Q 3

33. **We find it disappointing that progress in introducing a Tri-Service Armed Forces Bill has been so slow, although MoD explained that the work required has involved substantially more effort than the 'tidying-up exercise' which was originally envisaged.**

34. **As this Committee and our predecessors have previously concluded, there is a strong case for having a single system of Service law, and the main arguments for this are set out clearly in MoD's Memorandum. The proposal to extend the revised structure for command authority to joint organisations seems sensible, as it should provide for improved discipline arrangements for Service personnel in such organisations. We expect MoD to ensure that there is consistency in the administration of discipline between Service personnel and civilian staff who work in the same organisation.**

3 Proposals for a single system of Service law

35. MoD's Memorandum notes that, following initial scoping work, a Tri-Service Act Team was set up in September 2001 to conduct a thorough review of the Armed Forces' discipline policies and procedures and non-discipline related legislation in the SDAs.[48]

Discipline

36. The Memorandum states that 'of all the areas covered by the SDAs, discipline is arguably the most critical for OE [Operational Effectiveness]'.[49] The purpose of the proposals is not to affect the fundamentals of the present discipline system, with its focus on the CO, but to enable COs more readily to administer discipline to all under their command, of whatever Service. There will be no need to maintain distinctions between different types of court martial, either between or within the Services.[50] **We share MoD's view that discipline among Service personnel is crucial to maintaining Operational Effectiveness.**

Summary discipline

37. The Memorandum states that 'across the three Services, there are around some 15,000 summary disposals a year'.[51] Details of the number of offences dealt with at summary hearings over the three years 2001–2003 by each Service are provided in Table 1. Some 18–19,000 offences are dealt with at summary hearings each year.

Table 1 : Number of offences dealt with at Summary hearings in the three years 2001- 2003

	Royal Navy	Army	RAF	Total
2001	3,024	14,362	930	18,316
2002	2,933	14,724	1,483	19,140
2003	3,646	13,816	1,335	18,797

Source: MoD[52]

Note: More than one offence can be dealt with at a single summary hearing

38. The Memorandum explains that one of the key issues to be resolved has been the range of 'civil offences' capable of being dealt with summarily and the punishments available to the CO. Under the current law, a Royal Navy CO may deal with a wider range of 'civil

48 Ev 37
49 Ev 39
50 Ev 39
51 Ev 45
52 Ev 54

offences' and has greater summary powers of punishment than an Army or RAF CO.[53] The Memorandum states that 'the issue has been to agree a harmonised level of powers intended to underpin a single system of Service and OE (Operational Effectiveness), across all three services'.[54] MoD's proposals seek to 'reconcile the two approaches and necessarily reflect a compromise in the overriding interests of harmonisation'.[55] Under the proposals, there will be a significant narrowing of Royal Navy summary jurisdiction and sentencing powers involving more cases having to be dealt with at court martial. There will be a shift to summary dealing from trial by court martial in the Army and RAF and an increase in CO's sentencing powers. The agreed solution comprises a new harmonised list of criminal offences and powers of punishment.[56]

39. We asked about the significant narrowing of Royal Navy summary jurisdiction and sentencing powers and how this would affect the Navy. Captain Crabtree told us that the Navy had given up a number of powers but that they had very carefully considered what they were giving up. The Navy had 'taken into account that the Bill, or the Act, will deliver benefits in other areas'.[57] He recognised that because the scope of the summary powers will be reduced the Navy will face an 'increase in the number of courts martial'.[58]

40. The Memorandum[59] lists offences which are triable summarily in the Royal Navy and are to be extended to the Air Force and the Army. Some of these are serious offences such as assault occasioning actual bodily harm, and carrying articles with a point or blade in a public place and possession of an offensive weapon. We asked whether the Army and the RAF were content for their COs to deal with such cases. Mr Miller told us that:

> a number of the existing offences already potentially include quite complex charges and carry quite severe penalties. The additional list really is quite similar in terms of the range of potential complexity and sentence that it carries. In all those cases, old and new, there will have to be made a judgment as to whether it is sensible and realistic for a commanding officer on legal advice to deal with it. Only where the case is towards the simpler end of the spectrum under that offence would we expect the commanding officer to be taking it forward summarily. For those both existing and new offences, in the case of the Army and the Air Force, where there is a degree of complexity… then you would certainly expect that to be remitted by a higher authority to a court martial.[60]

41. As the figures in Table 1 above indicate, the vast majority of offences dealt with at summary hearings relate to the Army. We asked how many additional summary cases there would be under the new arrangements in the Army. Brigadier Andrews said that 'I can say confidently that it would be very few'.[61] He added that 'There will be a number of

53 Ev 39-40
54 Ev 40
55 Ev 40
56 Ev 40
57 Q 13
58 Q 13
59 Ev 51-2
60 Q 39
61 Q 19

these cases in the new list that perhaps, having consulted higher authority, he feels that he can properly deal with, in which case he [the CO] will, in which case there is a price here that is well worth paying in terms of justice delivered quickly and fairly'.[62]

42. We asked how MoD will ensure that COs will apply discipline fairly, efficiently and consistently.[63] Mr Caplin told us that:[64]

> One of the areas that we are going to have to undertake in terms of introducing this Bill is a proper programme of training for all commanding officers. That is going to be quite an interesting and large logistic exercise but what I can say to the Committee is we are absolutely committed to that.

43. **MoD has identified a harmonised list of offences which can be dealt with summarily by Commanding Officers of the three Services, and also the punishments available to them. This has, necessarily, had to reflect a compromise between the three Services. In the Royal Navy, more cases will have to be dealt with at courts martial, and in the Army and RAF, more cases will be able to be dealt with summarily. We welcome the commitment given by the Minister that Commanding Officers will receive a proper programme of training to ensure that they apply discipline fairly, efficiently and consistently. We expect MoD to monitor the effectiveness of this training.**

44. We asked Mr Morrison whether he had any reservations about moving towards more summary processes. He told us that:

> The extent of jurisdiction and to the extension of powers as far as the Navy is concerned? No, in fact we went to leading counsel with the exact details of what we were proposing to ask if he considered that it increased the risk of non-compliance over the current situation at all. He obviously gave a detailed reply but he summed it up as "not one jot".[65]

45. Given that the new arrangements will result in more cases being dealt with by COs who are not independent and without legal representation for the accused (which is why summary hearings are not considered complaint with Article 6 of the ECHR), we asked whether the new arrangements will lead to more legal challenges in the European Court of Human Rights. Mr Morrison told us that he did not believe so because of the existence of the 'right to elect [trial by court martial] and the right of appeal to a compliant court called the Summary Appeal Court. It is those two factors which are regarded as making a system which is, if you like, rough and ready at first hearings, overall compliant with Article 6 of the ECHR'.[66]

46. **The proposals on discipline will result in more cases being dealt with summarily by Commanding Officers. Summary hearings are not considered compliant with Article 6 of the European Convention on Human Rights, but MoD does not consider that the**

62 Q 20

63 Q 125

64 Q 126

65 Q 30

66 Q 31

increase in such hearings will result in more legal challenges in the European Court of Human Rights. We consider that there is an increased risk of this happening, and expect MoD to monitor this matter closely.

47. The Memorandum proposes to make the right to elect trial by court martial universal, as naval ratings do not currently have this right.[67] **We fully support the proposal in MoD's Memorandum that the right to elect trial by court martial should be universal.**

48. Another proposal set out in the Memorandum relating to summary discipline is the removal of the power of a CO to dismiss without any form of hearing a criminal charge which the CO would be unable to deal with summarily.[68] This power was a feature of a recent case—the Trooper Williams case. The Attorney General provided the following information to the House of Lords on 7 September 2004:

> This case, which involves an alleged unlawful killing of an Iraqi citizen during the course of an arrest, was brought to my attention after charges were dismissed by the soldier's Commanding Officer. This meant the case could not be tried by court martial. I referred the case to the Crown Prosecution Service, who asked the Metropolitan Police for assisting in collecting further evidence. I can confirm that today the Metropolitan Police, on the advice of the CPS, charged Trooper Williams with the murder of Hassan Said. [69]

49. **MoD is proposing to remove the power of a Commanding Officer to dismiss, without any form of hearing, a criminal charge which the Commanding Officer would be unable to deal with summarily. This issue is a feature of a current case which we did not examine because it was sub judice. The proposal would appear to be sensible, but we recommend that MoD gives further consideration to the operational implications of such a change.**

Administrative action

50. Brigadier Andrews told us about a reform being introduced in the Army from 1 January 2005. From this date:

> commanding officers in the Army and company commanders, that is sub-unit commanders, will deal with a very wide range of really low level disciplinary matters. The sort of things like poor turnout and late on parade, which are currently dealt with summarily under the Army Act, will be dealt with administratively.[70]

51. It was hoped that this would reduce the number of summary dealing cases 'by about 50 per cent in the Army'.[71] Air Commodore Amroliwala told us that the position in the RAF 'is almost exactly the same as the Army… the only thing that separates us is the regime that

67 Ev 40

68 Ev 40

69 HL Deb, 7 September 2004, col WS70

70 Q 21

71 Q 21

the Brigadier has just described of introducing a greater range of administrative sanctions that is already in the Royal Air Force'.[72]

52. MoD subsequently told us that all three Services operate a formal system of administrative action, quite separate from their criminal disciplinary systems, using established procedures to deal with personnel who have displayed professional shortcomings or have failed to act in accordance with the values and standards expected of them. Administrative action 'is based on the Service Test—have the actions or behaviour of a serviceman adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service—and sanctions are awarded dependent upon rank and the type and level of misconduct'.[73] MoD explained that 'whereas the primary purpose of disciplinary action is to punish offenders, the main aim of administrative action for misconduct is to safeguard the efficiency and operational effectiveness of the Service'.[74]

53. Administrative action may be taken in response to social misconduct, misconduct often the result of a civil conviction and the type of behaviour which although unrelated to discipline, impacts upon professional standing.[75] In all three Services a formal procedure exists which consists of investigation by the CO followed by a report, with recommended sanction by the CO to higher authority. The report proceeds through the chain of command by a clearly defined procedure and the sanction is awarded at the appropriate level.[76] For social misconduct, sanctions include:

- Termination of Service (resignation, retirement, discharge)
- Formal Action (posting, formal rebuke, formal warning, expression of displeasure or severe displeasure, reduction in rank)
- Informal Action (counselling or warning, rebuke, posting with unit, adverse comment in annual report).[77]

54. From 1 January 2005, the Army have distinguished between minor and major administrative action. The Royal Navy and RAF have not separated their administrative action into minor and major sanctions and continue to use their current system.[78] Minor administrative action is intended to deal with minor failings in standards or performance such as poor turnout, dirty rifles, or poor punctuality. The authorised sanctions for such failings include:

- Show parades—a maximum of five can be awarded at any one time, each no longer than 45 minutes.
- Extra duties—a maximum of five can be awarded at any one time.

72 Q 22
73 Ev 64
74 Ev 64
75 Ev 64
76 Ev 64
77 Ev 64
78 Ev 65-6

- Regimental work—a maximum of three periods may be awarded.[79]

55. The outcome of the administrative action can be contested and an appropriate reviewing officer can either uphold, mitigate or quash the original award. If the individual still remains unhappy, there is a statutory right to seek redress.

56. We asked whether the move towards dealing with more cases by way of administrative action would be ECHR-compliant. Brigadier Andrews was 'confident that they would be'[80], but emphasised that administrative action is for 'really very low level, very minor, non-criminal matters'.[81] Mr Morrison explained that:

> It is best to see a division between the criminal law, which includes summary jurisdiction, and that sort of action which is akin to what an employer can do anywhere to his employee: give him a bad report, not promote him to a higher job, that sort of thing. It is the latter area for which the expression "administrative action" is used by the Services.[82]

57. Mr Morrison considered this 'quite separate from the issue of the compliance of the criminal law and criminal procedure with the ECHR'.[83]

58. **We note that all three Services operate a formal system of administrative action separate from their criminal disciplinary systems and, from 1 January 2005, the Army introduced new arrangements which distinguish between minor and major administrative action. We find it surprising that, while the Armed Forces Tri-Service Bill is seeking to harmonise Service law, it appears that changes to the system of administrative action in the Army could lead to greater differences between the three Services in this area. Given the need for consistency in disciplinary procedures across all three Services, we look to MoD to ensure that there is similar consistency between the Services relating to the administrative action system.**

Court Martial

59. The Memorandum sets out the following key proposals relating to procedures for court martial (Annex E to the Memorandum provides further details of the proposals relating to the courts martial system):

- The creation of a single prosecuting authority to replace the three single-Service prosecuting authorities.
- A defence arrangement (the Memorandum states that detailed proposals are currently being developed).
- A joint court administration authority.

79 Ev 65
80 Q 24
81 Q 24
82 Q 29
83 Q 29

- One type of court martial.
- A standing court martial rather than ad-hoc courts.
- A number of technical changes to procedures, including allowing the 'judge advocate to arraign alone'.[84]

60. The Memorandum notes that the Review Team had concluded that, when imposing sentence, 'the court martial should continue to comprise a Judge Advocate and lay military members'.[85]

61. Details of the number of offences or individuals tried by court martial over the three years 2001–2003 by each Service are provided in Table 2.

Table 2: Number of offences or individuals tried by court martial in the three years 2001 to 2003

	Royal Navy	Army	RAF	Total
2001	103	632	273	1,008
2002	107	506	61	674
2003	145	471	86	702

Source: MoD[86]

Note: The Royal Navy and RAF figures relate to the number of offences tried. The Army figures relate to the numbers of individuals tried by court martial. The RAF figure for 2001 was due to a large number of theft and fraud offences at one station.

62. We have noted that, as the Royal Navy's summary powers will be reduced, there will be an increase in the number of Royal Navy courts martial. Captain Crabtree told us that the additional courts martial will be 'somewhere in the region of about 30 to 35 a year. In statistical terms, that is probably about a 50 per cent increase'.[87] This was considered manageable 'because in other areas in the management of courts martial and in the composition of the courts, there are changes that will improve the speed to courts martial and the nature of courts martial'.[88]

63. We asked about offences committed at sea and the impact of having to deal with more of these at court martial rather than in a summary manner. Captain Crabtree said that this issue had been recognised, 'part of that balancing exercise was the advantages that would be delivered by harmonisation. Part of the balancing exercise was the improvement to the courts martial process that will deliver more expeditious courts martial, so that we will not have to wait three or four or six months'.[89]

84 Ev 41
85 Ev 41
86 Ev 55
87 Q 14
88 Q 13
89 Q 17

64. We asked how more expeditious courts martial would be delivered. Mr Caplin told us that 'the court administration authority… will provide a change to the process. The other thing which I think will help the process… is to produce what you might call the establishment of a standing court or an assize system.[90] MoD told us that the average waiting time[91] for a case to go to court martial in 2004 was 139 days in the Royal Navy, 89 days in the Army and 98 days in the RAF.[92]

65. **The reduction in the summary powers of Royal Navy Commanding Officers will result in an increase in the number of courts martial. We consider it essential for naval personnel, who are alleged to have committed an offence or offences at sea, that their cases are dealt with as quickly as possible. We expect MoD to ensure that the planned improvements for more expeditious courts martial are delivered.**

66. Annex E to the Memorandum provides details of the proposals relating to courts martial. We asked whether all the elements listed were going to be in the Bill. Mrs Jones told us that:

> there are some elements in the proposals that we have got which will not require primary legislation. But it is very important in framing the legislation that we understand the detail of how the system will work to ensure that we have the right things in primary legislation that will indeed support the secondary legislation… The creation of a single prosecuting authority is a matter for primary legislation.[93]

Single prosecuting authority

67. The Memorandum proposes that there should be a single prosecuting authority with a staff of lawyers drawn from the three Services and notes that 'this is subject to detailed work to identify the structure of the new organisation to be headed by the prosecuting authority'.[94] We asked how the proposals for a single prosecuting authority were developing. Mr Morrison told us that it is proposed that the three separate prosecution authorities should be replaced by one authority, and that the powers and function of that authority will be 'very much the same as the powers currently exercised separately by the three authorities'.[95] This proposal has been agreed with the three Services.[96]

Defence arrangement

68. The Memorandum proposes the establishment of a defence arrangement, but notes that more detailed proposals are still being developed.[97] We asked about the proposals for a

90 Q 152

91 The time to go to court martial from the date that court martial is directed by the prosecuting authority

92 Ev 69

93 Q 44

94 Ev 52

95 Q 40

96 Q 41

97 Ev 41

defence arrangement. Mrs Jones told us that 'we do not envisage that there will be statutory provision for a defence authority necessarily'.[98] Mrs Jones added that:

> we have not entirely finished our consultation about this point, and one can never be absolutely sure whether the advice would be from parliamentary counsel or our own lawyers that these are things about which we should have statutory provision… if we feel we could continue with the arrangements that we have at the moment which are non-statutory, then that is what we will do.[99]

69. **MoD's Memorandum sets out a number of proposals relating to the courts martial system, these include proposals for a single prosecuting authority and a defence arrangement. It is not entirely clear to us why some of these will be matters for primary legislation and others will not. We expect MoD to set out in more detail the reasons why some of the proposals will not feature in the primary legislation.**

70. Some commentators, while acknowledging the modernisation that has taken place relating to courts martial, have questioned whether more could be done to match the civilian system. A recent article considered that:

> Certain aspects of court martial procedure remain open to question… a serious doubt has to flow from the way in which the panel is selected. In the Osnabruck trial, a panel of seven officers is acting as the jury, sitting with… a civilian judge advocate. But the panel is not selected at random, as a jury is in a civil trial, and military rank is certainly not forgotten. The president of the panel is the highest-ranking officer, and thereafter other members will appear in order of descending rank. When the panel comes to vote, it does so in ascending order, so that the most junior rank votes first.[100]

71. **The courts martial system has been modernised over recent years and the proposals in MoD's Memorandum should push this process further along. However, there appears to us to be further scope to align the system even closer to the equivalent civilian system. Under the current courts martial system the panel, the equivalent of a jury, is not selected randomly. We recommend that MOD gives consideration to the case for having a panel which is randomly selected.**

Review procedure

72. The Memorandum proposes that the review procedure for court martial finding and sentence will be abolished.[101] It states that 'with the significant improvements now in place in the court martial system and the introduction of the same rights of appeal to the Court of Appeal… as civilians, there is no longer a necessity to retain this non-judicial process which, although it can have advantages for some defendants, follows a determination by an ECHR compliant court'.[102] We asked about those who currently benefited from the

98 Q 49

99 Q 50

100 'Forces need final push to match civil justice', *The Times*, 25 January 2005

101 Ev 53

102 Ev 53

arrangements. Brigadier Andrews told us that 'At the moment a defendant or somebody who is convicted can appeal to the Army Review Authority, can petition them, on the basis of finding or sentence, and that was done for example in 2003 in about 15 cases. Fifteen cases were changed, mitigated, by the Army Reviewing Authority out of about 500 trials… It is a very unusual procedure and it is against that backdrop that in developing this Bill we have looked at a way of a timely and effective and transparent way of meeting the concerns of those petitioners in the future'.[103]

73. Mrs Jones told us that:

> The point about review is that it is non-judicial interference in the determination of a judicial authority, namely the court martial, but Service personnel who are convicted by a court martial of course have a right of appeal to the Court Martial Appeal Court in the same way that a civilian has a right of appeal to the Appeal Court…We feel that the rights are properly enshrined in appeal to proper courts, like the Court Martial Appeal Court, than leaving it to a civilian reviewing authority, albeit with legal advice. [104]

74. MoD provided us with information on the number of cases changes by the review procedure for court martial finding and sentence in 2004 in each of the three Services:

- **Royal Navy**: the Reviewing Authority reviewed 63 trials. 21 cases were changed on review. In 15 the finding was quashed[105] and in the other six the sentence was changed.
- **Army**: the Reviewing Authority reviewed 522 trials. Sentence was changed in 31 cases and in a further case the finding was quashed and a retrial authorised.
- **RAF**: the Reviewing Authority reviewed 45 trials. Sentence was changed in six cases.[106]

75. **Service personnel who are convicted at court martial have a right of appeal to the Court Martial Appeal Court. There is also a review procedure which MoD proposes to abolish on the grounds that it is no longer necessary to retain this non-judicial process. In 2004, the Reviewing Authorities reviewed 630 cases and in nine per cent of these changed either the finding or sentence, and MoD has acknowledged that the process can have advantages for some defendants. We consider this a substantial percentage. We expect MoD to revisit this proposal and assess whether those convicted in the future will have the same advantages as current defendants have and, if not, to identify ways in which this could be ensured.**

103 Q 53

104 Q 163

105 In the 15 cases, the finding was quashed as a direct result of the judgement of the Court Martial Appeal Court (CMAC) in the case of Dundon. The CMAC took into account the judgment of the ECHR in the case of Grieves and held that trial by uniformed judge advocate breached article 6 of the ECHR. Having determined the breach, the CMAC held that the appellant's conviction should be regarded as unsafe.

106 Ev 69

Judge Advocate General

76. The Memorandum proposes that the Judge Advocate General should be the single appointing authority for judge advocates, both in post and to all individual trails.[107] Mr Morrison explained that there is a Judge Advocate General for the Army and the Air Force, and a separate post called the Judge Advocate to the Fleet. He added that 'Given that we are going to have a unified system and a unified court, obviously that drives us even more logically towards having one rather than two appointing authorities'.[108]

77. At present the minimum qualification for appointment as judge advocate is a five year general qualification. This is below that prescribed for judicial office in the Crown Court or Magistrates Court. MoD propose to increase the minimum qualification for appointment as a judge advocate to be a seven year general qualification.[109] None of the current judge advocates will have to step down as a result of this proposal.[110] **We support the proposal to increase the minimum qualification for appointment as a judge advocate to match the requirement in the civilian system.**

European Court of Human Rights issues

78. The Memorandum states that 'Service law has evolved in recent years to take account of developments in case law, in both the House of Lords and the European Court of Human Rights, most recently by ending the use of uniformed judge advocates in Royal Navy courts martial and we remain confident that the system overall is ECHR compliant. These proposals for tri-Service law maintain an approach that is evolutionary rather than revolutionary'.[111] We asked why MoD has adopted such a piecemeal approach. Mr Miller told us that:

> We have found through the extensive consultation involving the Services and developing these proposals no appetite from, if you like, the users for a more revolutionary approach… We have made some significant adjustments but the core of the system has been found to be very much on the right lines, so we do not see from either direction a cause for a more revolutionary approach'.[112]

79. Mr Morrison added that 'Does the court [ECHR] require us to make radical change? The answer is no, patently… There is nothing which suggests in what they have said that we should change the system radically'.[113] **We note that MoD is confident that the overall Service discipline system is compliant with the European Convention on Human Rights and that radical change is not required. We expect MoD to continue to keep this issue under close review.**

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107 Ev 54

108 Q 59

109 Ev 71

110 Ev 69

111 Ev 39

112 Q 70

113 Q 70

80. We asked whether there was not a good case for an official MoD or government document alongside the Bill setting out why there is a necessity to have disciplinary procedures and offences for the Service personnel which are different to those in civil society. Mr Miller said that they would 'take that thought away and see if we can put it into effect. That is a very interesting idea'.[114] **MoD was receptive to our suggestion that a document should be produced alongside the Bill setting out the reasons why there was a need for disciplinary procedures and offences for Service personnel which are different to those in civil society. We look to MoD to produce such a document with the Bill.**

Redress of complaints

81. The Memorandum states that under current legislation, 'a Serviceman is entitled to elevate any complaint to his service to the highest level internally, the Service Boards'.[115] However, with certain significant exceptions, Service personnel cannot take a case to an employment tribunal.[116] It notes that consideration has been given to whether Service personnel should be brought within the scope of ordinary contract and employment law. However, the conclusion reached was that the 'introduction of civil contractual rights into an organisation which frequently requires immediate obedience to orders on penalty of criminal disciplinary action could cause problems'.[117] The Memorandum concludes that 'the current legal position in relation to the application of contract and employment law should not be altered', and it was therefore important that the internal grievance procedure should be demonstrably fair and effective.[118]

82. We asked MoD about the consideration that had been given to bringing Service personnel within the scope of ordinary contract and employment law. Mr Miller told us that:

> the key issues we were concerned with here was whether we should be moving beyond the current position where there are, of course, rights to go to tribunal on grounds of discrimination, etc, and broaden that out into the other areas of Service life and the strong feeling, and I think this is widespread through the Services, was that to do so would be inimical to the fundamental relationship between members of the Armed Forces and the Service where there is a requirement for discipline in the Service and for people to, in effect, obey orders irrespective of whether they wished to or without questioning these orders, and to introduce into that relationship a degree of contractual relationship would be very hard to make it compatible with the effective maintenance of a disciplined armed Service.[119]

83. **MoD has concluded that Service personnel should not be brought within the scope of ordinary contract and employment law as it could undermine the requirement to maintain a disciplined armed service. We consider that this is an issue which MoD**

114 Q 73

115 Ev 41

116 Ev 41

117 Ev 42

118 Ev 42

119 Q 80

needs to keep under review and to look closely at the experience of countries where Service personnel are covered by ordinary contract and employment law.

84. The Memorandum notes that the current grievance arrangements were considered to be satisfactory in relation to the majority of cases which are settled below Service Board level, but key areas of the redress system could be improved. The key principles and policy proposals to address these areas include:

- The right of individual Service personnel to state a complaint should continue to be founded in legislation.
- The principle that complaints should be resolved at the lowest level possible is paramount, as is the CO being integral to the system.
- The establishment of a Tri-Service Redress of Complaints Panel to underpin confidence in the system. The Memorandum notes that this has the attraction of efficiency, speed and a greater degree of independence than exists at present, and also of unburdening the Service Board of their current level of redress caseload, whilst not significantly reducing the highest level to which a complaint may be progressed. Further work is required to consider the detailed composition and procedures of the Panel and its specific powers.
- The establishment of a Tri-Service Secretariat to provide a focus for the complaints system.[120]

85. We asked MoD how work was progressing in relation to the proposals for a Tri-Service Redress of Complaints Panel. Mr Miller told us that there is a working group looking at how best to develop the redress arrangements. He added that 'It is, indeed, likely that we will come up with a new panel; the panel will, we hope, lead to some improvements in the redress process'.[121] The expected improvements include: speedier redress; removing from the Service Boards some of the issues which at present they have to deal with which are not always of high significance; and a system which is more clearly separated from the chain of command and has a more visible degree of independence in cases.[122]

86. At the evidence session on 2 February 2005, we asked MoD whether its thinking was sufficiently developed about the establishment of the complaints panel. Mr Caplin told us that 'this is a very, very difficult area and we have not developed fully the proposal… we have got some ideas as to how it might work, but they are certainly not formulated so as to take us to a process of introduction in a Bill, so it is at that very early stage'.[123]

87. We asked how the principle that the CO should be integral to the system could be reconciled with the proposition that it should be more clearly separated from the chain of command. Mr Caplin told us that 'these are difficult areas and our thinking is still to be fully established'.[124] Mrs Jones added that:

120 Ev 42-3

121 Q 87

122 Q 87

123 Q 191

124 Q 185

> Certainly on the redress of grievance, the view is that it should go first to the CO not least because if somebody has a complaint, it should be dealt with at the lowest possible level and there may be something that can be dealt with by the CO and it is quite proper he should have the opportunity to deal with it himself first of all. The idea of removing it from the chain of command by reference to a panel is that at the moment a complaint will go up through successive layers within the chain until it reaches a layer where the redress can be granted satisfactorily or refused. We are planning to remove it from the chain of command to the extent that complaints will be, if they are serious enough and need to be, referred to a panel which will be outwith the chain of command, but still within the Service itself.[125]

88. We asked whether the proposals relating to the redress of grievances would be included in the Bill. Mr Miller told us that 'I think the answer is that we do not have the proposals fully developed yet but it is not clear that all of them will need to be in primary legislation'.[126] Mrs Jones added that 'the right of redress at the moment is covered in one section in each of the three discipline Acts. Underneath that there are at a lower level the procedures and so we would not envisage the full system of redress to be in the Tri-Service Act, no'.[127]

89. **The Memorandum sets out a number of proposals to the current grievance arrangements, including the establishment of a Tri-Service Redress of Complaints Panel. In principle, the proposals as set out in the Memorandum appear sensible ones, although we are concerned that they seem still to be at a very early stage in their development. We are also not clear as to why the proposals relating to the redress of grievances might not be included in the Bill and we expect MoD to set out the reasons for this.**

Boards of Inquiry

90. Boards of Inquiry (BOI) are internal Service inquiries to investigate and report the facts about a matter and to express opinions.[128] The Memorandum notes that 'there is no justification for removing the statutory basis for Army and RAF BOI'.[129] The proposals set out in the Memorandum envisage a fully Tri-Service statutory provision, which will be a major change for the Royal Navy. The Memorandum notes that 'it is envisaged, subject to ongoing work, that the TSA itself should provide for a single system of Service Inquiry encompassing the present BOI and regimental/unit Inquiries, extended to cover the Royal Navy'.[130] The Memorandum states that appropriate provision would be made for:

- The possible purposes of a Service statutory Inquiry.
- The authority to convene such an Inquiry and the basic membership requirements.

125 Q 188

126 Q 95

127 Q 95

128 Ev 43

129 Ev 43

130 Ev 44

- Powers to deal with the subject and detail of mandatory inquiries and procedures.
- Protection for witnesses where their reputation might be affected.
- Certain powers and penalties including subpoenas and their enforcement.[131]

91. We asked how the work was progressing in relation to Boards of Inquiry. Captain Crabtree told us that:

> The proposals that are emerging at the moment will result in Boards of Inquiry in circumstances where you would have Boards of Inquiry at the moment, so no real change. It is just a harmonisation of the system and it will not affect the number or the sorts of circumstances where we would have them, but we see sense in harmonisation and we see sense in adopting some of the proposals which relate to what the other services do… So it is not a radical change, I do not think, in reality for the Navy.[132]

92. Brigadier Andrews told us that the work undertaken on BOIs 'gives us a straightforward, single, understandable system that we can put in place and use effectively'.[133] Air Commodore Amroliwala told us that 'This is going to bring far greater clarity so those who are running inquiries and those who are subject to inquiries will have a far better understanding of the nature of what it is we are doing'.[134]

93. In its updating Memorandum of 7 January 2005, MoD states[135] that it would like, in principle, to introduce the power, exercisable by a judicial officer, to subpoena a civilian witness, enforceable through the United Kingdom civilian courts. However, MoD recognises the potential limitations in the power's operation in circumstances where the inquiry takes place outside the United Kingdom or the witness is not from the United Kingdom. We asked in what circumstances the power to subpoena a civilian would be used. Mr Caplin told us that 'it would be very rare that we would have to subpoena a witness, but I think to have the power to do so is right and proper'.[136]

94. In the updating Memorandum of 7 January 2005, MoD states that:

> We are not persuaded that next of kin should have a statutory right to attend Service inquiries, which are essentially internal matters, although (as is currently the practice) they may be allowed to do so exceptionally on the authority of the President.[137]

95. We asked why MoD was not persuaded and how this squared with the aim of involving Service families more and more. Mr Caplin told us that:

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131 Ev 44

132 Q 98

133 Q 99

134 Q 99

135 Ev 71

136 Q 173

137 Ev 71

> I do not think with the Board of Inquiry that a statutory right to attend for the next of kin would be the way forward. I think the approach that we are taking now in engaging with the family, with the next of kin, but providing them with the full report from the board of inquiry I think is a very effective way.[138]

96. We asked what would be the exceptional circumstances that would allow the next of kin to attend. Mr Caplin told us that:

> a board of inquiry is about events at a certain time in a certain place, so the next of kin's role could be very limited in terms of the view of the president of the board of inquiry, but I would not really want to speculate on the type of occasion that that might occur, except to say that the inquiry has limited powers. It is not the same as a coroner's court where the next of kin would probably want to appear in those circumstances.[139]

97. **The Memorandum outlines a number of proposals relating to Boards of Inquiry. Radical changes are not envisaged to the existing system, but are aimed at ensuring that there are improvements over the current arrangements. We are disappointed that MoD has taken the view that next of kin would only be allowed to attend Boards of Inquiry in exceptional circumstances. We recognise that there may be reasons for not allowing next of kin to attend , for example, where the inquiry needs to consider highly classified material or where the operational environment may make attendance impracticable, but we consider that the presumption should be that next of kin should be allowed to attend and only in exceptional circumstances should they not be.**

Service offences

98. The Memorandum states that the Government is taking the 'opportunity of creating a single system of Service law to review and modernise existing provisions across the whole spectrum'.[140] It notes that work is reasonably advanced, for example, on a review of Service offences.[141] The application of Service law to accompanying civilians, the operation of Standing Civilian Courts, and in respect of child protection legislation are being reviewed.[142]

99. MoD provided further information on the work in these areas. The review of Service offences has focussed on harmonising and modernising the offences and sentences across the Services, although the existing differences are not significant. It is not generally the intention to provide for Service offences which are equivalent to civilian offences. Most Service offences reflect the particular circumstances of Service life and operations and have no equivalence in the civilian system. In some cases there are Service offences which, although they have analogous civilian offences, are being retained because of the particular implications of the offence for a disciplined service. The work has involved a review of the

138 Q 180

139 Q 181

140 Ev 44

141 Ev 44

142 Ev 44

maximum sentences of each offence. As part of this work, MoD has taken account of the maximum sentence for analogous civilian offences.[143]

100. **MoD has taken the opportunity to review Service offences, including a review of the maximum sentences for each offence. We consider it sensible that MoD has sought to take into account the maximum sentence for comparable civilian offences.**

143 Ev 67-8

4 Parliamentary scrutiny and legislation

101. The Government's intention in relation to the Tri-Service Armed Forces Bill, as set out in the Memorandum, is 'to use the opportunity presented by the next five yearly Armed Forces Bill, due in 2005–06, to provide for these changes within a single system of Service law'.[144] Mr Miller told us that:

> We are committed to bringing the Bill to the House next year [2005] and subject to parliamentary process, and the views of this Committee, enacting it the following year. We would then expect it to take some time, once legislation has been agreed, to bring the detailed application into force, but certainly by 2008, we would expect the great majority of the new arrangements to be in place.[145]

Pre-legislative scrutiny

102. We asked whether, in the context of consultation, MoD would submit the Bill for pre-legislative scrutiny, perhaps by this Committee. Mr Miller said that MoD saw the Memorandum 'we have already given you for this hearing setting this process in train. We would certainly expect to come back to you with more progress reports as the development of the Bill progresses'.[146] MoD provided us with an updating Memorandum on 7 January 2005.

103. Although we welcome the fact that we have been kept up to date with the progress of MoD's planning for the Bill, consideration of the Memoranda provided by MoD is not an alternative to Parliamentary scrutiny of the Bill itself. We consider below some of the options for Parliamentary, including pre-legislative scrutiny and suggest some of the key elements that the chosen form of scrutiny must comprise.

Experience of Armed Forces Bills

104. We asked MoD whether it was its intention that the Tri-Service Armed Forces Bill would be considered by Parliament in the same way as previous Armed Forces Bills, i.e. by an *ad hoc* Select Committee in the House of Commons.[147] MoD told us that:

> the five yearly Armed Forces Bills have been remitted to an ad hoc Select Committee after Second Reading. In our view there have been advantages to this approach. It ensures detailed consideration of the significant policy proposals within a wider context and a broadly non partisan forum. The powers of a Select Committee enable this level of scrutiny to range more widely than a Standing Committee on a bill and given the significance of the change to a single system of service law envisaged under

144 Ev 36

145 Q 4

146 Q 7

147 Ev 67

> the tri Service Bill it is important that the scrutiny of the proposals are subject to as thorough an examination as possible.[148]

105. MoD subsequently told us that no final decision had been taken and it would 'ultimately be a matter for the business managers and discussion through the usual channels, but we are working on the assumption that the Tri-Service Armed Forces Bill will also be considered by a Select Committee in addition to its other Parliamentary stages'.[149] MoD noted that:

> the Select Committee on the 2001 Bill [Armed Forces Bill] expressed its belief that such a process of some kind would continue to be necessary and valuable for future Bills—and indeed provided a model which could be followed with benefit for other types of legislation. They pointed out some minor defects to the procedures and hoped these would be taken into account in the course of considering future scrutiny of the tri-Service Act.[150]

106. The 2001 Select Committee on the Armed Forces Bill commented on its function as follows:

> This select committee, like its predecessors on the Armed Forces Bill, has the function of both a standing committee and a select committee. Ideally, it would be possible to combine the best elements of both types of committee, but the reality has been more limiting. When standing committees consider legislation, the meetings are held in public and Ministers are able to have their departmental officials present to provide advice on the detailed content of the proposed legislation. Any statement Ministers make is recorded and published and can subsequently be referred to as an aid to interpretation of the Acts. We, on the other hand, have had to conform to the practice of select committees which consider matters other than oral evidence in private. Our formal consideration of the Bill therefore had to take place in a private meeting: The Ministry of Defence officials, as Strangers… could not be admitted; and no verbatim record of the proceedings was kept. We believe it would assist all members of a committee examining future Bills of this kind if these matters were addressed.[151]

107. The last Select Committee on the Armed Forces Bill also commented upon the membership of the Committee:

> The composition of this Committee… did not follow the usual precedent of confining membership of select committees largely to backbench Members. It has been accepted practice in the past for a Defence Minister and a front bench Opposition spokesman to be appointed to the select committees on the quinquennial Armed Forces Bill, because these committees have the power to amend the Bill, and it is therefore felt necessary for a Minister to participate in the Committee's proceedings. On this occasion, two Defence Ministers were appointed to the

148 Ev 67

149 Ev 67

150 Ev 67

151 Special Report from the Select Committee on the Armed Forces Bill,HC 154-I, Session 2000–2001, para 10

> Committee (Mr Spellar and Dr Moonie) and three Opposition spokesmen (Mr Davies, Mr Keetch and Mr Key). The membership also included a Government and an Opposition Whip (Mr Clelland and Mr Randall) and two parliamentary private secretaries (Ms Squire, who is PPS to the Minister of State, Department for Education and Employment; and Mr Watts, who is PPS to the Minister of State for the Armed Forces). There was also a departure from previous practice in that, on this occasion, this Committee included no members of the Defence Committee.[152]

108. The last Select Committee on the Armed Forces Bill considered that 'the lessons of the controversy surrounding the appointment of the Committee should be learned'.[153] MoD told us that membership of such a Committee is not strictly a matter for the MoD.[154]

Scrutiny by select committee?

109. Mr Caplin told us that:

> I am well aware of what happened in 2000 and 2001. There was also, I think, a recommendation that the 2005 Bill should properly go to potentially a committee of both Houses or a special committee… The principle is that there must be proper and effective parliamentary scrutiny of this Bill and it is absolutely essential to us… it is essential it has proper parliamentary scrutiny, and I cannot state that enough.[155]

110. **We welcome the Minister's commitment to 'proper parliamentary scrutiny,' which we fully endorse. We also support the proposition that the parliamentary scrutiny of the Tri-Service Armed Forces Bill should seek to include the best elements of the procedure used for the quinquennial Armed Forces Bills.**

111. There are, however, also drawbacks to that procedure. Two in particular were identified by the Committee on the 2001 Bill:

- Membership: two of the last three select committees on Armed Forces Bills had eleven members; the other had ten. Most departmental select committees have eleven members. Experience suggests that investigative select committees operate best with around that number of members. If the membership were to include representatives of the front benches and the Whips' offices, it would not be possible also to appoint a reasonable spread of backbench Members.

- Transparency: select committees are not currently able to deliberate in public. As the committee on the 2001 Bill commented, this meant that no verbatim record was kept of its formal consideration of the bill and MoD officials were excluded from the meetings. The Tri-Service Armed Forces Bill will be a substantial piece of legislation in terms of both length and content. As this report has demonstrated it will make significant changes to a wide range of disciplinary and other matters which directly affect the working lives of service men and women. We do not

152 Special Report from the Select Committee on the Armed Forces Bill,HC 154-I, Session 2000–2001, para 5

153 Special Report from the Select Committee on the Armed Forces Bill,HC 154-I, Session 2000–2001, para 7

154 Ev 67

155 Q 195

believe that it would be acceptable to conduct the detailed line-by-line consideration of this legislation behind closed doors.

112. The Minister told us that MoD was committed to introducing the bill in 'the next session of Parliament.'[156] The intention he explained was to consult on the bill in 'mid year' so as to be able to introduce it in the autumn. We are not clear whether the Minister intends that that consultation should be on the basis of a complete text of a draft bill, but, if it were, there might also be time for conventional pre-legislative scrutiny of that draft. However, the Minister also stated:

> I should emphasise that we have a very, very demanding timetable… Long consultation is unlikely but some consultation is necessary.[157]

113. In a normal year we would take a commitment to introduce a bill 'in the autumn' to mean that the bill would be introduced after the Queen's Speech, i.e. some time after the middle of November. If, however, there is a General Election earlier in 2005, there will, of course, be no Queen's Speech in the autumn. There will also be no reason why the bill should not be introduced earlier than late November. An earlier introduction would allow more time for the bill's parliamentary consideration.

114. **Given the uncertainties with progress on the Bill's preparation and the parliamentary timetable over the coming months, we do not feel able to recommend a single specific model for its parliamentary consideration. We do, however, recommend that it contains the following elements:**

A select committee stage:

- **if a draft Bill is available for the mid-year consultation that draft should be referred for pre-legislative scrutiny to a select committee (which could be the Defence Committee, assuming that a Defence Committee has been appointed);**
- **if no draft Bill is available before the Bill's introduction, the Bill should be referred, immediately following its second reading, to a select committee (which again could be the Defence Committee). That committee would not formally amend the text of the Bill (unlike an Armed Forces Bill committee) but would produce a report which might include proposed amendments; and**

A standing committee stage:

- **Standing committees meet in public; their proceedings are recorded verbatim; and ministers can be advised by their officials. Furthermore a standing committee's larger membership should allow for the inclusion of representatives of the front benches and a spread of back benchers. It should include members of the select committee which considered the Bill (or draft Bill). Those Members would be able to table and speak to any proposed amendments from the select committee.**

156 Q 107

157 Q 120

115. We accept that the Government is likely, in referring the Bill (or draft Bill) to a select committee, to set a date by which the committee must report. The select committee must be given a reasonable length of time in which to conduct its inquiries. The committee on the 2001 Armed Forces Bill was appointed on 9 January and ordered to report by 15 March 2001. The 1996 Armed Forces Bill was referred to a select committee on 13 December 1995 and the committee agreed its report on 30 April 1996. **We recommend that the select committee to which the Bill or draft Bill is referred be given at least three months in which to report and that, if this period includes a substantial period when the House is not sitting, reasonable additional time should be allowed.**

Annual renewal of Service law

116. The Bill of Rights states:

> That the raising or keeping of a standing army within the kingdom in time of peace unless it be with the consent of Parliament is against the law.[158]

117. Reflecting the constitutional principle that the Armed Forces can only be maintained by the annual agreement of Parliament (through 'Defence Votes A'), the Service Discipline Acts also require annual renewal by Order in Council, and every five years by primary legislation. We asked MoD in November 2004, whether the Service law will continue to require annual renewal, and whether it will require renewal by primary legislation at least once every five years.[159] MoD told us that it was 'giving careful consideration to the possible future arrangements for the renewal of Service law, but have not yet reached a firm view'.[160]

118. The Committee on the last Armed Forces Bill concluded that:

> The introduction of a 'tri-Service' Discipline Act… would be an appropriate point at which to review the traditional procedures for parliamentary scrutiny of Armed Forces Bills. We recommend that the Select Committee on the tri-Service Bill (whether it is the Defence Committee or an *ad hoc* committee) should examine the procedures for renewing the Act and for scrutinising it, and recommend how it should be handled.[161]

119. We asked the Minister on 2 February 2005, whether he had reached a view on the future arrangements for the renewal of Service law. He told us that 'the answer today… is the same as it was on 25 November in that we have not reached a final view about that, but I would certainly be willing to share that with the Committee as soon as we have'.[162]

120. Renewal of service law every year remains an important constitutional principle, which should not be diluted in the Tri-Service Armed Forces Bill. Before 1955 the Army and Air Force Acts were subject to annual renewal by Act of Parliament. Since 1961, however, acts have been passed every five years and in between annual renewal has been by

158 Bill of Rights, 1688–89, Article VI

159 Ev 68

160 Ev 68

161 Special Report from the Select Committee on the Armed Forces Bill,HC 154-I, Session 2000–2001, para 8

162 Q 196

Order in Council. The Naval Discipline Act which was originally a permanent act was put on the same basis as the other two in 1971.

121. The Select Committee on the 1976 Armed Forces Bill rejected a proposal to discontinue the annual Continuation Order, although in the interests of the parliamentary timetable the expiry date for the Order was changed from 31 December to 31 August. No changes to the renewal procedures have been proposed in subsequent Armed Forces Bills. The Continuation Orders are subject to the affirmative procedure. In the Commons the consequent debate generally takes place in a Delegated Legislation Committee. But in the Lords they are taken on the floor of the House. **We recommend that annual continuation orders, subject to the affirmative procedure, should continue to be required for the proposed Tri-Service Armed Forces Bill.**

122. The pattern of quinquennial Armed Forces Bills has allowed more significant amendments to be made periodically to Service discipline. Although it is possible to provide for amendments to primary legislation to be made by secondary legislation, except in very limited circumstances this procedure is not one which we can support.

123. It might be argued that the five year gap between bills can have the effect of delaying changes which should be made more promptly. The Committee on the 2001 Armed Forces Bill argued that introduction of a Tri-Service Act was needed sooner than the next scheduled renewal (ie 2005–06) and recommended that it was brought in within three years. That of course did not happen and the presently proposed bill will be introduced to meet the quinquennial timetable of previous Armed Forces Bills. Furthermore wider pressures on the parliamentary timetable and the Government's legislative programme may well mean that even substantial proposed amendments to Service discipline legislation might have to wait some years for a parliamentary slot.

124. **We believe that periodic renewal by Act of Parliament must be retained. Given the pace of change in both military operational requirements and in civilian criminal law, there might be an argument for requiring that renewal to be more frequent than every five years, perhaps every three years. We recommend that the MoD consult on this proposition and that the select committee to which the Bill, or draft Bill, is referred consider it in greater detail than we have been able to.**

Delegated powers

125. The regulation-making powers to be available to the Government under the Act are also being considered. The Memorandum states that MoD is still considering 'the appropriateness nowadays of the provisions for the use of delegated powers'.[163] We asked MOD when it expected to reach conclusions on the provisions related to delegated powers and whether it intended to extend the range of matters that can be amended by regulations, rather than primary legislation.[164] MoD told us that it was its intention to keep the balance

163 Ev 44

164 Ev 68

between primary and secondary legislation broadly the same as at present.[165] MoD noted that:

- The changes to the structure and jurisdiction of Commanding Officers and Service courts will probably require some changes to the existing powers, for example, the determination of the number of members of a court martial will be related to a list of offences set out in a statutory instrument.
- Consideration is being given to amplifying the provisions on rules of court to clarify that certain civil court procedures may be adopted.
- There are certain provisions of recent (especially Home Office) criminal law legislation for which it is intended to make equivalent provision in the Bill (for example on sentencing) and it is possible that there will be one or more new order-making powers within those provisions.[166]

126. MoD also told us that:

> it may be necessary to make provision for some transitional arrangements by subordinate legislation, and the Bill will, as is normal, contain provision for transitional arrangements. The new arrangements covering the disciplinary and criminal justice system and other issues covered by the TSA will be brought into effect in one stage rather than gradually and, therefore, some of the large number of arrangements covering all matters that are in train when a new system is introduced will be provided for by subordinate legislation'.[167]

127. It is also MoD's intention:

> to retain in the TSA a provision equivalent to section 31 of the Armed Forces Act 2001. This section provides a general order-making power which enables the Secretary of State to make for the Armed Forces provisions equivalent to those contained in any future civilian criminal justice legislation or any existing legislation that it amends. Any order under this power will be made by statutory instrument subject to the negative resolution procedure except in the case of an order which amends any primary legislation when orders will be subject to the affirmative procedure.[168]

128. MoD added that work:

> is proceeding on the rationalisation and harmonisation of the various forms of subordinate instrument referred to in the Service Discipline Acts and a number of other Acts related to the Armed Forces and to be included in the TSA. This legislation provides variously (especially in such areas as pay, allowances and other terms of Service) for subordinate legislation in the form of statutory instruments, Orders in Council, Royal Warrant, Defence Council Regulations (DCR) and Queen's

165 Ev 68

166 Ev 68

167 Ev 68

168 Ev 68

> Regulations (QR). The form of subordinate legislation to be adopted is normally prescribed in the enabling Act which gives the Secretary of State and the Defence Council the statutory authority to make orders, rules and regulations by statutory instrument, DCR or, in a small number of cases, QR. Although this work is not scheduled to be completed until the end of the year, it is not our intention to extend the range of matters that can be amended by regulations. It is likely that the usual form of subordinate legislation in the TSA will be a statutory instrument under the negative resolution procedure while more routine and operational procedures will be detailed in DCRs and QRs as appropriate. As part of this work in some cases where the RN, in particular, currently make regulations under the Royal Prerogative, such as in relation to Boards of Inquiry, this power will be replaced by statutory provisions made by subordinate legislation as is already the case for the other two Services.[169]

129. **MoD's review of the regulation-making powers in the Service Discipline Acts is not yet completed. Their approach seems to be largely to translate the existing arrangements into the new legislation. In the absence of definitive proposals we are not able to reach a judgement on whether the proposed bill will contain appropriate regulation-making powers.**

130. **We recommend that the MoD include the use of regulation-making powers in its consultation and that the select committee to which the bill or draft bill is referred examine this issue. For this purpose we would recommend that MoD produce a detailed delegated powers memorandum, explaining what the delegated powers would be used for and why the negative or affirmative resolution procedure was chosen. We would also recommend that drafts of key secondary legislation should be made available to the parliamentary committees scrutinising the Bill.**

169 Ev 68

Conclusions and recommendations

Introduction

1. While we were content to consider the proposals set out in MoD's Memorandum, the sketchy nature of some of the information, and the lack of any draft clauses, limits the extent to which we have been able to reach substantive and unqualified final conclusions. (Paragraph 6)

2. We have not attempted any consideration of more fundamental issues such as the need for a military system of law, or the underlying principles of the existing arrangements. These issues will, however, need to be considered in future procedures relating to the Bill. We recommend that our successor Committee pursues this matter. (Paragraph 7)

3. We consider it very important for MoD to consult with those who will be affected by the proposals in the Tri-Service Armed Forces Bill—the men and women of our Armed Forces. MoD plans to 'start consulting around mid-year'. However, given that the timetable for the introduction of the Bill is autumn 2005, we are concerned that this might lead to less time than is needed for a proper consultation exercise to take place. We consider this issue further in the context of parliamentary scrutiny in Chapter 4 below. We look to MoD to ensure that proper consultation is undertaken and, where appropriate, the outcome of the consultation is reflected in the proposals in the Bill. (Paragraph 12)

4. The Government plans to introduce the Tri-Service Armed Forces Bill in the autumn of 2005. However, as MoD recognises, there is a great deal of work to be done. We look to MoD to keep us updated on the further development of the proposals in the Bill by way of regular reports. (Paragraph 15)

The case for a Tri-Service Armed Forces Act

5. We find it disappointing that progress in introducing a Tri-Service Armed Forces Bill has been so slow, although MoD explained that the work required has involved substantially more effort than the 'tidying-up exercise' which was originally envisaged. (Paragraph 33)

6. As this Committee and our predecessors have previously concluded, there is a strong case for having a single system of Service law, and the main arguments for this are set out clearly in MoD's Memorandum. The proposal to extend the revised structure for command authority to joint organisations seems sensible, as it should provide for improved discipline arrangements for Service personnel in such organisations. We expect MoD to ensure that there is consistency in the administration of discipline between Service personnel and civilian staff who work in the same organisation. (Paragraph 34)

Proposals for a single system of Service law

7. We share MoD's view that discipline among Service personnel is crucial to maintaining Operational Effectiveness. (Paragraph 36)

8. MoD has identified a harmonised list of offences which can be dealt with summarily by Commanding Officers of the three Services, and also the punishments available to them. This has, necessarily, had to reflect a compromise between the three Services. In the Royal Navy, more cases will have to be dealt with at courts martial, and in the Army and RAF, more cases will be able to be dealt with summarily. We welcome the commitment given by the Minister that Commanding Officers will receive a proper programme of training to ensure that they apply discipline fairly, efficiently and consistently. We expect MoD to monitor the effectiveness of this training. (Paragraph 43)

9. The proposals on discipline will result in more cases being dealt with summarily by Commanding Officers. Summary hearings are not considered compliant with Article 6 of the European Convention on Human Rights, but MoD does not consider that the increase in such hearings will result in more legal challenges in the European Court of Human Rights. We consider that there is an increased risk of this happening, and expect MoD to monitor this matter closely. (Paragraph 46)

10. We fully support the proposal in MoD's Memorandum that the right to elect trial by court martial should be universal. (Paragraph 47)

11. MoD is proposing to remove the power of a Commanding Officer to dismiss, without any form of hearing, a criminal charge which the Commanding Officer would be unable to deal with summarily. This issue is a feature of a current case which we did not examine because it was sub judice. The proposal would appear to be sensible, but we recommend that MoD gives further consideration to the operational implications of such a change. (Paragraph 49)

12. We note that all three Services operate a formal system of administrative action separate from their criminal disciplinary systems and, from 1 January 2005, the Army introduced new arrangements which distinguish between minor and major administrative action. We find it surprising that, while the Armed Forces Tri-Service Bill is seeking to harmonise Service law, it appears that changes to the system of administrative action in the Army could lead to greater differences between the three Services in this area. Given the need for consistency in disciplinary procedures across all three Services, we look to MoD to ensure that there is similar consistency between the Services relating to the administrative action system. (Paragraph 58)

13. The reduction in the summary powers of Royal Navy Commanding Officers will result in an increase in the number of courts martial. We consider it essential for naval personnel, who are alleged to have committed an offence or offences at sea, that their cases are dealt with as quickly as possible. We expect MoD to ensure that the planned improvements for more expeditious courts martial are delivered. (Paragraph 65)

14. MoD's Memorandum sets out a number of proposals relating to the courts martial system, these include proposals for a single prosecuting authority and a defence arrangement. It is not entirely clear to us why some of these will be matters for primary legislation and others will not. We expect MoD to set out in more detail the reasons why some of the proposals will not feature in the primary legislation. (Paragraph 69)

15. The courts martial system has been modernised over recent years and the proposals in MoD's Memorandum should push this process further along. However, there appears to us to be further scope to align the system even closer to the equivalent civilian system. Under the current courts martial system the panel, the equivalent of a jury, is not selected randomly. We recommend that MOD gives consideration to the case for having a panel which is randomly selected. (Paragraph 71)

16. Service personnel who are convicted at court martial have a right of appeal to the Court Martial Appeal Court. There is also a review procedure which MoD proposes to abolish on the grounds that it is no longer necessary to retain this non-judicial process. In 2004, the Reviewing Authorities reviewed 630 cases and in nine per cent of these changed either the finding or sentence, and MoD has acknowledged that the process can have advantages for some defendants. We consider this a substantial percentage. We expect MoD to revisit this proposal and assess whether those convicted in the future will have the same advantages as current defendants have and, if not, to identify ways in which this could be ensured. (Paragraph 75)

17. We support the proposal to increase the minimum qualification for appointment as a judge advocate to match the requirement in the civilian system. (Paragraph 77)

18. We note that MoD is confident that the overall Service discipline system is compliant with the European Convention on Human Rights and that radical change is not required. We expect MoD to continue to keep this issue under close review. (Paragraph 79)

19. MoD was receptive to our suggestion that a document should be produced alongside the Bill setting out the reasons why there was a need for disciplinary procedures and offences for Service personnel which are different to those in civil society. We look to MoD to produce such a document with the Bill. (Paragraph 80)

20. MoD has concluded that Service personnel should not be brought within the scope of ordinary contract and employment law as it could undermine the requirement to maintain a disciplined armed service. We consider that this is an issue which MoD needs to keep under review and to look closely at the experience of countries where Service personnel are covered by ordinary contract and employment law. (Paragraph 83)

21. The Memorandum sets out a number of proposals to the current grievance arrangements, including the establishment of a Tri-Service Redress of Complaints Panel. In principle, the proposals as set out in the Memorandum appear sensible ones, although we are concerned that they seem still to be at a very early stage in their development. We are also not clear as to why the proposals relating to the redress of

grievances might not be included in the Bill and we expect MoD to set out the reasons for this. (Paragraph 89)

22. The Memorandum outlines a number of proposals relating to Boards of Inquiry. Radical changes are not envisaged to the existing system, but are aimed at ensuring that there are improvements over the current arrangements. We are disappointed that MoD has taken the view that next of kin would only be allowed to attend Boards of Inquiry in exceptional circumstances. We recognise that there may be reasons for not allowing next of kin to attend , for example, where the inquiry needs to consider highly classified material or where the operational environment may make attendance impracticable, but we consider that the presumption should be that next of kin should be allowed to attend and only in exceptional circumstances should they not be. (Paragraph 97)

23. MoD has taken the opportunity to review Service offences, including a review of the maximum sentences for each offence. We consider it sensible that MoD has sought to take into account the maximum sentence for comparable civilian offences. (Paragraph 100)

Parliamentary scrutiny and legislation

24. We welcome the Minister's commitment to 'proper parliamentary scrutiny,' which we fully endorse. We also support the proposition that the parliamentary scrutiny of the Tri-Service Armed Forces Bill should seek to include the best elements of the procedure used for the quinquennial Armed Forces Bills. (Paragraph 110)

25. Given the uncertainties with progress on the Bill's preparation and the parliamentary timetable over the coming months, we do not feel able to recommend a single specific model for its parliamentary consideration. We do, however, recommend that it contains the following elements:

A select committee stage:

- if a draft Bill is available for the mid-year consultation that draft should be referred for pre-legislative scrutiny to a select committee (which could be the Defence Committee, assuming that a Defence Committee has been appointed);
- if no draft Bill is available before the Bill's introduction, the Bill should be referred, immediately following its second reading, to a select committee (which again could be the Defence Committee). That committee would not formally amend the text of the Bill (unlike an Armed Forces Bill committee) but would produce a report which might include proposed amendments; and

A standing committee stage:

- Standing committees meet in public; their proceedings are recorded verbatim; and ministers can be advised by their officials. Furthermore a standing committee's larger membership should allow for the inclusion of representatives of the front benches and a spread of back benchers. It should include members of the select committee which considered the Bill (or draft Bill). Those Members would be able

to table and speak to any proposed amendments from the select committee. (Paragraph 114)

26. We recommend that the select committee to which the Bill or draft Bill is referred be given at least three months in which to report and that, if this period includes a substantial period when the House is not sitting, reasonable additional time should be allowed. (Paragraph 115)

27. We recommend that annual continuation orders, subject to the affirmative procedure, should continue to be required for the proposed Tri-Service Armed Forces Bill. (Paragraph 121)

28. We believe that periodic renewal by Act of Parliament must be retained. Given the pace of change in both military operational requirements and in civilian criminal law, there might be an argument for requiring that renewal to be more frequent than every five years, perhaps every three years. We recommend that the MoD consult on this proposition and that the select committee to which the Bill, or draft Bill, is referred consider it in greater detail than we have been able to. (Paragraph 124)

29. MoD's review of the regulation-making powers in the Service Discipline Acts is not yet completed. Their approach seems to be largely to translate the existing arrangements into the new legislation. In the absence of definitive proposals we are not able to reach a judgement on whether the proposed bill will contain appropriate regulation-making powers. (Paragraph 129)

30. We recommend that the MoD include the use of regulation-making powers in its consultation and that the select committee to which the bill or draft bill is referred examine this issue. For this purpose we would recommend that MoD produce a detailed delegated powers memorandum, explaining what the delegated powers would be used for and why the negative or affirmative resolution procedure was chosen. We would also recommend that drafts of key secondary legislation should be made available to the parliamentary committees scrutinising the Bill. (Paragraph 130)

Annex: List of Abbreviations

BOI	Board of Inquiry
CO	Commanding Officer
DCR	Defence Council Regulations
ECHR	European Convention on Human Rights
MoD	Ministry of Defence
OE	Operational Effectiveness
SAC	Summary Appeal Court
SDA	Service Discipline Acts
TSA	Tri-Service Act
QR	Queen's Regulations

Formal Minutes

Wednesday 2 March 2005

Morning Sitting

Members present:

Mr Bruce George, in the Chair

Mr James Cran	Mike Gapes
Mr David Crausby	Richard Ottaway
Mr Dai Havard	Mr Frank Roy
Mr Kevan Jones	

The Committee deliberated.

Draft Report (Tri-Service Armed Forces Bill), proposed by the Chairman, brought up and read.

The Committee deliberated.

[Adjourned till this day at 2.30 pm

Wednesday 2 March 2005

Afternoon Sitting

Members present:

Mr Bruce George, in the Chair

Mr James Cran	Mr Kevan Jones
Mr David Crausby	Mike Gapes
Mr Mike Hancock	Mr Frank Roy
Mr Dai Havard	Mr Peter Viggers

The Committee deliberated.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 130 read and agreed to.

Annex [List of Abbreviations] agreed to.

Summary agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the provisions of Standing Order No. 134 (select committees (reports)) be applied to the Report.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

Ordered, That several memoranda be reported to the House.

[Adjourned till Wednesday 16 March at 10.00 am

Witnesses

Wednesday 27 October 2004

Page

Mr Julian Miller, Director General Service Personnel Policy, **Mrs Teresa Jones,** Head of Armed Forces Bill Team, **Captain Peter Crabtree RN OBE,** Armed Forces Bill Team, **Brigadier Stephen Andrews CBE,** Director Personnel Services (Army), **Air Commodore Dusty Amroliwala OBE,** Director Personnel and Training Policy (RAF), and **Mr Humphrey Morrison,** Legal Adviser, Ministry of Defence

Ev 1

Wednesday 2 February 2005

Mr Ivor Caplin, a Member of the House, Parliamentary Under Secretary of State for Defence, **Mrs Teresa Jones,** Head of Armed Forces Bill Team, and **Mr Humphrey Morrison,** Legal Adviser, Ministry of Defence

Ev 20

List of written evidence

Reports from the Defence Committee since 2001

Session 2004–05

First Report	The Work of the Committee in 2004	HC 290

Session 2003–04

First Report	Armed Forces Pensions and Compensation	HC 96-I & II (*Cm 6109*)
Second Report	Annual Report for 2003	HC 293
Third Report	Lessons of Iraq	HC 57-I, II & III (*HC 635*)
Fourth Report	Strategic Export Controls: Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny	HC 390 (*Cm 6357*)
Fifth Report	The Defence White Paper 2003	HC 465-I & II (*HC 1048*)
Sixth Report	Defence Procurement	HC 572-I & II (*Cm 6338*)

Session 2002–03

First Report	Missile Defence	HC 290 (*HC 411*)
Second Report	Annual Report for 2002	HC 378
Third Report	Arms Control and Disarmament (Inspections) Bill	HC 321 (*HC 754*)
Fourth Report	The Government's Proposals for Secondary Legislation under the Export Control Act	HC 620 (*Cm 5988*)
Fifth Report	Strategic Export Controls: Annual Report for 2001, Licensing Policy and Parliamentary Scrutiny	HC 474 (*Cm 5943*)
Sixth Report	A New Chapter to the Strategic Defence Review	HC 93-I & II (*HC 975*)
Seventh Report	Draft Civil Contingencies Bill	HC 557 (*Cm 6078*)
Eighth Report	Defence Procurement	HC 694 (*HC 1194*)

Session 2001–02

First Report	Ministry of Defence Police: Changes in jurisdiction proposed under the Anti-terrorism Crime and Security Bill 2001	HC 382 (*HC 621*)
Second Report	The Threat from Terrorism	HC 348 (*HC 667*)
Third Report	The Ministry of Defence Reviews of Armed Forces' Pension and Compensation Arrangements	HC 666 (*HC 115*)
Fourth Report	Major Procurement Projects	HC 779 (*HC 1229*)
Fifth Report	The Government's Annual Report on Strategic Export Controls for 2000, Licensing Policy and Prior Parliamentary Scrutiny (Joint with Foreign Affairs Committee, International Development Committee and Trade and Industry Committee)	HC 718 (*Cm 5629*)
Sixth Report	Defence and Security in the UK	HC 518 (*HC 1230*)
Seventh Report	The Future of NATO	HC 914 (*HC 1231*)

Government Responses to Defence Committee reports are published as Special Reports from the Committee (or as Command papers). They are listed here in brackets by the HC (or Cm) No. after the report they relate to.

Oral evidence

Taken before the Defence Committee

on Wednesday 27 October 2004

Members present:

Mr Bruce George, in the Chair

Mr James Cran
Mr David Crausby
Mike Gapes
Mr Mike Hancock
Mr Dai Havard
Rachel Squire
Mr Peter Viggers

Witnesses: **Mr Julian Miller,** Director General Service Personnel Policy, **Mrs Teresa Jones,** Head of Armed Forces Bill Team, **Captain Peter Crabtree RN OBE,** Armed Forces Bill Team, **Brigadier Stephen Andrews CBE,** Director Personal Services (Army), **Air Commodore Dusty Amroliwala OBE,** Director Personnel and Training Policy (RAF), and **Mr Humphrey Morrison,** Legal Adviser, Ministry of Defence, examined.

Q1 Chairman: Thank you very much for coming. This is a long-awaited meeting. Peter Viggers and I were on the Select Committee on the Armed Forces Bill many years ago, expecting this proposal at least a decade ago, although I notice that the phraseology is different. In the early Nineties, there was talk of consolidation; now it is harmonisation. Can you tell me the difference between consolidation and harmonisation and why it has taken so long for either of them to appear before the House, albeit not yet in final form?

Mr Miller: I am happy to take up those two points. Consolidation was indeed identified in the Nineties as being an issue, the point then being to try to bring together the various disparate changes to legislation which had happened over numerous years. It was a tidying-up exercise. What we then looked at subsequently, and the SDR flagged this up in 1998, was the need to have a single system of Service law, so rather than simply tidying up three separate Acts, to recognise that particularly as joint organisations, joint operations became more important, it was desirable that all Service personnel should be under the same legal system and not have to chop and change as they moved from one part of the armed force structure to another. That led us to decide that a single Act was appropriate, and that is where we are now; that is really what harmonisation, as you refer to it, sets out for our aim. You mention that this has been a long time coming. Of course we recognise that. In 2001, my predecessor—

Q2 Chairman: It goes back much further than that, I can tell you.

Mr Miller: In 2001, when we had recognised that harmonisation and the Single Act was the way ahead, we started to build up the team and to get to grips with the scale and complexity of the task we were setting ourselves. I think it is worth saying at the outset that this has been very much an MoD-wide exercise. It has involved the Services from the outset as a joint effort to produce an approved system of law, which they are keen to see us introduce. This has resulted in us setting up a team at the centre of the department with full Service representation and working very closely with the staffs of the three principal personnel officers as well as the legal advisers, but it is a demanding task, a big task. As you know, it is going to be a large Bill, and it raises issues of policy, which I suppose are inevitable as one tries to bring together the way the three separate Services have done their business in the past and find a future with which they are comfortable.

Q3 Chairman: Fifteen years is a pretty long time, even by the standards of the MoD. We were told in 1991, and probably earlier, and I can recall when Peter Viggers was Chairman of the Armed Forces Bill Committee it was a matter or urgency when we were relatively young men and we had the lamest of excuses. The best was: oh, well, they have seconded a Treasury specialist to us and he went back. Obviously, the removal of that guy brought the whole thing to an end. Maybe you could drop us a note and tell us why if it was urgent then, 15 years ago, did not the Ministry of Defence do anything about it. Teresa, maybe you were around monitoring us in those days. Can you recall why it has taken so long?

Mrs Jones: I was Head of the Bill Team in 1990–91 when we produced that Armed Forces Act. It was the Select Committee on that Bill that particularly gave impetus to the idea of consolidation rather than harmonisation. A lot of work, I would say, went into consolidating the three discipline Acts to the extent—and Humphrey Morrison will correct me if I am wrong—that there was a first draft of that Bill. That work was overtaken by two things really: one was the need to make changes to Armed Forces' legislation that arose out of the Human Rights Act in 1998, so we had the Armed Forces Discipline Bill in 2000 and the Armed Forces Bill in 2001; and the second thing was obviously the Strategic Defence Review, which changed the emphasis from consolidation, which is a tidying up that Julian Miller mentioned, to a complete review of the Service Discipline Acts. The work in doing that

review means that we are looking at not just the discipline proposals but the proposals throughout the three Service Acts, some of which, I have to say, have not been looked at, probably at all, since 1955. That is one of the reasons why it was such a massive project.

Q4 Chairman: Thank you very much. That seems, at first sight a plausible explanation. When is the Government committed to doing all this?
Mr Miller: We are committed to bringing the Bill to the House next year and subject to parliamentary process, and the views of this Committee, enacting it the following year. We would then expect it to take some time, once legislation has been agreed, to bring the detailed application into force, but certainly by 2008, we would expect the great majority of the new arrangements to be in place.

Q5 Chairman: You are rushing then! I hope I am around to see the end product of this speedy process. Can you tell us why it is so wide? The MoD is not responsible for many pieces of legislation. Is it because you feel you do not have the skills or whatever, and suddenly a mammoth piece of legislations comes and you are not quite ready for something of this magnitude?
Mr Miller: It is certainly true that it is a much larger piece of legislation than the Department routinely deals with, and it is a very ambitious piece of legislation, but we have the right skills in place. We have built up a team since 2001 to its present size. We now have a team led by Humphrey Morrison with lawyers within the MoD who are concentrating on this; we have five lawyers dealing with it and an Armed Forces Bill team of seven lead by Teresa Jones with Service representation, as well as the contributions from other parts of the Department. Of course, at this stage, as the drafting process is now underway, we also have four parliamentary counsel.

Q6 Chairman: Are they going to stay? Is it going to be recalled or torpedoed as in the early Nineties?
Mr Miller: We are pretty confident now, Chairman, that this will proceed to the production of a full Bill, which will be brought to the House next year.

Q7 Chairman: In terms of consultation, will you let us have a look at it for, hopefully, pre-legislative scrutiny?
Mr Miller: We had seen the memorandum we have already given you for this hearing setting this process in train. We would certainly expect to come back to you with more progress reports as the development of the Bill progresses and deal with any questions that you have.

Q8 Mr Viggers: I think I heard you say that you have four parliamentary draftsmen annexed to this. You do have a commitment, do you, from their department that they will maintain the people there because it is a peculiar operation, as I understand it. I fully understand the complexity of the system. It is really very difficult for a team to do this. It really needs to be one person to be responsible. You have the commitment from the parliamentary draftsmen?
Mr Miller: We have the commitment and a work plan which we have agreed with parliamentary counsel, which will deliver the product by the time needed next year.

Q9 Mr Viggers: The main argument put forward for a single system of Service law is that it is more appropriate for joint operations. Can you say whether specific problems have arisen in the past which have caused you to feel this is now an urgent issue?
Mr Miller: It is joint operations. It is also the operation of joint units where it may be difficult to have a single Service clearly in the lead and therefore to determine which system of law applies and when somebody from one Service joins such a joint unit. Arrangements have to be put in place to allow discipline to apply to them from their own Service. The conduct of joint operations does indeed add some complications and *ad hoc* arrangements would be needed—for example, in the Falklands and Iraq—to provide sensible disciplinary arrangements, which would be very much simpler and more directly dealt with if there was a single system of law. If it would be helpful, we can certainly give you a note, for example, on some of those arrangements.[1]
Chairman: Yes, please do that.

Q10 Mr Viggers: The attachment regulations do not apply to fully joint units, as we understand it. Did you give consideration to changing the attachment regulations to give commanding officers such powers rather than to move forward to a joint decision?
Mr Miller: We did look at the attachment approach and decided that it did not really meet the underlying requirement to have all Service personnel subject to a constant and understood single system. Perhaps I could ask Mr Morrison to elaborate.
Mr Morrison: Quite simply, using the attachment regulations does not get rid of the basic problem that members of each Service are subject to different procedures, powers, penalties and so on. If you start applying attachment, it simply means, let us say if a soldier becomes attached to the Navy, whereas as a soldier he would not be subject to the possibility of summary dismissal, as a sailor he does, so attachment does not resolve the differences in the law but instead imposes on people changes in their legal position when they move to join the other system or the other Service. In practice, as a result, attachment has never been used effectively, and indeed the Services are very reluctant that it should be used because each attachment involves a change in the legal position of the person attached, which is then changed again when that person moves back again to his or her own Service. It obviously is particularly difficult where you have a joint unit

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where it is not possible to say which Service ought to be the one which characterised that unit. If you have a joint Army, Navy and Air Force unit, which law is to apply? Should it be the Army; should it be the Navy; should it be the Air Force? If it does not matter which one applies, then why have all these minor differences between the laws and the penalties and powers and so on that do apply? The obvious logic is that if you can swap people round between Services, at least make them subject to the same laws all the time.

Q11 Mr Viggers: There is reference to the Defence Procurement Agency and the Defence Logistics Organisation which says that a revised structure for command authority will extend to these organisations. How can that be when they are basically civilian organisations? What will the implication be for those two organisations?
Mr Miller: Within those agencies, there are many military personnel operating and some of those agencies can be led by military officers. What we would expect is that the introduction of the single system of Service law under the TSA would make it easier for disciplinary arrangements as they apply to Service personnel operating in those structures to be simplified and to be effectively discharged, so that if someone is working in the DLO, rather than having to have disciplinary measures applied by a commander from their Service who might be outside that organisation, it would facilitate arrangements set up inside the organisation to apply discipline by the immediate chain of command.[2]

Q12 Mr Viggers: Is there to be any change in the legal status of civilians?
Mr Miller: No.

Q13 Mr Hancock: Can I draw your attention to the issues raised in your memorandum, particularly around paragraph 25, which deals with harmonisation of offences and the way in which particularly the Royal Navy would see a significant narrowing of their ability to deal with matters. I am conscious that we are about to go to vote and unfortunately when we come back I will not be with you because I will be taking part in a debate, so I am not going to hear your answer, but I look forward to reading it. I would be interested to know if all three Services could identify those elements of the existing machine that you consider to be vital to your operational effectiveness. What are the issues affecting the Navy, because they are the ones who will have the most changes to deal with?
Mr Miller: We will make sure that you can read a full answer.

The Committee suspended from 3.13 pm to 3.37 pm for a division in the House

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Mr Miller: I think Mr Hancock's question was referring particularly to the issue of harmonisation in paragraph 25 of our memorandum, which is looking at summary powers. His question was referring to the extent that the Navy has had to adjust and change particularly its arrangements for summary justice. Captain Crabtree will now elaborate.
Captain Crabtree: It is right to say that the Navy has given up a number of powers and that will be evident from the memorandum that we gave to you. We very carefully considered, in looking at what we were giving up, the prize, I suppose is the way you put it, of harmonisation, and we recognise there are significant benefits in that. We have also taken into account that the Bill, or the Act, will deliver benefits in other areas. While our summary powers will be reduced so that we will have an increase in the number of courts martial, we believe that is manageable because in other areas in the management of courts martial and in the composition of courts, there are changes that will improve the speed to courts martial and the nature of courts martial. It is a balancing exercise. When you look at that balance, the loss of powers, we believe, is manageable in the number of courts martial that will be generated from it.

Q14 Mr Viggers: How many extra courts martial do you anticipate there will be?
Captain Crabtree: Looking at the last three or four years, somewhere in the region of about 30 to 35 a year. In statistical terms, that is probably about a 50% increase.

Q15 Mr Viggers: Have you made a calculation as to how many of those will be at sea?
Captain Crabtree: All courts martial at the moment, or in my time in the Service, have been conducted ashore. Of course, a number of the accused come from the sea. I would think about 50% at the moment come from the sea. There will be a dozen or so ships where accused will go to courts martial and we will have to fit those courts martial around the ships' operational programme. If we have the ability to run courts more effectively and less resource intensive in, for example, the fact that many of our five-man courts that we have in the Navy in the future may result in a three-man court, or three-person court, that gives us more flexibility in composition and therefore in being able to move quickly to a court martial.

Q16 Mr Viggers: I phrased my question in a rather slack way. I meant of course; how many of the offences which will end in courts martial start with an offence committed at sea? Much was made in previous meetings of the Select Committee on the Armed Forces Bill, I remember, of the operational difficulty that would be imposed if the offence happened at sea and it was not possible to be dealt with in a brisk and summary manner. How are you facing up to the operational difficulties there?

Captain Crabtree: My answer actually is probably in many respects the same because while I cannot give you a precise figure as to the number of offences that are committed at sea, while an individual is in the ship, a large number of individuals who go to courts martial are serving in ships and they commit offences while they are ashore or on runs ashore somewhere. The witnesses are from the ship, the accused is from the ship, the character witness may be an officer from the ship, and all those individuals will have to be removed from the ship. It is as much where the individual is serving and where the witnesses are as opposed to whether the offence is committed on board, for example. A percentage of offences certainly are committed on board. I can come back and give you an indication for any one particular year, if you would like that.[3]

Q17 Mr Viggers: My concern, of course, is that a case which was previously being handled in a summary manner will now lead to a court martial later and this, as it were, causes a cloud to hang over the accused, and indeed no doubt the witnesses and everyone else involved. How are you going to cope with that?
Captain Crabtree: We recognise precisely that problem, which is why I mentioned the balancing exercise previously. Part of that balancing exercise was the advantages that would be delivered by harmonisation. Part of the balancing exercise was the improvement to the courts martial process that will deliver more expeditious courts martial, so that we will not have to wait three or four or six months, or whatever it may be. We have selected the powers we want to retain, and they have been agreed by all three Services, on the basis that these are the powers and punishments and the offences that most frequently occur. Where we have given up powers and offences, that is on the basis of a very careful statistical analysis and discussion with our lawyers and our commanders to identify what we can give up with least difficulty. As I say, it is something in the region of about 30 trials, but we believe that is manageable for the greater prize.

Q18 Mr Viggers: How many people are taken off duties because they are to be subject to a summary trial or a court martial in due course? I assume a small number will be confined, will be locked up, a very small number. Others may be taken off duties. Have you worked out how many in total will be taken off duties under the new regime and have you got the numbers taken off duties in the previous regime?
Captain Crabtree: I think it is fair to say that there should be no change in that respect. If an individual has committed an offence which results in him going to summary trial, then if he deserves to be locked up because there is a concern about whether he will absent himself or commit further offences—Bail Act type considerations—and those apply whether it is a summary trial or court martial type matter. As far as moving people off ship to wait for trial, I do not think there will be any great change. There might be changes in terms of two or three people but not many, and that was a factor that we took into account again in deciding what powers we could afford to give up and what offences we would want to retain as available to the CO. I think we have optimised what the Navy can afford to agree to in what is a harmonised package.

Q19 Mr Cran: I am going to ask a few questions about the Army, in which I am quite interested, and so I guess it is you, Brigadier, I am looking at. The Committee is quite interested in the practical effects of your proposals at the level of the commanding officer, as it were. I take an old-fashioned view that whenever you have new legislation, it means work for everybody. The point I think the Committee would be quite interested to know is: how many additional summary cases, I suppose one could say, a year will commanding officers have to deal with? Is it possible to compute that?
Brigadier Andrews: I do not think that there is really any science that would let us give you a reliable figure, but I can say confidently that it would be very few. The Bill is constructed on the basic powers that a commanding officer in the Army, and indeed in the Royal Air Force, already has. The maximum penalty that the commanding officer can impose has been extended and of course the range of offences the commanding officer may deal with summarily has been extended. I think that we would see commanding officers exercising their judgment based on the advice and using much the same judgment as they do now about which offences they should deal with summarily and which offences they should refer to higher authority with a view to trial by court martial. Whilst this Bill and these powers may well allow a few more offences to be dealt with summarily, those cases where it is within the commanding officer's capability based on the legal advice he received, I think a commanding officer in the Army will recognise these powers and it is very much business as usual.

Q20 Mr Cran: I would like to be clear—and maybe my colleagues are there before me—why it is that you are quite so confident. I am not arguing with you. I am just seeking your rationale, as it were. Why do you come to the conclusion, and I quote as I took the words down, your legislation will allow "only a few more cases". I want to know why you are confident that is going to be so.
Brigadier Andrews: The list of offences that the commanding officer may deal with has been extended. Most of those offences are potentially serious offences. Of course, the commanding officer there has to make the same decision as he has to make now. He has to decide whether this is something that should properly be dealt with by him, the commanding officer, essentially in-house, or whether it is something that is so serious that it should be dealt with by the Army as a corporate body. I think he will apply the same judgement as he

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applies now to that. There will be a number of these cases in the new list that perhaps, having consulted higher authority, he feels that he can properly deal with, in which case he will, in which case there is a price here that is well worth paying in terms of justice delivered quickly and fairly.

Q21 Mr Cran: Let us assume for a minute, just to test what you are saying to me, that you are wrong. I am not saying you will be but just let us assume you might be and that it is going to result in rather more pressure on the commanding officers as you have alluded to in the answers you have just given. Is there going to be any consideration given to giving commanding officers more resources, whatever it is that is needed to deal with, if I am correct in saying there might be, an increase in these summary cases?
Brigadier Andrews: If I may, I need to bring you up to date on another important reform that we are in the process of introducing into the Army, and that is from 1 January next year commanding officers in the Army and company commanders, that is sub-unit commanders, will deal with a very wide range of really low level disciplinary matters. The sort of things like poor turnout and late on parade, which are currently dealt with summarily under the Army Act, will be dealt with administratively. There will be a regime of minor sanctions applied. We hope that that will reduce the number of summary dealing cases by about 50% in the Army. That is certainly my hope as the Policy Director responsible. Were there to be a small increase in the number of cases and perhaps more complex cases that a commanding officer dealt with summarily under the new Act, I do not think that that would be a burden on him at all. Of course these are tried, tested and respected procedures, so I do not see that there would be a difficulty there.[4]
Mr Cran: I am very grateful. That could not have been clearer.

Q22 Mr Crausby: I have some similar questions to those of James Cran about the Army but mine are aimed at the RAF. First, how many, if any, additional summary cases a year will RAF commanding officers have to deal with under the proposals? Is it like the Army, very few, or is it a different situation?
Air Commodore Amroliwala: It is almost exactly the same as the Army. I think the only thing that separates us is the regime that the Brigadier has just described of introducing a greater range of administrative sanctions that is already in place in the Royal Air Force. There is also, at the same time, a growing movement towards using administrative outcomes and disposals wherever that is practically possible. At the time when there is the potential for a greater range of summary matters to be put before a commanding officer, there is, on the other side, a greater tendency, right across the Service, to use administrative procedures wherever they are practically possible and appropriate to use. To a greater or lesser extent, we see the two being self-balancing in the final event.

Q23 Mr Crausby: So that there would be no need for additional resources at all and you feel that we will be able to cope with them in the same way?
Air Commodore Amroliwala: We foresee no need for additional resources as an outcome of this harmonisation.

Q24 Mike Gapes: Brigadier Andrews, can I take you up on what you have just said? You have said that you were going to move towards a system of low level administrative dealing with minor offences presumably. As I understand it, the summary hearings before a commanding officer are not considered compliant with Article 6 of the European Convention on Human Rights, whereas courts martial are. Would these administrative hearings be compliant?
Brigadier Andrews: Yes, I am confident that they would be, and I think I need to explain a little more here. This is administrative action for really very low level, very minor, non-criminal matters. If I could add, we are absolutely confident that summary dealing, as it stands now, as it is provided for in this Bill, is compliant with Article 6 of the Convention, but certainly our administrative action of course has been framed in line with the Human Rights Act, in line with all the good principles and best practice of modern employment law, but these really are very low level, professional shortcomings—people who are late on parade, have not turned up for work, they have dirty boots, perhaps their rifles are dirty and have not been properly cleaned at the end of the day. They are matters which are not deserving of the full weight of the criminal law, which, after all, is what summary dealing is. What we are dealing with here is a minor shortcoming which is dealt with very quickly; a minor sanction is awarded with the whole purpose of setting straight that shortcoming.

Q25 Mike Gapes: Would the individuals concerned have a right of appeal to a higher level?
Brigadier Andrews: Of course, yes, the right of review is built into that procedure. That right of review can be exercised as quickly as possible.

Q26 Mike Gapes: They could actually then go to a summary process or not?
Brigadier Andrews: No, they would not be given the option of saying, "No, I insist on my right to a summary hearing here". No, they would not. I would have to defer to my learned friends here, but I think in Convention terms we are talking about issues which really do not get above the criminal threshold here. Of course we are after something that is open, fair and can be delivered in a very timely, effective and appropriate way. We are absolutely confident that it would meet the scrutiny of a Human Rights lawyer.

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Q27 Mike Gapes: I hope that is the case. Given the way in which human rights lawyers are able to reinterpret legislation, we will wait and see. Can I therefore take it a bit further? As I understand it, at present round about 14,000 cases are dealt with by summary hearings or trials in the Army and about 400 to 500 are dealt with by courts martial?
Brigadier Andrews: Yes.

Q28 Mike Gapes: Given the point that I have already made about whether there is compliance or not with the European Court of Human Rights, could you explain why you feel it is right that commanding officers would have to deal with more cases which might be of greater complexity as a result of the overall changes, not what we have just been talking about, and with more extensive sentencing powers? Would this not leave you open, if you are moving a substantial part of this workload which currently is dealt with in a way which is compliant with the European Court, towards one which is not? Would this not lead to greater problems in the future?
Brigadier Andrews: I think I must defer to Mr Morrison on that point.
Mr Miller: Chairman, may I first pick up the point Mr Gapes made earlier about compliance and summary process and say that the key issue there, which Humphrey I am sure will elaborate on, is that it is part of a broader process of law, so that no-one is obliged to be subject to summary justice; they have the right to elect trial by a court martial, and indeed the Tri-Service Act will extend that throughout the three Services.

Q29 Mike Gapes: Does that apply in those cases which have been dealt with at the administrative level as well?
Mr Morrison: I think the easiest way to describe this is as follows. It is best to see a division between the criminal law, which includes summary jurisdiction, and that sort of action which is akin to what an employer can do anywhere to his employee: give him a bad report, not promote him to a higher job, that sort of thing. It is that latter area for which the expression "administrative action" is used by the Services. It has always been there as an alternative, sometimes an additional element, in reporting on people, in dealing with their minor failures and their successes in their career. It is quite separate from the issue of the compliance of the criminal law and criminal procedures with the ECHR. As far as the criminal element is concerned, that does cover court martial trial and it does cover and require compliance with the system of summary discipline. We take the view, and we have been to leading counsel for advice on it, that not only does the existing system meet the requirements for compliance, by virtue, as Julian has said, of the right to elect trial by court martial where, if they choose that method, the court martial then uses only the power that would have been available to the CO, and also by the availability of a right of appeal to a compliant summary appeal court. The result of that system, in our view, renders the criminal jurisdiction of the Armed Forces compliant and we are happy that the small changes that we are making to that will, if anything, improve the system, make it more easily explicable because it will more consistent and to that degree fairer and, as Julian has mentioned, it will remove a small limitation that exists under the naval legislation on the right to elect. That is separate and the ECHR issues relating to that are separate from the question of administrative action, employers' action, where the remedies for any administrative action that a person is unhappy with is through the system known as redress. In some cases there is also for the Services access to the civil courts, in particular employment tribunals, if, for example, some sort of administrative action was taken against someone—they were not promoted or got a black mark because of discrimination. Where there is discrimination, they can go direct to outside courts. That, if you like, forms a separate, coherent whole, but does not give rise to the questions of compliance that relate to the criminal jurisdiction.

Q30 Mike Gapes: Can I take that a bit further? As a government legal officer or legal adviser, do you have any reservations about moving towards more summary processes?
Mr Morrison: The extent of jurisdiction and to the extension of powers as far as the Army is concerned? No, in fact we went to leading counsel with the exact details of what we were proposing to ask if he considered that it increased the risk of non-compliance over the current situation at all. He obviously gave a detailed reply but he summed it up as "not one jot".

Q31 Mike Gapes: If it was argued that moving towards a system whereby more cases were being dealt with by COs who were not independent and were being dealt with without legal representation for the accused, which is why it is thought that summary hearings are not compliant with Article 6, you see no problem in that? You do not think that that is liable to lead to more legal challenges in the European Court of Human Rights?
Mr Morrison: No, because of the existence of the two factors which are regarded as the essential safeguard, which make the summary system compliant overall: the right to elect and the right of appeal to a compliant court called the summary appeal court. It is those two factors which are regarded as making a system which is, if you like, rough and ready at first hearings, overall compliant with Article 6 of the ECHR.

Q32 Mr Havard: May I ask a supplementary? Maybe this is a daft question but I will ask it. If the Army is now going to make this change to administrative action rather than have summary hearings, so it is going to run its business more efficiently or more effectively maybe, if that has been the case, why was this not done before? If administrative actions could have been taken to save on all these summary hearings, why now and why not before?

Brigadier Andrews: I think that our disciplinary policy, like the law, has evolved, that the Armed Forces Discipline Act introduced a new, very structured way of conducting summary hearings. It introduced some very important safeguards, which Mr Morrison has set out. I think it made the whole process for one summary case just about as much as one individual, supported by his unit administrators, could reasonably deal with, and it does do that. Summary dealing I think, certainly in the Army and I am sure in the Royal Navy and the Royal Air Force, is respected as being fair. We know it is respected as being fair by what our people tell us and by the fact that the appeal rate is so low. We then have to ask ourselves: are we using these very precious powers in an appropriate way? Is there a better way of upholding good order and military discipline, especially with regard to those low level matters which are not really wholly deserving of the full weight of these procedures? We looked at that very carefully with our legal officers and we came to the conclusion, the Army Board came to the conclusion, that there was a better way of doing it. The Royal Air Force recognised this some time ago and that is what we are introducing now. The Army has welcomed this very warmly indeed. It will put disciplinary power, low level power, effective power, back in the hands of our junior commanders so that they can deal with professional shortcomings there and then. As we say in the Army: discipline at the point of leadership.

Q33 Mr Havard: It is not because it is more efficient, the Treasury word—"effective" means it works and "efficient" means it is cost-effective and you save money—or because you did not have previous confidence in, enough training and support for, the people lower down to be able to do it properly?
Brigadier Andrews: Not at all. We, of course, are interested in good order and military discipline and we are interested in the most efficient and effective way of upholding good order and military discipline and we put in place what we think are reasonable and effective changes. We have reformed. I think we have now moved with the landscape as modern employers.

Q34 Mr Viggers: There have been some offences which, for practical purposes, have been triable summarily in the Royal Navy because the Royal Navy ships are away from home, which are now to be extended to the Air Force and the Army. These are listed in Appendix 1 to Annex D. One of these offences is assault occasioning actual bodily harm. Does this require commanding officers to get involved in the issue of compensation, as would be the case in civilian courts?
Captain Crabtree: We deal at summary level with assault occasioning actual bodily harm, as with any of the offences on that list, on the basis of legal advice which is given to the CO and only when it is a simple offence of that nature. Of course, assault occasioning actual bodily harm can be straightforward or it can be serious; the penalties are of a significant range. When we have an assault occasioning actual bodily harm, as with a common assault when there might be an injury, we have given our COs at the moment limited powers of compensation but, before they exercise those powers, they take legal advice. They also have written guidance, which is exactly the guidance that lay magistrates operate to in the magistrates' court, for example. I recognise, of course, they may have a legally qualified clerk sitting with them. As I say, our COs also take legal advice. That is something we wanted to preserve in the Bill and we have taken it forward as a proposal, which has been accepted within the constraints of a limited sum of money and on the basis of a requirement for legal advice to be made available.

Q35 Mr Viggers: I am not sure whether the briefing material we have been given so far lists the number of occasions when compensation has been given and the range of compensation. If we have already been given this information in the briefing note, I apologise. If we have not, I would be grateful if we could be.[5]
Captain Crabtree: The number of assault occasioning actual bodily harm cases dealt with summarily ranges, over the last three years, between three or five and eight, so it is only a very limited number of cases that commanding officers are dealing with of that nature. Serious ones go, of course, to courts martial because of their nature.

Q36 Mr Viggers: Are the Army and the Royal Air Force content that their commanding officers will be given these powers of compensation as you describe?
Brigadier Andrews: Yes, the powers are forthcoming and certainly we already have a provision for criminal injuries overseas. Yes, I would anticipate, as Captain Crabtree has just been talking about, there would be very few cases and they would be cases which would be hallmarked by their straightforwardness.

Q37 Mr Viggers: I suppose the question was rather simple. What I should have asked is: because everybody likes being given power, are the Army and the Air Force content that their commanding officers will be capable of exercising this with some advice?
Air Commodore Amroliwala: If I can answer for the Royal Air Force, I have no doubt at all that they will be content and competent to exercise the power. As the Brigadier has already said, we are already involved in overseas locations with criminal injuries compensation as a matter of course in the event in those locations.

Q38 Mr Viggers: Another offence which the Army and Royal Air Force commanding officers will have the power to deal with include carrying articles with a point or blade in a public place and possession of an offensive weapon. Those are listed in Appendix 1

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to Annex D at page 25 of the memorandum. These are regarded as extremely serious by the police and civil magistrates and in the civil court and often lead to imprisonment. Is it appropriate that commanding officers who have only limited powers of detention should deal with these cases?

Air Commodore Amroliwala: If the circumstances of the case were such that the likely outcome would attract a sentence which was in excess of that available to the commanding officer, then in my view it would not be more appropriate and nor would the commanding officer deal with that offence in the first place. Like all of these offences on the schedule and all others that are dealt with, they fall within a range of seriousness and it will only be in that area where it is appropriate that commanders should deal with these, that he will do so. I could not foresee any circumstances in which an incident which might attract a custodial sentence, the order that you describe, would ever come near a commanding officer's table to deal with.

Q39 Mr Viggers: There is another range of difficulties. For instance, the obtaining of Services by deception, fraudulent use of a telephone, obtaining property by deception: these might involve using credit or a bank card, perhaps on the internet, which could require considerable forensic and technical resources. Have you addressed the issue of whether commanding officers will have the resources that are needed to try those offences?

Mr Miller: Could I just offer a general observation on the additional offences and how they relate to the existing offences? As Dusty Amroliwala was indicating, a number of the existing offences already potentially include quite complex charges and carry quite severe penalties. The additional list really is quite similar in terms of the range of potential complexity and sentence that it carries.[6] In all those cases, old and new, there will have to be made a judgment as to whether it is sensible and realistic for a commanding officer on legal advice to deal with it. Only where the case is towards the simpler end of the spectrum under that offence would we expect the commanding officer to be taking it forward summarily. For those both existing and new offences, in the case of the Army and the Air Force, where there is a degree of complexity of the sort you describe, then you would certainly expect that to be remitted by a higher authority to a court martial.

Captain Crabtree: I think, Mr Viggers, it is worth saying that that is precisely the approach the Navy takes at the moment. We would not conceive of dealing with a bladed article or offensive weapon case where there were any of the aggravating circumstances which would lead the criminal courts to a sentence of imprisonment, so it would have to be right at the bottom of the range. The law is clear and the advice to COs would be clear in that area, as it would be in other areas in relation to the offences on that list. There are safeguards in place to ensure that only those that are capable of being dealt with by a CO are dealt with, and others go to court martial.[7]

Q40 Mr Havard: If I could turn to the question of courts martial, in the memorandum we have had from the Ministry of Defence, it talks about a number of things but it talks about a single prosecuting authority and it also talks about defence arrangements as still being considered. We do not know exactly what shape or form they are going to take. Could you give us an update on the development of these elements?

Mr Miller: The single prosecuting authority is something which we think makes sense when we have a single system of Service law. We would expect the Naval Judge Advocate in effect to be wound in to the Judge Advocate General. I am being corrected. Let Mr Morrison correct me publicly.

Mr Morrison: Obviously the three separate prosecution authorities, the Army, Navy and the Air Force prosecuting authorities, it is proposed should be replaced by one authority. The powers and function of that authority will be very much the same as the powers currently exercised separately by the three authorities. The authority will also have the same degree at least of independence, which is regarded as an essential element of the role of the authority. The big difference will be obviously that his or her staff will be tri-Service; they will be lawyers, prosecutors, from all three Services. The creation of that single law authority flows, I think logically, from having a single system of Service law and ensures that we do not, by retaining separate administrative organisms, face the COs with the difficulty that while they are applying one system of law and they have got over that hurdle, they then have to deal with three separate authorities, depending on the Service of the people under their command. In very broad terms, accepting that you will have one person instead of three, the statutory provisions should look almost the same, if not the same, as the provisions that you have at the moment in each of the separate Acts.

Q41 Mr Havard: Can I ask then what the response of the three Services is to this currently? You give me the answer.

Mrs Jones: This is a proposal that has been agreed with the three Services.

[6] *Note by Witness*: For example, theft which is an offence which may be dealt with summarily in all three Services at present and carries a maximum penalty at court martial of 7 years' imprisonment. In all but the most straightforward cases therefore it would be referred for trial by court martial.

[7] *Note by Witness*: The more complex offences envisaged involving deception and fraud (ie the more complex internet fraud which require forensic investigation) would invariably be sent to court martial. However, one-off deceptions for relatively small sums, for example by submitting a claim to a cash office on board for a journey which had not been undertaken, might subject to the safeguards in place be suitable for summary hearing. Similarly, simple misuse of an on board telephone system or a foreign telephone system connected to a warship when alongside, with intent to avoid payment, may be straightforward enough to be expeditiously dealt with summarily, again subject to the safeguards.

Q42 Mr Havard: I understand the principle of it being that is agreed, but the whole question of how it is to work and its relative competencies is presumably still in play. What is the response of each of the Services to that?
Captain Crabtree: If I can talk from a naval perspective, we have no difficulty whatsoever. We think joint institutions are a fundamental part of taking a harmonised system forward, so we have no difficulty at all with a joint prosecuting authority, which will prosecute all offenders, matters having been referred to the prosecution authority for consideration. It will add, at the very least, to consistency of approach and fairness.

Q43 Mr Havard: For the record, we will hear what each of the Services has to say.
Air Commodore Amroliwala: I do not think I can add a great deal to that. There was a clear logic, following the work we are doing in terms of harmonisation, for the prosecution to come into a single body. I can only see benefit to the Service and the Services from such an approach.
Brigadier Andrews: I think the important point for us in all of this is that in Service courts there are Service prosecutors, and I think that the Bill sets out a framework for ensuring that prosecutions in military courts are informed by prosecutions which have a profound understanding of the context of the offences and of course of the public and Service interest.

Q44 Mr Havard: Given we have this list in Annex E, are we to see all of these elements then or only some of them actually coming forward in terms of the Bill? You describe in Annex E a number of elements that ought to be in the structure to which you are proposing to change. Are all these elements actually going to be in the Bill?
Mrs Jones: Not necessarily; there are some elements in the proposals that we have got which will not require primary legislation. But it is very important in framing the legislation that we understand the detail of how the system will work to ensure that we have the right things in in primary legislation that will indeed support the secondary legislation that might be needed in certain areas. So the package that we have presented will include some things that are in primary legislation. The creation of a single prosecuting authority is a matter for primary legislation. The single Service prosecuting authorities at the moment are provided for in the separate discipline Acts. Therefore, clearly it will be right in the Tri-Service Act for that primary legislation to contain the provision for a single prosecuting authority. As for the way in which that prosecuting authority is organised, there will be some elements about the ability, for example, of the prosecuting authority to delegate his functions, which will be rightly contained in the primary legislation; other functions and how that prosecuting authority operates will not be a matter for primary legislation, as now. The sort of work that we are still engaged on with a joint prosecuting authority will be looking very much at things like: where are they going to be located; how are the individuals going to operate within it. Those are not matters for legislation.

Q45 Mr Havard: If I could get behind the descriptive sides, the administrative structures and so on, one of the things we have been seeing recently in cases is that there is an interface between all of these agencies and other agencies, not the least of which is the civil police, for example, the civil criminal justice system, and the Lord Chancellor's role in all of that; we have also been seeing the question about how things are policed, evidence gathered, who actually brings prosecutions, how they conduct them, the evidence gathering process, all of that. It is a big agenda. Within it, if you are going to have a single prosecuting authority, I am old enough and I am afraid ugly enough to remember being around at the time of the setting up of the Crown Prosecution Service and arguing with Mrs Thatcher and others that they were getting it wrong. It was got wrong and it had to be changed several times. It was about the relationship between the police Services, various and different, across the country and local authorities being changed into a unified body that then brought prosecutions and the police Service then gathering evidence and going to the Crown Prosecution Service, and you know the structure. It seems to me as though you are proposing a similar sort of structure in essence here. Within that, there are obviously relationships. In administrative terms, who is collecting the evidence, who is deciding within a relative tariff whether or not something is administrative or should be dealt with summarily or should go to a court martial, whatever? This is the bread and butter; it is the guts of the process, is it not? This is the sort of stuff I think we want to see in terms of how the process is actually going to be constructed so that we have confidence that all these other relationships are right and how someone can appeal and say that the person presented the wrong evidence, got it wrong and it was dealt with in the wrong way. These are the issues that I am trying to get to here. Some of that needs to be statutory; maybe some of it not. That was a bit of a diatribe rather than a question but that is an area of concern. Any observations you have would be helpful.
Mr Miller: You have wrapped up a number of issues. Perhaps, to start with, Mr Morrison could say something about the relationship with the evidence gathering and collection.
Mr Morrison: Before I do that, may I just make one illustrative example about the idea of a joint prosecuting authority? At the moment, if Servicemen and Servicewomen from different Services but perhaps within a joint regiment or joint command are accused of an offence together—they may be fighting each other or both are involved in doing something to some third person—and it is a serious offence, it goes from the CO up to the prosecuting authority. If one is a soldier and one is an airman, it goes to two separate prosecuting authorities and each has to decide separately what to

do. One may take a view that it ought to be referred back to the CO to be dealt with by the CO or think there are appropriate charges, or whatever he or she thinks is the appropriate charge. The other may take a different view. At the moment, the separation of all the procedures and systems with different people looking at the same question but capable of reaching a different decision is an inhibition on efficient command and efficient and fair justice. The notion of combining them together is made possible because they are no longer applying separate rules; they are all supposed to be applying the same rules, and we trust that those rules will be applied in a general way consistently. It is that logic which leads us to a single prosecuting authority. As to the investigation of offences, the CO we envisage will, as at present, remain at the heart of the process. It is under the existing law the CO to whom offences are initially reported, and it is the CO who decides what to do next. What we do, however, envisage is a clarification of the use of provisions which we put in place in the 2001 Act which allows the prosecuting authorities to give direct advice to the Service police so they do their jobs more efficiently, and that will be brought more fully into the picture. We already have statutory provisions to allow it from the 2001 Act, as I say, but when the whole of the framework, the sort of issues that you are referring to are set out in the Bill, what you will see is a clearer reference to the prosecuting authorities being more closely involved at an early stage in helping the police in the investigation of offences, and the decision on least serious offences of what should be charged. The aim is to get, if you like, a more professional view and to avoid the situation in which the police, prior to the 2001 Act, had to act on their own and then sometimes found when they got to the prosecuting authorities that they said, "Well, you should have done this, you should look at that evidence. You should have spoken to this person"—etc, etc. So the aim is certainly closer co-operation between Service police and the prosecuting authorities, particularly on obviously major offences, but that the CO will still remain at the heart of things. There are some important issues about how exactly the papers chains and the decision making chains should work, and we certainly recognise that it is vital to avoid making these overcomplicated.

Q46 Mr Havard: Well, I think this is a question of more consistency or better consistency of advice and quality of advice and relationship with the policing Services because the Services themselves have separate arrangements, maybe not for today and not for the Bill, but there are concerns as you know from our inquiry into duty of care and all the rest of it and there is the question of the Service police, for example, and whether there should be verification of how that is consistent with other standards outside the Services and so on. So there are issues like that that will come elsewhere. But if the process here is a unified prosecution Service into which evidence is given and then decisions are made about whether or not it is sensible to prosecute, that is essentially what the Act is going to show, is it?
Mr Morrison: At the lower level, yes, most cases will still involve what one might call low level justice of the CO. Matters will still go straight to the CO and he will deal with them and the police may still not be involved in minor offences which will still come before the CO. But once you get into the more serious offences and the exact division still has to be agreed, there is a recognition of the importance of ensuring, if you like, that the prosecuting authority is brought in at an early enough stage to make sure that the right decision on charges, the right steps as to evidence, are taken. But that will not be affecting all the minor cases which the CO is looking at. So if you like in very crude terms there will be two routes: the very basic route which is still the CO controlling the whole system and the more sophisticated route which already exists with a view to court martial but in which we will try to bring the Service police and the prosecuting authority into a closer contact.

Q47 Mr Havard: Could I just ask you a question about the defence arrangements then, because this is the other area that is still not described. What sort of process is going to evolve there? What does it look like currently? When someone is charged subject to this, what are the defence arrangements likely to be?
Captain Crabtree: The arrangements differ in Service. In my own Service if you are charged with an offence and you are interviewed by the police you have the same rights that every citizen has to be able to contact a lawyer, to have that lawyer with you subject to the nature of the offence, and advise you. As far as representation at courts martial are concerned, you have the right within my Service to select a naval lawyer who would be outside your command chain so there was no issue of conflict of interest, or to elect to have a civilian lawyer, and at the moment at naval courts martial about 50% of the individuals elect a naval lawyer and 50% select civilians, so essentially naval personnel, as I am sure all Service personnel, have the same rights of access in terms of representation at courts martial and advice prior to interview by Service police officers.

Q48 Mr Havard: Have the other Services anything to add?
Brigadier Andrews: No.
Air Commodore Amroliwala: No.

In the absence of the Chairman, Mr Viggers took the Chair

Q49 Mr Havard: This whole question therefore about that structure, and it is a simple one in one sense but there may be a complicated answer, is about its consistency with the UK's obligations under the European Convention for Human Rights. There was a way of doing it in the past, and you are obviously reviewing it. Are you to have confidence that it will be consistent with these obligations and, if so, how?

Mr Miller: We have that confidence and we have been careful in taking advice from counsel as these proposals are developing. Across the piece we would expect that the proposals which come forward in the Act next year will be compliant.

Mrs Jones: Could I add to that that we do not envisage that there will be statutory provision for a defence authority necessarily. The issue about defence arrangements is in particular not to restrict the rights that Service personnel, particularly in the Navy at the moment, have of choosing a naval officer to be there to act for them in a court martial, but there are issues clearly if we have a joint prosecuting authority—there are what I would I suppose refer to as professional and ethical considerations about people serving in the prosecuting authority then moving straight to a defence job or vice versa, and these are issues that we have to make sure we have appropriate safeguards in place for. They are not a matter for statute but they are matters on which we are in correspondence with the Bar Council and the Law Society. Our initial contacts with them have shown that they have no difficulty with the sort of arrangements that we would be proposing whereby Service personnel could still act as defending officers, but we need to make sure that there are safeguards in place so that there can be no possible appearance of a conflict of interest.

Q50 Mr Havard: That is my last question, in a sense. What it says in the memorandum is that, as far as the defence arrangements are concerned, this will probably not require statutory provision and we wanted to know why is that the case? Where have you got to? The word "probably" is here, it "probably will not", so that suggests that you are still having some discussions, or it is subject to some iterative process, if I can describe an argument in that way?

Mrs Jones: I think the point is we have not entirely finished our consultation about this point, and one can never be absolutely sure whether the advice would be from parliamentary counsel or our own lawyers that these are things about which we should have statutory provision. If those discussions lead us to think we should have a formal defence authority that might be one issue where clearly we would need statutory provision, but if we feel we could continue with the arrangements that we have at the moment which are non statutory, then that is what we will do. We cannot make a final decision on that at the moment, however, until we have finished our consultation on quite how we want this to work.

Q51 Mr Havard: So we should ask you two questions later down the track which are "Why you are not having an authority" and "Are you or are you not going to use other parliamentary arrangements like the regulatory reform order process or whatever to bring changes after the enabling Bill"?

Mr Morrison: The general proposition here is that the ability of the Services to ensure that they ought to provide so that those accused under their system are legally represented does not require statutory authority. It is as simple as that. You do not need to say in a Bill "the Services may provide" or even that "they shall provide". That is a general duty which arises not merely from compliance but from the general requirements of the law to have a charge should be fair. A trial in which somebody is not adequately defended can be appealed and go to the CMAC. We have a Courts Martial Appeal Court which will look at the fairness of the trial in accordance both with the ECHR and law court principles, so there is not any thought suddenly to start saying that all this needs to go in the Bill. It will not and it does not exist at the moment. If we wished for some reason, and at the moment there seems to be no argument to suggest that we should, to have some over-arching authority to control and organise the defence, which for some reason had to be a freestanding and independent authority, then one would look at statutory provisions but so far none of the Services, nor the MoD centre , has suggested that there is any reason for this.

Q52 Mr Havard: And you do not require that to be compliant with the obligations under the Human Rights Act?

Mr Morrison: The defence system provided must be compliant but you do not need a statutory provision to deal with that.

Q53 Rachel Squire: Can I focus my questions on the review procedure to Brigadier Andrews? It is proposed that the review procedure for court martial finding and sentence will be abolished, and the memorandum sets out the case for this but also notes that the current arrangements can have advantages with some defendants. Could you say, Brigadier, what your view is of those advantages and how much defendants currently benefit from these advantages?

Brigadier Andrews: At the moment a defendant or somebody who is convicted can appeal to the Army Review Authority, can petition them, on the basis of a finding or a sentence, and that was done for example in 2003 in about 15 cases. Fifteen cases were changed, mitigated, by the Army Reviewing Authority out of about 500 trials. Now all cases are reviewed for legal correctness by the Judge Advocate General, and a number of individuals do decide to petition the reviewing authority. They may have their Finding sentence varied. The reviewing authority only acts with the advice of the Judge Advocate General and it may only mitigate a sentence, so it can only act to the benefit of the individual. It is a very unusual procedure but it does provide a very swift remedy for a petitioner who feels he has been wronged in some way, either by the procedure of the court or by the finding of the court or by the sentence, so it is a very quick process, as a petitioner would see it, to setting the matter straight. It is a very unusual procedure and it is against that

backdrop that in developing this Bill we have looked at a way of a timely and effective and transparent way of meeting the concerns of those petitioners in the future.

Q54 Rachel Squire: So, as you have said, it is roughly around 500 courts martial a year for the Army?
Brigadier Andrews: Yes.

Q55 Rachel Squire: And the Army is the major user of the system. So would you say the Army is content for the review system to be abolished?
Brigadier Andrews: I think against the backdrop—

Q56 Rachel Squire: Given the advantages that it is clearly seen to have by the petitioners?
Brigadier Andrews: We, of course, have had to look very closely at the balance of the argument for the obvious benefit to the petitioner and the complexities that obviously stem from such an unusual procedure, particularly the procedure that in future has to be seen, as any post trial procedure must of course be seen, to be absolutely transparent. We have had a very careful and I think very comprehensive debate amongst the Services and with our legal advisers about the matter of review, and I think this Bill will, I hope very much for those who find themselves convicted or courts martialled, deliver timely justice to those who feel they have been wronged in some way by the court martial procedure.

Q57 Rachel Squire: Have you consulted amongst all ranks, or only at the top?
Brigadier Andrews: Well, of course, there are very few soldiers and officers in an Army of over 100,000 who find themselves on the receiving end of a court martial. I do not mean that to be facetious and, of course, not all of those have petitioned the reviewing authority, and it would be very unusual, for example, for somebody who pleaded guilty to petition the reviewing authority over the finding, but a number do. I have been a member of the Army reviewing authority for four out of the last five years and I think I understand, as do those officers who have worked with me as members of the reviewing authority, very well the mind of the petitioner and in acting in the interests of discipline across the Service and looking at the nature of offences, in this Bill we will arrive at a procedure where the concerns of those petitioners should be met. I hope very much that they will be.

Q58 Rachel Squire: It is a very small number but it is just trying to ensure that this change, this abolition of review system, is seen as a move towards openness and transparency and is not interpreted as a denial of what was seen as somebody's right if they found themselves in that position. That was why I was wondering whom you had consulted.
Brigadier Andrews: It is a very complex question. It brings into the equation many elements, not least of which are the rights of victims, the rights of individuals themselves, and the need for military justice to be seen to be fair and to be transparently fair, and I think that the legal advice that we received has pointed to a way on which we can achieve that fair outcome. That is what our people are interested in: they are interested in timely and fair outcomes in the justice system.

Q59 Mr Cran: I have been looking at the memorandum from the Ministry of Defence—how sad I am if I am reading this, but anyway! At the end, on page 29, we come to this individual called the Judge Advocate General and it says this: "The Judge Advocate General should be the single appointing authority for judge advocates, both in post and to all individual trials." There is no other reference, as far as I can see, in the memorandum to this. Can you tell us what the rationale for this is?
Mr Morrison: At the moment there is a Judge Advocate General who does exactly that job for the Army and the Air Force. There is a separate post called the Judge Advocate to the Fleet—they are both ancient, historic appointments—who has the same task as far as the Navy is concerned. There was previously a strong rationale for the separation of the Navy because the Navy had different rules as to who could be a Judge Advocate. In particular the Navy used uniformed officers as Judge Advocates in their trials—they were qualified lawyers but they were members of the Royal Navy—whereas the Army and the Air Force had moved over to the appointment of civilian Judge Advocates, judges if you like. In a case called *Grieves* the European Court recently held that the naval system of having uniformed Judge Advocates was non-compliant and they therefore moved over to appointing, broadly speaking from the same pool of civilian Judge Advocates. All the Services are now on exactly the same system and it seems unnecessary to have to maintain separate authorities appointing from different pools of civilian judges for courts martial. Given that we are going to have a unified system and a unified court, obviously that drives us even more logically towards having one rather than two appointing authorities.

Q60 Mr Cran: So the Judge Advocate General will not be a serving officer but, as it were, will be a legal professional?
Mr Morrison: He always has been for the last—

Q61 Mr Cran: Except for the Navy, did you say?
Captain Crabtree: The Navy have had an individual called the Judge Advocate of the Fleet who like the Judge Advocate General is a senior circuit judge who supervises and superintends our system. The Navy also had an individual called the Chief Naval Judge Advocate who was a senior naval lawyer. In the other two Services they are called Director (Legal Services) but we called ours Chief Naval Judge Advocate because he also had a role as a Judge Advocate and appointed Judge Advocates in particular trials. Once the case of *Grieves* was decided that appointment essentially came to an end and he is now called the Director (Naval Legal

Services) so there was a distinction between the Chief Naval Judge Advocate and JAF, the Judge Advocate of the Fleet.
Mr Cran: And I suppose there is no point my asking whether there is any resistance by the Navy to that, because you are so much in agreement it is unbelievable!

Q62 Rachel Squire: It is unprecedented for the three Services to be in agreement.
Captain Crabtree: Even the Judge Advocate of the Fleet and the Judge Advocate General's office are content with the proposal.

Q63 Mr Cran: Why am I not surprised at that answer! Again, because there is nothing else in the document about the Judge Advocate General that I can see, could you set out the functions of the Judge Advocate General? I presume he or she will do more than I read out at the beginning. Could you set that out for us?
Mr Morrison: The key functions are the appointment and overall supervision of the judge advocacy system. They choose the judge advocates, both those who will become Judge Advocates generally and those who will sit on an individual case, and that is the JAG's primary function. More generally, of course, he is an expert.

Q64 Mr Cran: Or she?
Mr Morrison: He or she—it happens it is a he at the moment—he is an expert in the criminal law generally and has judicial experience, and that lends weight to the comments of the Judge Advocate General or Judge Admiral of the Fleet and their offices in relation to things like legislative proposals and so on. They are also involved in helping with the drafting of the rules relating to the Courts Martial Appeal Court because that is governed not by MoD legislation but by DCA legislation. I think those are really the main areas.[8]
Brigadier Andrews: We are very happy to send you the page from the Queen's Regulations which sets out the role of the Judge Advocate General. He does traditionally provide the Army and the Royal Air Force and, in future, the Royal Navy as well with advice and have a general overview of the way that the military criminal justice system is working, and indeed personally I can say as a member of the reviewing authority he has provided invaluable advice in the way we have developed these legal and disciplinary matters over the years.

Q65 Mr Cran: So this post is exactly the same as at present in the case of the Army and the Royal Air Force; it is just going to be different in terms of the Navy?
Brigadier Andrews: Yes.

Q66 Mr Cran: Who is going to appoint him and for what sort of tenure?

Captain Crabtree: The Queen appoints—

Q67 Mr Cran: But who really does?
Captain Crabtree: The Lord Chancellor.

Q68 Mr Cran: We know she does not sit down and say, "Now who am I going to get?"
Captain Crabtree: It is on the recommendation of the Lord Chancellor in exactly the same way as any circuit judge.

Q69 Mr Cran: And I do not know what the tenure is.
Captain Crabtree: The tenure of a circuit judge, I think I am right in saying, is until 72 and there is no fixed contract, so to speak, with respect to the Judge Advocate General.[9] It may be that he or she wants to move on to a different legal appointment but there is no fixed term.

Q70 Mike Gapes: You referred to this case of *Grieves*, and there have been a number of other case, *Findlay* and *Hood*, which have led to changes subsequently to comply with decisions which went against our government in the European Court. The memorandum we have from the MoD in paragraph 22 says that Service law has evolved in recent years to take account of developments in case law both in the House of Lords and in the European Court of Human Rights and it then says, "These proposals"—the new proposals—"maintain an approach that is evolutionary rather than revolutionary". My question really is why should we have such a piecemeal approach? Are we waiting for further rulings against us in the future so that our evolutionary approach will then be again changing?

The Committee suspended from 4.48 pm to 4.55 pm for a division in the House

Mr Miller: The question I think, paraphrased, was whether we should be more revolutionary and less evolutionary than we have been. We have found through the extensive consultation involving the Services and developing these proposals no appetite from, if you like, the users for a more revolutionary approach. You linked the question to some of the changes which have had to be made in recent years and it is worth saying in that context that the fundamentals of the Service justice system have been repeatedly found to be well-based and compliant. We have made some significant adjustments but the core of the system has been found to be very much on the right lines, so we do not see from either direction a cause for a more revolutionary approach. What we have been doing, as you see, is trying to deal with some quite complex issues even in the evolutionary approach of moving towards a single system of justice.
Mr Morrison: I cannot add very much but to echo Julian. The consultations really were very extensive and very lengthy of all the Services of people of all

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[9] *Note by Witness*: Current JAG is a circuit judge appointed on a five year contract to act as JAG. He is also assigned to the South Eastern circuit.

ranks and rates, and the users overall regard the system of courts martial as an impressive, fair and good system. There is therefore no user appetite for radical change. Does the court require us to make radical change? The answer is no, patently. They have required changes and in 1996 they did require significant changes, that was the case of *Findlay*, but since then in every case that we have been involved in in front of the European Court of Human Rights they have always said that the system is basically sound, they have found things wrong with it, and no doubt in the future they will continue to scrutinise areas of it, both generally and in detail, and they may find further things, particularly in the details, that they do not like but we have to evolve in line with those requirements, if there are any. There is nothing which suggests in what they have said that we should change the system radically.

Q71 Mike Gapes: Could you tell me in what areas, if in any areas at all, a Tri-Service Bill will improve human rights compliance?

The Chairman resumed the chair

Mr Morrison: The most obvious one is consistency. That is not that we consider the existing position to be non-compliant, but certainly it has been the case, and *Grieves* was an example of it, that the court have themselves been worried and suspicious when different rules apply for no apparent reason, so if there are differences in punishments, for instance, if two Servicemen, one a sailor and one a soldier, commit an offence together and they are subject to different penalties, that is the sort of thing that will worry the ECHR, and I certainly see one of the key benefits of harmonisation as not strictly dealing with any legal point on ECHR but when we are before the ECHR and we are explaining our systems and sometimes having to justify them, it is far more convincing to do so on the basis that all unnecessary differences of treatment of members of different Services have been removed, so I think in that very broad sense that is important. There are one or two points where we have been concerned about ECHR. There is at the moment a very small restriction under naval legislation on the right to elect court martial trial instead of summary trial. We are going to remove that so that in all the Services there is what one might call a universal unfettered right to elect. We believe that is slightly safer in terms of ECHR compliance.

Q72 Mike Gapes: As you are aware, in the modern world sometimes lay people, civil society generally, does not really understand why there should be different disciplinary procedures and offences in a military context as there would be in society as a whole, and the reasons why those things are necessary. Do you not think it would be a good idea if there was to be an official MoD or government document, maybe even the Lord Chancellor could publish it, alongside the Bill setting out why there is a necessity to have these disciplinary procedures and offences for the Armed Forces which are different to those in society?

Mr Morrison: There is, I think, a very good setting-out by the House of Lords in the cases of *Boyd*, *Hastie* and *Spears*, the most recent House of Lords' consideration of the courts martial system, which they held to be compliant, in which they set out not just the law but the justification for a Service system and in broad terms the existence of a Service system, they recognised, is one which has to maintain discipline everywhere in the world and ensure that members of the Armed Forces—and I want to make sure I reflect their views as accurately as I can—that members of the Armed Forces have not had inculcated in them but if necessary had enforced both self-discipline in the sense of self-control, prevention of soldiers shooting, as it were, when they should not, as well as discipline in the sense of a willingness to obey orders by the willingness to attack an enemy, and that consideration has justified the setting-up of a system which is capable of understanding and applying those needs through a disciplinary system.

Q73 Mike Gapes: I think you have missed the point of my question. Really in a sense that may be something that has come out of a judgment in the Lords. What I am more concerned about is how we popularise, if you like, those arguments and put across the case because otherwise you might find the general public, society as a whole, do not understand perhaps the reasons. Is there not an argument that there should be—I am not saying a very simple document because anything that is involving legal questions is not going to be simple, but a document which can explain the reasons in terms which your normal member of the public and society can understand?

Mr Miller: That is a very fair distinction to make and it is not something we had thought about but we will, if we may, take that thought away and see if we can put it into effect. That is a very interesting idea.

Q74 Mike Gapes: Thank you. Finally from me, what safeguards are currently in place to ensure that Servicemen and women are aware of their legal rights, for example, to elect to trial by courts martial, and how will this Tri-Service Bill improve on those?

Brigadier Andrews: When a soldier is reported for an offence and he is then warned for orders to appear before his Commanding Officer, at least 24 hours in advance of that hearing he is given a little book and he is required to confirm to his CO that he has had this book when he arrives in front of him which sets out what his statutory rights are. He also has appointed an accused adviser who will be an officer or warrant officer who is known to him and will sit down with him and set out for him what his rights are and what the procedures are, so that it is absolutely clear to him. It is explained to him both in clear written instructions and by somebody he knows what his rights are, and that will cover his right to elect for trial by court martial, the procedure

that the commanding officer will follow, and subsequently his right to appeal to the summary appeal court, and the accused adviser is with him throughout that process.

Q75 Mike Gapes: Is that the same in all three Services?
Air Commodore Amroliwala: It is exactly the same for the Royal Air Force, and I will add also that the actual summary hearing itself, which is a scripted process, requires the commanding officer at a number of points in that hearing again to draw attention to the accused's rights under the pamphlet, the publication that he has been given and if necessary to adjourn the hearing if the accused in any way looks as if he does not quite understand so they can properly explain to him.

Q76 Mike Gapes: Is this equivalent to PACE in the Police Force?
Mr Morrison: No.

Q77 Mike Gapes: It is not a similar process?
Air Commodore Amroliwala: Other than they both relate to the rights of the accused, no.
Captain Crabtree: In terms of anything that goes before the formality of a disciplinary trial, of course the individual has those rights that would apply. At the hearing the naval position is as for the other two Services. It is also worth mentioning the representative that the Brigadier mentioned, the accused adviser. He is there to ask questions on behalf of the accused if necessary, so all the information comes out and he is there to mitigate if the accused is found guilty or the case is proven. So he is well represented.

Q78 Mike Gapes: The accused adviser being who?
Brigadier Andrews: He will be an officer or a warrant officer that is either appointed by the Commanding Officer if the accused wants him to, or the accused can say, "I would like Lieutenant Smith to be my accused adviser today, please, sir", and Lieutenant Smith, if he is available, will step forward.

Q79 Mike Gapes: It will only be someone of that rank? It would not be somebody who was just a colleague, or somebody of the same rank?
Brigadier Andrews: No, it would not. It would be somebody who was competent and confident to give him authoritative advice.
Mike Gapes: Thank you.

Q80 Mr Havard: I am glad to see they are not going to be calling a peer in that context to be one of their mates, as opposed to one down the other end! There might be one of them later on. I want to ask about this business of redress of complaints, if I could. As I understand it, within the structure currently an individual can escalate, through the processes you describe, a complaint to the highest level up to the Service board and so on. What they cannot then do is take cases to employment tribunals, for example. In the memorandum from the MoD it says that consideration has been given as to whether Service personnel should be brought within the scope of ordinary contract and employment law and so on. Can you tell me more about that consideration and what was the extent of the consultation that fed into that?
Mr Miller: I might come back to the process of consultation in a moment but the key issue we were concerned with here was whether we should be moving beyond the current position where there are, of course, rights to go to tribunal on grounds of discrimination, etc, and broaden that out into the other areas of Service life and the strong feeling, and I think this is widespread through the Services, was that to do so would be inimical to the fundamental relationship between members of the Armed Forces and the Service where there is a requirement for discipline in the Service and for people to, in effect, obey orders irrespective of whether they wished to or without questioning those orders, and to introduce into that relationship a degree of contractual relationship would be very hard to make it compatible with the effective maintenance of a disciplined armed Service.

Q81 Mr Havard: Can I add a supplementary because I am conflating two questions, and it is difficult to do it out of order. As I understand it, the engagement of Service is not, in the strictly legal sense, a contract so was this part of all of this consideration? Could you embellish on whether that was the driver, or was it something else? What was involved in that consideration?
Mr Morrison: Do you mind repeating the question? I am sorry.

Q82 Mr Havard: As I understand it there is contract law, in more general terms, there is employment law which relates one to another and often interrelates, but the engagement of Service is not a contract in the sense that Jo Bloggs would have a contract of employment which would be broader than just simply basic employment terms with Marks & Spencers or whatever—that is not the same relationship as far as Service personnel are concerned. Consequently how they relate to this whole process of redress and other tribunals and so on you have been considering, and you are saying there are certain things you feel are inimical with other obligations they have, but I wanted to get a little bit more about what was in that consideration and perhaps we can come back to whom you did consult?
Mr Morrison: I hope this is helpful, and forgive me if I do not give you the information you are looking for, certain aspects of employment law do apply to Service personnel. The most important by far is the law on discrimination, and in that area it was recognised that there was nothing in the Service disciplinary relationship which could possibly justify keeping members of the Armed Forces away from an independent judicial decision on whether they had been discriminated against, and therefore members of the Armed Forces, as does everyone

else, have access to employment tribunals in relation to discrimination. In relation to the much more general position, the normal everyday relationship, if you like, between the Army and the individual Service personnel, I have to go back to what Julian has said; there the relationship is seen as essentially one of discipline and not of "What have I agreed to and what have I not agreed to", and the urgency, if you like, of that disciplinary element, the importance of the immediate obeying of lawful orders without questioning whether it has been agreed or not, the need to be able to enforce that not by sacking someone but by some sort of immediate disciplinary measure, led us to the conclusion that in areas apart from discrimination that disciplinary relationship has to be structured first and foremost around the statutory relationship of command and discipline and not by examination of what has and has not been agreed enforced by things like dismissal or other employer-type remedies. Does that help?

Q83 Mr Havard: To a certain extent because I am beginning to understand a little bit more about how you approached it which was part of the question. It seems to me that in relation to human rights legislation there are things about equality and fair treatment which we have a particular process for dealing with through employment tribunals or whatever. Service personnel are in a particular position; therefore there is a particular set of obligations in relation to how they can be dealt with. In terms of terms and conditions as to whether they get pay and rations on time and other things then maybe not so, so there is a separation then, presumably, on broad headings of activity that you have to look at as to whether they can be said to be compliant by the fact that there is a process in one area, but does the other process cater for all the other terms? I am just trying to get a feel for who is involved in all of that consideration.
Mrs Jones: There are two points here. The point you have drawn out, that in some areas Service personnel can go to an employment tribunal where it does not interfere with this particular disciplinary relationship, is clear but for all the other areas where there is not that protection it makes it all the more important that we have a proper and effective and transparent system of redress, which is why there is statutory provision for a redress of grievance procedure within the Armed Forces which they can use. From that point of view, therefore, in those areas where we need to protect the relationship between discipline and command, the importance of having a system of redress is clear. In terms of the consultation, I do not think I can make very much more of that. The consultation has been very much within the armed Services themselves certainly, as we developed this process—I was not there for this particular bit, I am relieved to say, but all the proposals we have for the Bill have been matters which have been exhaustively discussed between the three Services as part of the joint approach, and so the consultation has not particularly, I think I would be right in saying, taken place with external bodies. It has been, "Are we clear that there are some areas of the relationship in terms of command and discipline that must be maintained in the way we have them at the moment? Can we go further than we have at the moment in terms of being able to apply directly to employment tribunals, for example, in relation to discrimination cases?" So that consultation has been internal rather than with outside bodies.

Q84 Mr Havard: I suppose once this process is running there will be external actors, as it were, in the picture who will look at it and make comment on it anyway. Presumably you will have some process of review examining whether or not it is efficient and whether you need to change it. Do you think it is a good idea that maybe you may bring in some external actors to perhaps advise you in terms of reviewing it, or commission them to look at it, because there is experience elsewhere about how these things could work that might be useful?
Mrs Jones: I would not rule that out. There are a number of ways in which the Services consult their own personnel about how particular processes work but I do not think there are any plans at the moment to bring in external people to see how the redress of grievance process will work.
Brigadier Andrews: Perhaps I could help here. In the Army three years ago we set up an office for the standards of casework, because it is the Director's, that is the Brigadier's job to look at how efficient and effective we are in following our own disciplinary rules and rules of complaints, and he does that and, of course, the work he has done has informed our consultation within the formulation of the Bill here, so we already have self-regulation of our own procedures here.

Q85 Mr Havard: That is very helpful but one of my questions was going to be on the question of other countries. You have consulted other countries and there is a list of them in the memorandum, and there may be others as well, but the position of whether or not people can, if you like, prosecute any arguments they have in contract law and employment law in different ways presumably was part of the consideration that came into the advice you got when you consulted other countries about how they do it. How do Canada, United States, Australia, New Zealand handle this and how is that fed into the process? Do they do it differently, do some of them not have the relationship you are describing?
Mrs Jones: I think it is generally fair to say that in Commonwealth countries and in the United States they also do not have contracts of employment in the way that we would have considered. And certainly in our consultation with those countries, and in particular Canada, who has done a very wide-ranging review of its disciplinary powers, we have drawn quite heavily on their experience in relation to their redress of grievance procedure in drawing together the proposals that we are now looking at for our own.

Q86 Mr Havard: Forgive me, yes, you have done that part of it but there is also this other part of it which is how they relate in terms of being able to press all the other things beyond the simple disciplinary matters. It is the contract and employment law, which is slightly different.
Mr Morrison: I think redress will cover, as it does at the moment, any case in which any member of the Armed Forces feels him or herself wronged or unfairly treated in anyway. It is not limited to disciplinary situations, and I think that is the same with Canada. Their redress system is also very wide-ranging. But in that sense, although there is still work to do on the structure of redress system, it will certainly be broad-ranging in the same sort of way that the existing redress provisions are broad-ranging. So we have, if you like, the quasi criminal jurisdiction which can result in an appeal; everything else that is not covered by appeal, any sense that somebody has been mistreated, if you like, is subject to redress and at the moment it can be literally on anything from pay policy to promotions or discharge or whatever.
Mrs Jones: Can I just add that I have been reminded that as part of the consultation process we did consult the police about their systems of complaint, and also ACAS.
Mr Havard: I would like to pursue this further but time does not allow it. There was an argument back in the early 1900s about this, was there not? We have uniformed Services that are not members of trade unions, so this argument has been run round once or twice before. There is a history to it. Maybe it comes into the questions that my colleague, Mr Gapes, was asking earlier on about clarity and about description, about separation, demarcation and people being clear exactly which things are included and not, why they are not and how they are dealt with if they are not?

Q87 Mr Viggers: The memorandum says there is to be a Tri-Service Redress of Complaints Panel but that further work will be needed on the detail. Can I probe as to how we are getting on so far and where we think we are going? How is the further work progressing and when do you expect to complete this?
Mr Miller: It is progressing. There is a working group looking at how best to develop the redress arrangements. It is, indeed, likely that we will come up with a new panel; that panel will, we hope, lead to some improvements in the redress process, that it will lead to speedier redress, that it will remove from the Service boards some of the issues which at present they have to deal with which are not perhaps always of terribly high significance: that it will be a system which is perhaps more clearly separated from the chain of command and has a more visible degree of independence in cases where that is appropriate, and in particular that it is a system of review by a panel which will be empowered clearly to take appropriate action where redress is appropriate, and that we hope it will be in a position to give those complainants who are found to have a justified case a speedy and effective remedy.

Q88 Mr Viggers: Have you decided how many members of the panel there will be yet?
Mr Miller: We have not decided the details of the panel but it is likely to be something which we can constitute from a variety of people who will be providing a pool at a, in military terms, Two Star level to appear on the panel. It will be, I expect, able to draw on military and civilian members and to adjust its constitution according to the particular redress case that is coming forward.
Mrs Jones: In general we would expect the membership to be about three.

Q89 Mr Viggers: And these will be Two Star, or possibly One Star?
Mrs Jones: Two Star.
Mr Miller: Normally Two Star. I think you are picking up the reference in the memorandum to the possibility of involving One Star.

Q90 Mr Viggers: Yes. I was wondering which arms these would come from? Might there be a predominance? I would imagine a Special Forces person would rather have a Special Forces person on the review panel than a submariner. Is there likely to be a predominance of those with legal training and personnel experience?
Mr Miller: I do not think we have really got our proposals for the redress panel in a sufficiently developed state to give you definitive answers on these points but we would certainly expect there would be sufficient scope in the pool of panel members to ensure there were people of appropriate background and expertise to deal with individual cases as they came forward.

Q91 Mr Viggers: Because to get that appropriate expertise and experience they probably need to be personnel-trained rather than dagger-in-the-teeth, and I wondered whether you will be seeking to get a cross-section of the Armed Forces on the panel, or whether these will be people who are specifically trained in sitting on panels?
Mr Miller: I do not think we are looking at people who are going to be full-time panel members, but people who will have day jobs but expertise which will be brought to bear usefully in that sort of panel.

Q92 Mr Viggers: Can I ask about the constitutional relationship between officers and the Sovereign? As I understand it from the memorandum it is made clear that issues of significance like dismissal or issues of that importance might still go through to the Sovereign, whereas other issues will be stopped at a lower level. Can you tell me what happens when an officer successfully petitions to the Sovereign?
Mr Morrison: The case must have first gone to the Board, and if a petition then is made to the Sovereign it is put through the Secretary of State to the Sovereign who acts in her normal constitutional

position taking advice from ministers, but she can look at any aspect of the case put to her and can give any instruction that she thinks appropriate. In other words, the person petitioning does not have to ask for a particular remedy or allege some legal defect or anything like that, so it is a very broad range of activities of actions that Her Majesty can take. Clearly at the same time there is a recognition constitutionally that she has entrusted the basic decision on these matters to the Defence Council and that, therefore, the power should be used sparingly otherwise there could be scope for, in the event, executive interference, in the broader sense Crown interference, in the process, and it has been reckoned for 100 years that the Sovereign's involvement in these cases has to be where it is manifest that justice for some reason has not been done by the Defence Council rather than her acting as a re-hearing from the start of the whole case. So it is a fairly limited procedure in which, as I say, she is not looking at the whole case afresh but seeing if there are grounds for it to be clear that justice has not been done. In that case, she can take any action she thinks appropriate.

Q93 Mr Viggers: But she takes advice from ministers?
Mr Morrison: Constitutionally she does, yes. It is not a personal power of a Sovereign.

Q94 Mr Viggers: So it is not, as it were, the prerogative of calling for Mr A or Mrs B to form a government from which she consults her own advisers?
Mr Morrison: No. She consults the Secretary of State.

Q95 Mr Viggers: Will all proposals relating to the redress of grievances set out in the memorandum be included in the Bill? Do you yet know?
Mr Miller: I think the answer is that we do not have the proposals fully developed yet but it is not clear that all of them will need to be in primary legislation.
Mrs Jones: A bit like now, the right of redress at the moment is covered in one section in each of the three discipline Acts. Underneath that there are at a lower level the procedures and so we would not envisage the full system of redress to be in the Tri-Service Act, no.

Q96 Mr Viggers: And is there a procedure whereby you take the view of serving personnel officers and other ranks about the proposals you have for disciplinary procedures?
Mr Miller: In terms of the proposals which we are now developing for redress?

Q97 Mr Viggers: Yes, specifically and generally?
Mr Miller: Well, that is part of the general process. It is a very wide consultation.
Brigadier Andrews: We have certainly within the Army explored in a number of ways how we, over the years, have developed our disciplinary procedures and we test the fairness, the perception of fairness, in our own continuous attitude survey where we ask our people, a significant number from time to time on a regular basis, "Do you feel that Service disciplinary procedures are fair? Have you been treated fairly?" So not only do we consult on how we should develop our procedures; we also test them as we go.

Q98 Rachel Squire: I want to ask you about Boards of Inquiry. I understand it is envisaged that the Tri-Service Act, subject to on-going work, should provide for a single system of Service inquiry encompassing present Boards of Inquiry and regimental unit inquiries extended to cover the Royal Navy, so quite a radical proposal for the Royal Navy. The memorandum currently says this is going to carry on with work progressing, so can I ask those of you who would like to comment what your views are and how the work is progressing?
Captain Crabtree: The principal difference between the Royal Navy and the other two Services at the moment is that our power of Board of Inquiry is in prerogative, whereas the Army and the RAF's is statutory. The reality is that we are pretty close together in many respects because once one goes below and looks at the rules we have in place there is a degree of commonality. The proposals that are emerging at the moment will result in Boards of Inquiries in circumstances where you would have Boards of Inquiries at the moment, so no real change. It is just a harmonisation of the system and it will not affect the number or the sorts of circumstances where we would have them, but we see sense in harmonisation and we see sense in adopting some of the proposals which relate to what the other Services do, for example, the right or requirement to take an oath in giving evidence. We do not do that at the moment but we listen to what the other Services have said about the advantages and we are entirely happy to go down that route. So it is not a radical change, I do not think, in reality for the Navy.

Q99 Rachel Squire: So you are being positive?
Captain Crabtree: We are being positive.
Brigadier Andrews: I think that the work we have done on Boards of Inquiry here is a really useful harmonisation. It gives us a straightforward, single, understandable system that we can put in place and use effectively. This is, for us, a really useful progress.
Air Commodore Amroliwala: The variety of inquiries we have had in the past have been sometimes ill-defined in the sense of which inquiry might be most suitable for which circumstance. This is going to bring far greater clarity so those who are both running inquiries and those who are subject to inquiries will have a far better understanding of the nature of what it is we are doing.
Rachel Squire: Thank you. I think that answers that particular topic.
Chairman: We will end at this point; you have suffered enough!

Q100 Mr Viggers: Just quickly, the intention is to use the Armed Forces Bill as the vehicle for implementing administrative change. Is it your expectation and intention that this will operate in the same way as previous select committees on the Armed Forces Bill, which will have a Select Committee stage prior to the Standing Committee?
Mr Miller: Subject to the views of the House, that is our expectation.

Q101 Chairman: The views of the House can prevail a little. You are very lucky; you have been saved by the bell. I am about to launch into a diatribe about the appalling misuse of the Select Committee on the Armed Forces Bill, which excluded free and independent members of Parliament; it was an outrageous abuse of parliamentary power by the Alternative Executive, PPSs, Whips. The only honourable person there was Rachel, but she was a trustee who was put on, and if there is anything remotely resembling that farce of composition I hope the House will express its anger in the strongest possible way. Now, we will write to you on that[10] and the Clerk will be a little more discreet than I was in expressing our views!
Mr Miller: We will look forward to that. Thank you.
Chairman: Thank you very much for coming.

[10] Ev 67

Wednesday 2 February 2005

Members present:

Mr Bruce George, in the Chair

Mr James Cran
Mr David Crausby
Mr Mike Hancock
Mr Dai Havard
Mr Frank Roy

Witnesses: **Mr Ivor Caplin**, a Member of the House, Parliamentary Under-Secretary of State for Defence, **Mrs Teresa Jones**, Head of the Armed Forces Bill team and **Mr Humphrey Morrison**, Legal Adviser, Ministry of Defence, examined.

Q102 Chairman: Welcome to you all. This is our second session on this subject and we are pleased to be involved in the early stages. Minister, are there any introductory remarks you would like to make?
Mr Caplin: Chairman, thank you for those remarks. First, I would like to thank the Committee for agreeing to undertake this early investigation. It was from a discussion that you and I had and an exchange of letters that I thought it would be useful in the interim period for the Select Committee to be able to take a view on some of these matters.

Q103 Chairman: Thank you.
Mr Caplin: The officials joining me you have seen before when you took evidence on 27 October 2004. For completeness I will introduce Teresa Jones, who is head of the Bill team and Humphrey Morrison who is legal adviser to the Bill team for the MoD. I thought it might be useful, Chairman, if I outlined a few principles for the Bill. I will not be too long, I know how Select Committees do not like long introductions to ministerial evidence.

Q104 Chairman: It never saves questions, we ask the questions anyway.
Mr Caplin: Just let me say a few introductory remarks, if I may.

Q105 Chairman: Please.
Mr Caplin: First, Service law is essential to the continued operational effectiveness of our Armed Forces. We are absolutely clear at the MoD about that. The system that we have has to be fair, consistent, efficient and, of course, compliant with the European Convention on Human Rights. We do ask an enormous amount from our Armed Forces and we owe them nothing less in terms of the processes. This Bill will give Parliament a real opportunity to improve the existing provisions. The piecemeal amendments over the years have brought about useful changes and they have helped us to keep Service law in line with developments in civilian law but the result is an incoherent whole which does not reflect and support as well as it could the way in which our Armed Forces operate in a modern world. The Strategic Defence Review, which you will recall with fondness, I am sure, Chairman, actually stated that a single system of Service law that operates equally well in single and joint Service environments would better support the Services which are increasingly deployed and trained together. It will enable Commanding Officers to apply discipline fairly, efficiently and consistently to all under their command of whatever Service. The proper protections and safeguards that ensure a fair system will be clearly enshrined in this legislation and we can make improvements to processes which will help ensure that justice is not unduly delayed. I want to emphasise this afternoon that the principles have the full support of the Service chiefs. Harmonisation and modernisation of summary and court martial powers and processes follows extensive consultation and discussion at the Ministry. The approach now has been evolutionary not revolutionary. The proposals on discipline do not affect the fundamentals of the current system in any way. They preserve its focus on the Commanding Officer with the majority of cases dealt with summarily and more serious cases tried by court martial. But I do not under-estimate the size of this task. There is an enormous amount of detailed work going on to ensure that we make the most of the opportunity we have now and we must not waste this opportunity, we need to ensure we get this Bill right. In parallel we recognise, also, that if this is going to be as successful as it should be we need to devote resources to its implementation, and we will. A modern and fair system of Service law, Chairman, is as important to supporting operational effectiveness as having the best trained and equipped forces as possible. A harmonised approach to Service law is about enhancing operational effectiveness. That is the prize. Thank you, Chairman.

Q106 Chairman: Thank you very much. That is well received. Minister, when you wrote to me on 5 October you acknowledged that this was a very substantial project and that you were operating to a demanding timescale; I looked back with some irony, at least a decade before you came on the scene when this legislation was promised, so although you may have been operating on a demanding timescale, the MoD overall has been operating on an incredibly relaxed timescale. I am really glad before I bite the dust I will be able happily to observe the passing of this piece of legislation. You have given us two memoranda relating to the Tri-Service Armed Forces Act which set out the main proposals and progress that you have made in developing them. However, it appears that there is still, as you have implied, a lot of work to be done before the Bill can be introduced. I wonder whether it is possible,

Minister, for you now or later to give a commitment that if there is a substantial addition to what you are proposing at least the next Defence Committee will have the opportunity of perhaps looking at the addition to what you have been able to achieve up to this point in time. Can you drop us a note as to whether that is feasible?
Mr Caplin: Let me say, firstly, I hope you are not planning to bite the dust just yet.

Q107 Chairman: No, I am not planning it, no. Not quite yet, next Parliament.
Mr Caplin: I anticipate that although there is a lot of work to be done, officials are very clear that we have a timetable to meet. This is supported strongly by ministers and the MoD. We need to try and ensure that the timetable is met. We have a commitment to introduce this legislation in the next session of Parliament, that is still our intention. If there are major changes that would change the nature of the Bill in a substantial way then I think it would be right and proper for me to consider again whether or not we had to come back to the Select Committee for another look.

Q108 Chairman: Certainly we will not want to hold up the process.
Mr Caplin: I appreciate that and I appreciate the work that has gone on previously on these issues where, as you say, there has been some time which people have spent looking at these issues.

Q109 Chairman: I know there is very little legislation that is passed by the Ministry of Defence and I think it is quite helpful if it comes to this Committee first because once we have looked at it and said "fine" then it gives the Minister enormous ability to be able to say "Well, look, this Bill has been examined by a Committee in the House of Commons and they have agreed to its content". I cannot imagine why the process is not used considerably more frequently. Certainly I accept what you said, Minister.
Mr Caplin: Okay. I do not think I need to comment on that.

Q110 Chairman: How confident are you that the Bill will be introduced in the autumn of this year? You seem pretty confident?
Mr Caplin: I am confident. Just let me clarify what I have just said. Recently I have had further discussions with the three Service Principal Personnel Officers and we have discussed the introduction of the Bill. We are confident about meeting the target that the House has asked us to meet which is to introduce this in the next session of Parliament. We aim and expect to be able to do that. Of course implementation will take place after Parliament has completed its deliberations but now we have a clear timetable and, yes, we intend to meet it.

Q111 Chairman: I know this is a hypothetical question, so I can save you an immediate answer, but should there be any delays—and there could be—would it have any impact upon the operational effectiveness of the Armed Forces if it is not introduced, as we hope it will be, in the autumn of this year?
Mr Caplin: I think we have to reflect that the introduction of a Bill into the Commons in the autumn of this year is not the same as changing the Service law in the autumn of this year. Clearly the Service law structure that we do have is affected, it is compliant with the ECHR. We have been through the changes we had to make, for instance, in the Navy this time last year; therefore I think we have a system that is coherent. A slight problem is that in terms of tri-Service we need a better system which reflects the whole and allows the Services not to be stove piped, if you like, but to operate on that tri-Service basis which the Committee will recognise.

Q112 Chairman: Could I ask Teresa—who is very well known to us in a very positive way—can you give us some indication of the process which was involved once you started working on this? What kind of working parties were there previously once Treasury Counsel was withdrawn and the whole process came to an end? How did it get up to the level of ministers? The MoD does not do much legislation so it must be, if not unique, pretty unusual?
Mr Caplin: Just before Teresa answers, we have done quite a bit since I have been in post with pensions and compensation.

Q113 Chairman: You know what you are talking about.
Mrs Jones: Chairman, yes, it is always pretty exciting for the Ministry of Defence when it has legislation, challenging as well. This process did start quite a long time ago because we always expect to have a Bill before Parliament every five years renewing the Service Discipline Acts. Work really started in earnest on a Tri-Service Bill back in about 2001. Most of the work involved a great deal of consultation with the Services themselves at the beginning because this is an enormous change for the Services to move to a single Act. A lot of that consultation, which we wrote about in the first memorandum, included the experience of countries overseas. I am sorry to say that most of the work took place through a committee called SDWARP, which is the Service Discipline Acts Review Working Party. It was through that committee structure, which involved all three Services, and a central team, that we really developed most of the policies, I think, for the Tri-Service Bill. It is a system that I joined in 2003 when the work was well underway. As we have effectively a guaranteed place in the parliamentary programme every five years, because Service law runs out every five years, we could plan at least with some confidence on that basis, together with the encouragement of Parliament to pull our finger out. In terms of the process, because of knowing we have a place in the parliamentary programme, it is easier to secure the service of the parliamentary counsel at an earlier stage than some of the Government departments would enjoy because we do not have quite the same struggle in terms of finding ourselves a place in the parliamentary programme.

Parliamentary counsel is engaged with us at the moment, very heavily indeed, in doing the first draft of some of the clauses. Our responsibility as a team is to draw the policy together, get the clearance that we need both within the department and with other Government departments that are affected, and it is that process which we are engaged in at the moment.

Q114 Chairman: At what stage, Minister, do you get involved?
Mr Caplin: I have taken a close personal interest in the whole process, even down to our exchange of letters, memorandums, et cetera, et cetera. I should emphasise that colleague ministers, including the Secretary of State, are taking an active interest, also, in areas of the Bill and I think that is right because my noble friend, Lord Bach, will meet with peers tomorrow to talk to them on a similar basis to that which we are having today. All of us are engaged and obviously Mr Ingram will be involved because of his responsibility for operations. It is essential that from a ministerial team perspective we are all across this and I can say to you that we are and we are all engaged in the processes.

Q115 Mr Cran: On to the question of consultation. I do not think any of us can disagree that good employers will consult their, I suppose one has to use the word, "employees" on this occasion. Therefore that begs the question how much consultation the MoD has done? Certainly you acknowledged that you had to do it in your memorandum at paragraph 13 but I have to say to you that the Committee is out and about quite frequently these days and on our last two visits to Cyprus and Northern Ireland we were hard put to find anybody with much knowledge about what it was you were about. Just talk us through what this consultation exercise has been? How profound has it been and how many of the employees do you think you have got through to?
Mr Caplin: That is a very interesting question, Mr Cran, if I may say because I would expect very few of our current serving members of the Armed Forces to know what we are doing at the present time. This has been very much about bringing together the chiefs and bringing the officers and understanding the processes that Teresa and her team can put to ministers. Having said that, there will be significant internal and external consultation and public relations' campaigns once we get the Bill a bit further on. For instance, I think certainly when we receive your initial views as a Committee about the Bill that will be one of the areas that we will start to look at, placing articles in our Service newspapers and developing a coherent strategy for consultation. I think that is probably the right approach at this stage, given the early stages that we are at. If the Bill was in Parliament I think the criticism that you are suggesting to me maybe would be more valid but because we are in a very early stage I would not expect lots and lots of our soldiers, for instance, and the infantry to know what was going on.

Q116 Mr Cran: I should say to you I mean no criticism whatsoever, I am trying to get at what you are doing and what you are about.
Mr Caplin: Yes.

Q117 Mr Cran: Therefore it would really be wrong of me to use the word consultation, would it not? What you have been doing is consulting at a particular level within the Armed Forces?
Mr Caplin: Yes.

Q118 Mr Cran: What have you been consulting them about?
Mr Caplin: Teresa can answer some of the detailed questions on those discussions because she was conducting these before I came into post. From my own perspective, every time I have met the Principal Personnel Officers and DCDS (Personnel), we have a natural discussion around the table about the progress of the Bill, issues that maybe we need to look at in a strategic sense which we can feed back then to Teresa and the team. That has been a very effective process, I think, because ultimately those PPOs and chiefs and the Commanding Officers are the people who have to make this work in a couple of years' time. Teresa will give some background.
Mrs Jones: Sadly, actually, I was not around for that consultation period. All the travel was done before I arrived. There was extensive consultation at the early stages and not just with officers. As I understand it, the consultation took place—I think Humphrey Morrison was involved in some of that and he will be able to add to this—in a sense at the beginning so that our proposals could be framed with the result of that consultation in mind. Certainly what we are proposing now is to move to an informing stage but we do bear in mind that implementation will take quite a long time and there is a danger of going too early, telling some people about a system of Service law which is not going to come in for a few years. Humphrey Morrison may like to add some comments about the consultations.
Mr Caplin: Just let me amplify this because I think this is quite interesting. These discussions were going on in 2001–02, that is four years ago. Around 70,000, ie a third, over a third, of our Armed Forces will have moved on, back into the civil sector, into civilian life since then. Timing of this consultation and discussions in terms of public relations are very important given that we have to operate the systems of Service law that we have today. It is important that is understood by today's Armed Forces. There will be an occasion in the future when we start to talk more about those people who are going through the Armed Forces in 2006–07 when we implement this new system of law. I do not know if you want to add anything?
Mr Morrison: A little bit. Yes, we spent at least 18 months visiting units and commands both in Britain, Northern Ireland, Kosovo, Germany, Cyprus and elsewhere. We discussed at all ranks, from the senior command to open meetings with all ranks. In some cases we were able to subdivide and consult with junior ranks then NCOs, warrant officers and officers, all separately. This was not obviously

consultation on the Bill, it was asking them about their views of discipline, the way discipline worked, their views of the other Services' disciplinary arrangements. Where we were meeting joint units—the JHFJoint Helicopter Force, for example—we were able to talk more specifically about their perceptions about the differences in the way they were treated because a different law was being applied. I describe that more as a fact finding exercise on a very large scale but which, certainly, at the same time, had a very significant impact on what ultimately we proposed, even getting down to quite a lot of the detail in terms of summary jurisdiction, the degree to which things should be harmonised, how COs are to operate where you have a joint force and so on.

Q119 Mr Cran: Just so that I can get this clear in my mind, I have had two propositions thus far, a consultation exercise, which has very clear connotations, and then you used the word fact-finding exercise. I am not sure I understand that the two are coterminous. Were you asking for opinions, that is what I want to know?
Mr Morrison: We were. We were asking for experiences, information, opinions and suggestions. It was not consultation in the sense that we were not putting to them our proposals and saying "What do you think of those"? I was trying to draw a distinction between that sort of exercise, which is the next stage, and the sort of, if you like, consultation or fact-finding which was making sure that we understood how people at all ranks saw the problems, not necessarily just the problems but what they thought was good about their existing systems, problems of efficiency, paperwork, all sorts of aspects. I would describe it as predominantly fact-finding but with the emphasis on getting people to give us not only purely factual information but their opinions on the good and the bad in the system.

Q120 Mr Cran: So we have been fact-finding, that was the first exercise; consultation, was that almost ploughing in with the fact-finding or do we move on to that stage next?
Mr Caplin: To an extent, I see this exercise as part of the consultation process, that is why the Chairman and I exchanged those ideas and letters as to how we could get a process going that would give us some different views about tri-Service discipline and the Bill. Notwithstanding whatever report ultimately comes back, this has been a useful exercise for us already in being able to address many of the issues that have been raised over time by members of the Armed Forces themselves and the Defence Select Committee. I think this is part of the consultation process but I should emphasise that we have a very, very demanding timetable as we have established already. Long consultation is unlikely but some consultation is necessary.

Q121 Mr Cran: We are very grateful and we all are here, we are being consulted, but, of course, it is very important that the end user is going to be consulted too. What I read from what you have said is that you are not going to have a lot of time to consult the end user but you are going to have some time and will do a measure of consultation?
Mr Caplin: Yes. I anticipate being able to start consulting around mid year when we will have had the views back from the Select Committee. We will have formulated more proposals; we will talk through the Chain of Command where we are and then go out and do some consultation. That should be in good time for the introduction of the Bill in the autumn as we have discussed already.

Q122 Mr Cran: Let us just hypothecate: maybe some body of opinion is going to come forward that you have to take notice of, would it be too late to take account of that?
Mr Caplin: I think that would depend on the gravity of what was raised. I would hope from a ministerial perspective, and working with Teresa and the team, that we will have covered all those. If someone comes out of left field and says "What about this" and it is a showstopper then we will have to come back and consider it. That was the nature of the Chairman's opening question, I think, in terms of the range of what might come out. I am not ruling that out but I am pretty confident that we have covered most of the basics, but we will have to see.

Q123 Mr Cran: My last question: once we get the Bill, it is in this place going through the mill, the House of Commons and Parliament, there may be changes there which affect Armed Forces personnel fairly profoundly, who knows, how will you inform them of that? Are you aiming to inform them as it happens or has this got to be rolled up at the end when the Act is in its final stage and you communicate?
Mr Caplin: I think we have quite a good experience from what we have been doing already in the last 18 months on pensions and compensation where we outlined some of the principles of what we want to try and achieve. Then we had a regular update to members of the Armed Forces as the Bill went through and now we are planning a major exercise, of course, in relation to the transfer, for instance, of pensions and the new compensation scheme which will come into force on 6 April. That experience that we have learnt there will be put to good use in developing a proper strategy for delivering details of this new disciplinary law to the Armed Forces.

Q124 Chairman: Mind you, we did produce our recommendations to you on pensions and compensation and it did not make a blind bit of difference.
Mr Caplin: Chairman, I think that is a very interesting comment. I would say to you that I read them with interest and I responded quicker than the usual timeframe, I think, to your suggestions, some of which were okay and some of which were not.
Chairman: Perhaps you could tell your predecessor, a good bunch of people on the Defence Committee. That is provoking you.

Q125 Mr Hancock: Minister, if I could take you back to your opening statement. You used the words: "It will enable Commanding Officers to apply discipline fairly, efficiently and consistently". I think consistency is the important thing here, is it not? One of the failures you hear time and time again is where some people end up being court martialled and others do not for virtually the same issue. It is that element of discretion which causes so much concern. I am interested to know whether you believe you can now ensure that there is a consistent approach to these matters?
Mr Caplin: Certainly the key principle of the Bill that I outlined in my opening remarks is to try and ensure that.

Q126 Mr Hancock: How do you do that?
Mr Caplin: One of the areas that we are going to have to undertake in terms of introducing this Bill is a proper programme of training for all Commanding Officers. That is going to be quite an interesting and large logistic exercise but what I can say to the Committee is we are absolutely committed to that. Now, as we go through that training exercise we will have to make clear to COs exactly what is expected of them at each level so there is a proper understanding and consistency across the board. That is what we are aiming at, and I think rightly. Because we operate in a joint environment we all know around this table there are no single Service operations any more, very unusual, even the tsunami is a collection of different forces or Carlisle, these things reflect a tri-Service approach, we have, therefore, in terms of discipline, to have that approach. I think the best thing we can achieve is effective and proper training of Commanding Officers which allows them then to make those judgments about consistency.

Q127 Mr Hancock: Have you reflected back, say over the last four years, on those cases which have progressed to court martial and similar instances where Commanding Officers chose not to go that way? In the Navy, for example, there are many examples where people facing the same repercussions have not gone down the same path. There is a genuine feeling that this issue is one of lack of consistency, lack of Commanding Officers having the nouse to see the problems which arise out of not having a consistent approach. I want to know whether or not you are absolutely sure that these things have been properly exercised by the consideration you have given which would lead me to believe that we have learnt from that. It is one thing saying "We are going in for extensive training of Commanding Officers" but there has to be some proof that, for the people they are dispensing justice to, this is still going to be delivered in a fair and proper way. It does not mean necessarily courts martial will be the norm because Commanding Officers will not want to exercise discretion but discretion has to be exercised consistently also, does it not?
Mr Caplin: I think there are two things, Mr Hancock, if I may say. Firstly, there will be an increase in terms of the numbers of offences for Army and RAF COs that they can look at. We think it will double from about eight to 16. I think that is probably right reflecting the difference between Army, RAF and Navy and of course there is a difference there if you are away on a ship it is completely different for six months than if you are here on a base, and we all accept that. Also, we have, of course, the independent prosecuting iesauthorities which were introduced in 1997, and you will recall came from the 1996 Act, in the light ofthe *Findlay* case before the European Court of Human Rights. Now that independent prosecuting authorities areare there really to act, as we would know as constituency MPs, like the Crown Prosecution Service. What we are going to do from 1 April this year, and this is in advance of the Act, is we are going to bring in a central court administration authority which I hope will give us some efficiency gains in advance of the Bill coming in. We will start to have some idea of how this process is going to work in the wider context.

Q128 Mr Hancock: Reading your memorandum, I want to get back to it, if I was Service personnel I would want to be sure that irrespective of which base I was on, which squadron I was working with, which ship I was on, I was going to be treated fairly. In the memorandum it says that the Commanding Officer, after getting evidence from the relevant military authority, the RMP or whoever has carried out the investigation, will then make a decision. He will not have to refer that to the independent prosecuting authority if he chooses not to pursue it to a court martial. I want to know that the people who are going to be subjected to this discipline can have confidence that a Commanding Officer would exercise that discretion the same, whether it is in Portsmouth or Devonport, or whether it is in Bosnia or Baghdad?
Mr Caplin: I am not going to say to you today that is possible because these are a huge group of Commanding Officers. I think my original answer still stands that we have to go through a programme of training, you can call this a cultural change programme, if you like, because the role of the CO is going to be slightly different. There will still be summary powers that they can dismiss, of course, and that is why we ask people to be Commanding Officers. I think the Committee has heard me say this before, we do not run operational theatres from Whitehall, nor should we. It is important that COs run their operational theatre whether it is in Basra or on board *HMS Chatham* over the new year, those are all important areas of how the Armed Forces operate. I think we are going to have to undertake training to deliver exactly what you are suggesting Mr Hancock. I accept that entirely and I am not balking at that but it is a major exercise which I do not think we would want to undertake yet. We would want to consider how we undertake that exercise in the run-up to implementation of the Bill, not the run-up to the introduction of the Bill.

Mrs Jones: Just adding on that specific point, we are looking particularly at the COs' powers in relation to court martial only offences. There are a whole range of offences which can only be dealt with at court martial. In those cases, the CO will not have the power to dismiss those offences. They will have to go to the prosecuting authority because that is the right place for the prosecutorial decision to be made, when we are talking about serious offences. It will be absolutely clear in the legislation what the COs' powers are in relation to different sorts of offences and in the secondary legislation that underpins it and, indeed, in the guidance and training to which the Minister referred. I think there is probably not a lot more I can say in that respect. It will be set out in the legislation what the CO can do. He will not have complete discretion in relation to serious offences.

Q129 Mr Hancock: I apologise to Frank, because Frank felt that question relating to your opening statement impinged on his questions.
Mr Caplin: I do not want to cause a spat in Committee. It would not be my style at all, Chairman.

Q130 Mr Hancock: I apologise with courtesy. What lessons have we learnt? With 65,000 of the British Army now having served in Iraq, what have we learnt about disciplinary changes that need to be made from that experience with such a large number of people being deployed through a theatre?
Mr Caplin: Let me put it this way, because these are difficult times to talk about current operations as we all appreciate.

Q131 Mr Hancock: Of course.
Mr Caplin: I am going to have to couch this in rather vague terms. I think from current operations, and you are focusing on Iraq, I will talk about Afghanistan, the Balkans and other things, I think what is reinforced by visits and discussions with our forces there is the tri-Service nature of what they are doing and, therefore, the need for disciplinary powers and court martial processes that represent the modern approach. We know round this table that most of this discipline relates back to the 1955 Acts and, in the last two years when I have come before the House, we have reintroduced the various powers. They know that those Acts are 50 years old. They know it needs changing. Certainly when I have been out and about, and I have been to most of the places that you have been to, maybe one or two more, I think they understand the need for a new approach on a tri-Service basis to disciplinary powers. I think that is the message I would get from current operations given that I cannot and will not go into every detail.

Q132 Mr Hancock: No. I do not want you to take us down that road. There are lessons that have been recognised as to the very nature of the way our Services react now and the Bill will reflect more fully the lessons of those experiences wherever they be.
Mr Caplin: I think the Committee would recognise that one of the things which the Ministry of Defence does extremely well is to learn lessons from the past. I would contend that sometimes we are our biggest critic, even accepting the Select Committee's views and other organisations internally. Some of our reports into various matters have been much more critical of our own processes than others have been. Where we have lessons to learn it is essential we learn them because, as I said in my opening remarks, good discipline means good ethos and that means good soldiers, sailors and airmen, which is important.

Q133 Mr Havard: If I can take you on to the dirty detail of money. As I understand it from the reorganisations that are described, you said you would take a little bit of advantage of making some economies of scale or some advantages in terms of the prosecuting authority. The idea, as I understand it, is that by integrating the various processes or unifying them which exist currently for three separate Services, that is the prosecuting authorities, the admin offices and so on, there are likely to be some financial savings in relation to that, potentially. Perhaps you could say something about any savings that come from this. It would seem to me that one of the other areas of savings is going to be a reduction in the number of courts martial?
Mr Caplin: I would not like to comment on the latter, to be honest, because I think that is quite a difficult area to comment on, whether it will go up or down, it does depend on the circumstance in any particular year. At the outset, this is not about saving money, this is about good tri-Service disciplinary law. It is probable this will cost us money rather than save us money, even allowing for introducing the administration authority, that is such a small part of what we are doing. If you take into account the major training programme which I have just been talking about, there are obviously costs associated with that. There are likely to be infrastructure costs to put this together, there may be other costs that we will have to meet. The commitment is that we will meet those costs because we see this as essential and important and I have tried to emphasise, as you will be aware when you have heard debates in the House, the importance of our personnel to the Armed Forces, and this reinforces that message.

Q134 Mr Havard: I am very interested in what you have just said. What I am trying to get at is—perhaps I am becoming cynical, moving from scepticism to cynicism—often bean counters in the Treasury and elsewhere say "Where is the advantage financially?", maybe not initially but over time, the extent to which "savings" are seen to be a tool in driving through the process. What you seemed to be saying earlier on was that is not really required, it is not what is motivating this particular change.
Mr Caplin: It is not motivating it at all, it is the importance of what we are doing. I do not want to mislead the Committee in any way at all. If you are asking me to crystal ball gaze five years or seven years down the line, I think it is likely you will be in

a cost neutral situation because you will have spent your costs upfront to create your prosecuting authority, your training, your administration approach, et cetera, you will have a tri-Service basis. I think it is likely over a longer period you will start to see some savings. To suggest you will see lots and lots of savings which you can put back to front line operations is not why we are doing this, and I do not see that is possible.

Q135 Mr Havard: I am reassured by some of that. In your statement you talk about ". . . devote resources to its implementation", I think that comes back to some of the questions my other colleagues have been asking about consultation, knowledge, understanding and confidence in a process because I think what we see is, if you like, one person's complaint is another one's indictment, as it were. Often the two sides of the same coin are being looked at by a process in all confidence that it will come forward. As you will know only too well, we have been looking at a number of things in relation to our duty of care inquiry where people feel that the process has not done justice to the command, rightly so, in a lot of cases, it would seem to me, in the past, so confidence in the process. There is an opportunity cost, is there not, for getting it wrong in that sense which also redresses against any crude financial savings there may be?
Mr Caplin: Certainly there is, if we get it wrong and that is why we are determined not to, and I made that clear in my opening remarks in response to the Chairman, that we are determined to get this piece of legislation right, and it is important that we do. I can only restate that this is not about saving money, and if there are savings it is in the longer term.
Mr Roy: Minister, most of my questions have been asked and answered.
Mr Havard: That will not stop you.

Q136 Mr Roy: It will not stop me, no. From the notes we have, I am surprised to know there are 15,000 summary disposals a year, which seems a huge amount. I did not expect to read that. Can I ask you specifically: some of the hearings before those Commanding Officers are clearly not themselves independent and impartial as required by the Human Rights law. How concerned are you, therefore, in principle that you are proposing to extend the role of a non-compliant procedure, bearing in mind that there are some protections within those procedures? Are you not worried you are extending something which seems to be wrong?
Mr Caplin: Mr Roy, if I have understood your question, I think you are suggesting to me that currently we have procedures which are non-compliant and we are going to carry that on in the future. I think I would argue with you that is not the case and the purpose of this Bill is to ensure that in the longer term Service law is compliant with the ECHR. I pointed out earlier that the independent prosecuting authorities came out of a European Court judgment in 1997, the *Findlay* case, and the Committee will be familiar that there are other cases which have forced us to look at some of those issues. In fact, some of these issues in terms of review were taken by the evidence which Brigadier Andrews gave to you on 27 October in relation to Rachel Squire's questions where he dealt with many of these points in some detail. Also, I would say to you that if you are looking at ECHR, I will quote the extract from the Ninth Report of the Joint Committee on Human Rights—Jean Corston's Committee of 22 March—where the Committee said—this was in response to the *Grieves* case, which everyone around the table will be familiar with—in paragraph 23, Recommendation 4: "We do, however, have one general point to make about the context in which the need for this remedial order arises. It seems to us unfortunate that the Ministry of Defence waited for the adverse finding in Grieves before making the changes necessary to bring the Royal Navy's court martial system into line with those of the other two armed services in respect of this particular issue of compliance. In our view, a more dynamic approach to giving effect to previous adverse decisions of the European Court would have led it to the conclusion that this latest finding of incompatibility was very likely, and that further recourse to Strasbourg probably could have been avoided had the opportunity been taken in the Armed Forces (Discipline) Act 2000 or the Armed Forces Act 2001." If you take that view from the Joint Committee on Human Rights, what we are trying to ensure is that the Committee cannot come back again and say we have not been looking dynamically at taking decisions about discipline and law.

Q137 Mr Roy: Can I just clarify: am I right that appearing before a Commanding Officer is not considered compliant with Article 6 of the European Convention on Human Rights for a number of reasons including the fact of the CO's lack of independence and absence of legal representation for the accused?
Mr Caplin: Let me make one point, and then I will ask Humphrey to give you the legal background. The most important issue here is that we have looked at this in terms of summary powers; we have had leading counsel advice and we are content, the advice we have is that process is compliant.
Mr Morrison: Just to fill in the way we see the summary procedure as a whole. The stage at which a member of the Armed Forces goes before a CO is not itself compliant.

Q138 Mr Roy: So that is non-compliant.
Mr Morrison: At that stage it is non-compliant. The summary process, as a whole, that is including two very important extra things: the availability of appeal to a compliant court, which is a summary appeal court, and the right for members of the Armed Forces to choose to go instead to a court martial, which is a compliant court, with that court itself restricted to the powers which a CO would have instead of appearing before the CO to go to the compliant court wielding the same powers of a CO. On those two factors leading counsel on several occasions has confirmed his view that he considers that overall system to be compliant.

Q139 Mr Roy: The reason the overall system is human rights compatible is the accused has the right to elect trial by courts martial and to appeal against the Commanding Officer's decision, and I accept you are saying that. In that case what is done to ensure that the accused knows about those particular rights?
Mr Morrison: He has to be informed. The statute itself provides for a stage at which he must be given a right to elect. He can come forward and say "I want to elect", he has to be given that option.

Q140 Mr Roy: How is he given that advice?
Mr Morrison: I do not know the exact paperwork but it has to happen.

Q141 Mr Roy: It is not a 300-page document?
Mr Morrison: No.

Q142 Mr Havard: Can I ask a supplementary to that. If it is going to be a courts martial obviously he or she has got legal advice; if summary dealing, where does this advice come from? How independent is the advice-giver, as it were, at that stage in the process? They seem to be "independent" in the courts martial process but I spent a number of years as a trade union official carrying out this function saying to people "No, no, you have got these options as well, pal", who does that job?
Mrs Jones: The arrangements are reasonably similar in all three Services but, essentially, if somebody is going to be dealt with by their Commanding Officer they have to be given information, I think it is at least 24-hours in advance a leaflet is given to them, about their rights in relation to those proceedings. Sometimes an assisting officer or an accused's friend will be appointed, there will be advice, but I have to say that will be internal advice, by and large. As far as I am aware—and perhaps we could write if I have not got this right—there is nothing to stop a serviceman taking legal advice when he is involved in summary proceedings, although there is no statutory provision that he must be provided with that legal advice. The legal advice that a serviceman can get, he can get either from a member of the Service's own legal branch or he can choose to get that advice from a civilian lawyer if he wishes.[1]

Q143 Mr Havard: But if it is not in his knowledge and experience that he can do all these things, he cannot do any of them, can he?
Mrs Jones: He will be informed that he can do these things.

Mr Caplin: Can I deal with this point which Mr Havard has raised as well. In terms of our welfare processes and the chaplaincy service and all the other welfare processes, if a member of the Armed Forces is in that sort of trouble then that whole welfare system is there to support him or her. That is a very important part of that process.

Q144 Mr Roy: Can I clarify from Mr Morrison the overall compliance opinion, has that been tested in the European Court?
Mr Morrison: On summary dealings, as yet there has been no challenge on summary dealings under our present system, in other words since the introduction of a summary appeal court and the right to elect. Our current statutory framework, that was all introduced by the 2000 Discipline Act but has not been subject yet to testing in front of the courts. Obviously when the legislation which put all that in place was being considered, at that stage and again since, we took the best advice we could.

Q145 Mr Roy: It has just not been tested?
Mr Morrison: As yet, it has not been tested.

Q146 Mr Hancock: Can I ask a supplementary on the issue about the 24 hours before a decision is made. I am interested to know how an accused Service personnel would get access to legal advice in that period of time knowing that the following day a decision is going to be taken. You said they can get outside legal advice if they want or they can get access through the military legal services. Are you telling me that is available to personnel who are not based in this country, for example?
Mrs Jones: Yes, as far as I am aware but it would be on the telephone sometimes, it depends where they are.

Q147 Mr Hancock: I can understand it would be on the telephone. I would like to be clear that Service personnel who would be subjected to a disciplinary hearing could make a choice to have a reaction dealt with by the Commanding Officer but before they chose themselves to exercise some choice they would have access to proper legal advice. You can say that, can you?
Mrs Jones: I am not saying that they do choose to take legal advice. I am saying there is nothing to stop them taking legal advice.

Q148 Mr Hancock: To say it, it has to be available, does it not? I am saying are you sure it is available?
Mrs Jones: I cannot say.

Q149 Mr Hancock: The Bill should have that proviso in it otherwise it can never be compliant with the European law, can it, because it needs to be compliant if you are going to bring into being that people will have access to proper legal advice before any decision that they choose to make is made, whether they choose to exercise that choice is another matter but they should have the facility of legal advice being available to them.

[1] *Note by witness:* Overseas, legal advice in relation to summary dealing is routinely provided on request by Service lawyers, either from a different Service from the accused or from outside the accused's chain of command. In UK, this service is only available as a matter of routine for RN personnel but in Northern Ireland for personnel of all three services. The rights of an accused, which include taking legal advice, are set out in guidance that must be provided to him at least 24 hours in advance of the hearing. At the end of a summary hearing or trial the accused must be told about his right of appeal. A copy of the Army guidance "The rights of a soldier arrested for or charged with an offence under the Army Act 1955" has been provided to the Committee.

Mr Caplin: Mr Hancock, this centres on the word "access" and how you gain access and where you are in the world.

Q150 Mr Hancock: I understand.
Mr Caplin: Whether it appears in the Bill or not still maybe an open discussion, given that we are in these early stages in reflection of your consideration of where we are. It is absolutely clear to me that the outcome of this is to strengthen our already compliant process, that is what we are aiming to do, and if there is an issue about access to legal advice, which does not encompass the welfare services which I have just mentioned, then obviously we will have to have a look at that.

Q151 Mr Cran: You have been talking with my colleagues about summary offences but you have edged into the whole question of courts martial which I just want to go into in a little more detail, not making any reference to individual cases, of course, but speaking in a general nature about what you are proposing.
Mr Caplin: Yes.

Q152 Mr Cran: As I understand it the procedures for court martial are broadly similar to that of crown court, a judge advocate doing the work of the crown court judge, a panel of Service officers, warrant officers, instead of the jury, but I guess you could call it a jury. We were told in a session on 27 October that planned improvements will ". . . deliver more expeditious courts martial". I think the Committee is interested in knowing what these planned improvements are? I ask that question against the background of the Royal Navy because there there is going to be a reduction in the summary powers of Commanding Officers, a consequential increase in the number of courts martial. Against that background, what would you say?
Mr Caplin: Firstly, I have talked already about the court administration authority so, clearly, there is a movement there which will provide a change to the process. The other thing which I think will help the process, and it particularly relates to the Navy, is to produce what you might call the establishment of a standing court or an assize system. Rather than deal with one court martial here and one court martial there, we have one standing court here and one standing court there which is in semi-permanent session.

Q153 Mr Cran: I am sorry to interrupt but what do you mean by "here" and "there".
Mr Caplin: I am being deliberately vague because we are still working on how this will work. The concept will be that you have your court martial and you bring cases to the court martial rather than what happens at the moment which is the Army goes here, the Navy goes here, the RAF goes here. We need to create a situation where "here" is the court martial and we are going to bring the cases to it. In the longer term, if you look at the system of a crown court in your constituency, Mr Cran, or mine, it clearly works and I think we are reflecting that in these new changes so that, ultimately, we can bring military law more in line with civilian law. I think that is going to help the process both in the Navy, RAF and the Army and will be beneficial in the longer term.

Q154 Mr Cran: The corollary of all of that, of course, is that the one phenomenon that you can bet on in the legal system if you are coming to court—and I have to stress I never have thus far but I am told by those who know a great deal more than me—that it is characterised by this problem of delay. Therefore this whole question of delay is something you have to think about as well, have you not? How have you addressed it?
Mr Caplin: I think you are absolutely right. The system can take too long. I think if this assize system works, and the standing court approach works, I think in the medium to long term we will see reducing numbers which will alleviate some of those delays. I accept entirely that delay is unacceptable. Part of the driver here for a tri-Service approach has been to try and reduce delay. One of the obvious areas is we will no longer have to have five people, for instance, from the Royal Navy, if we are all operating under a single disciplinary law, it could be three members from the Royal Navy, someone from the Army and someone from the RAF trying a certain number of cases. There could be efficiency gains there which allow a much quicker approach to the judicial process which is where we all want to get to, I think.

Q155 Mr Cran: I think on the basis of logic I would go in more or less the same direction as you are. In any questions I am asking, I do not mean to criticise.
Mr Caplin: No.

Q156 Mr Cran: It is just one wants to know whether the structure you propose, which I approve of, is going to result in a reduction in delays. Do we know what the average waiting time for courts martial at the minute is and what it might be under your system?
Mr Caplin: We do not have any league tables unlike other departments of state on these particular matters. I guess if the Committee is really interested in that we could gather together some information but we have not done that work yet, no.[2]

Q157 Mr Cran: I do not want to ask you to get together a whole lot of information you do not already have to hand but it would have been useful, would it not, to justify at least at one level what it is you are doing which in all other senses I think is absolutely sensible.
Mr Caplin: Yes.

Q158 Mr Cran: I do not want you to go into additional work please. Can I move on to the Royal Navy, again, these offences committed at sea. That presents an unhappy dimension, does it not, because

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it is not always possible to get the culprit from ship to one of these courts. How are you going to deal with this?
Mr Caplin: Obviously the Navy system is one which has stood the test of time, that is fair enough to say. Commanding officers have used their power judiciously. I think I am right in saying that the maximum sentence they would give is 90 days, so clearly anything that is more serious than that, an allegation, for instance, of grievous bodily harm in a run ashore, would naturally, I think, in all our views be longer than 90 days, therefore the person needs to be returned to base and arrangements need to be put in place to make that happen. I think predominantly our Commanding Officers, commanders of our ships understand that and they exercise that decision-making with discretion and with considerable ability. I think we have all seen and heard our experiences of that ability that they have.

Q159 Mr Cran: I will not press you because I understand the problems of this particular Service, as you have said. We will see what happens. One last question, it is simply this, with the Royal Navy again, if there is going to be a court martial, either an officer or officers or ratings, for all I know, are going to have to be shipped back, as it were, for the court martial. I think that is a proposition you would accept, is it not? What is going to happen to replace them on the ship to safeguard operational requirements? These are all unhappy questions but they have to be looked at. Where have you got there?
Mrs Jones: That is a situation which arises now. Of course the Navy can conduct a court martial at sea.

Q160 Mr Cran: It might be more important in the future because of the reduction of the summary powers?
Mr Caplin: I do not think this is going to happen, to be honest. If you want me to hunch here, given where we are going and the whole approach, I think if you were in command of a ship, an offence that was outside that maximum sentence, you would take the view that has to go back to base for further consideration. Of course, a Commanding Officer of a ship, he is not there alone, he has access to all the modern communications that he needs, the access point that Mike Hancock was making just now about other people, he has access to talk to people back in Portsmouth or Devonport or anywhere like that. I think it is highly unlikely that we will be in that position.
Mr Morrison: We did conduct with the Navy a very careful consideration of which of their offences which at the moment can fall within a CO's jurisdiction they actually use and it was mainly as a result of that study and discussions with the other Service officers of course that resulted in this small group of offences being added to the Army and Air Force. The offences which we have taken away, which in the Navy's case theoretically involve the most extraordinarily serious offences, rape, grievous bodily harm and so on, it was established and agreed by the Navy are never tried by COs and have not been tried by COs in years. I think to a great extent, while not wishing to say that we could guarantee that there will be no effect upon courts martial, the harmonisation we have gone for in most cases is the removal, as far as the Navy is concerned, of an entirely theoretical summary jurisdiction and to try and indeed to obtain an agreement with the other Services that they would have added to their summary jurisdiction a small group of offences which the Navy in a tried and tested way did actually use at summary level, and that is the eight or so extra offences that have been added or we are proposing should be added to the Army and the Air Force.

Q161 Chairman: Minister, one of the proposals is that the review procedures for court martial findings and sentences will be abolished. Now, in the evidence session of 27 October last year, we were told that in 2003 15 cases were changed by the Army Reviewing Authority out of around 500 trials. Can you tell us how many were changed in 2004? Maybe that is an unfair question to ask and if you cannot answer it, maybe you would drop us a note.[3]

Mr Caplin: I might be able to. I have a lot of statistics here. I was avoiding the need to actually use any of them because I know how select committees hate statistics being bandied about, but that one I am not sure we have got. I have got 83 pages of other statistics here, but not that one.

Q162 Chairman: Perhaps you could drop us a note then.
Mr Caplin: We will, yes.

Q163 Chairman: So 15 cases out of 500 is not an insignificant number, 3%. How will you ensure that deserving cases are not passed over following the abolition of this system?
Mr Caplin: Let me introduce this and then Teresa might want to come in. Part of what I said in response to Mr Roy's question earlier about the evidence given by Brigadier Andrews on 27 October did relate to the review process as well and if you take account of what the Joint Committee on Human Rights was saying to us, I think it is important that we are ahead of the game in terms of some of those processes. Maybe I could ask Teresa to deal with some of the detail of that.
Mrs Jones: Perhaps I could just add that the point about review is that it is non-judicial interference in the determination of a judicial authority, namely the court martial, but Service personnel who are convicted by a court martial of course have a right of appeal to the Court Martial Appeal Court in the same way that a civilian has a right of appeal to the Appeal Court. We will also be introducing bail pending appeal, so the Service personnel will be no worse off than their civilian counterparts in being able to appeal against the findings and sentences to the Court Martial Appeal Court. The other point about review is that review is a determination, particularly in relation to the sentence. The Reviewing Authority can change the sentence to one

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that is no worse than the sentence that was awarded by the court martial. Individuals may take a different view about what amounts to a worse sentence, so, for example, is dismissal worse than detention, or the other way round? We feel that the rights are properly enshrined in appeal to proper courts, like the Court Martial Appeal Court, than leaving it to a civilian reviewing authority, albeit with legal advice.

Q164 Mr Crausby: Your updated memorandum of 7 January of this year states that you have concluded that the minimum qualification for the appointment as a judge advocate should be increased to a minimum seven-year qualification. What real effect will this change have? Will some of your current judge advocates, for instance, have to step down as a result of that increase in the minimum qualification?
Mr Caplin: We do not know the answer to that. We will have to look into that. Why we are doing it, if that is the other implication of your question, Mr Crausby, is quite simple. This is about modernising the system of disciplinary law and modernising this particular aspect of judge advocacy. It will create military law much more in line with civilian law. If my memory serves me right, the current minimum qualification for judge advocates, I think, is five years in usual circumstances. As other people have suggested from this Select Committee, this is a bit like the Crown Court system and we can expect people to be properly trained and able to undertake the often complex cases before them.

Q165 Mr Crausby: Have there been any problems with those with less than seven years' qualifications?
Mr Caplin: This is about modernising the system. This is not saying that there are lots of problems with the current judge advocates. It is about the future and it is about bringing forward a Bill which still stand the test of time, I think, really for some years to come, the 1955 Acts being the ones that we still relate to 50 years on as the main Acts, albeit updated, but the main Acts that relate to Service discipline. I think we would all accept that it is now time to update the military law.

Q166 Mr Crausby: Your updating memorandum also says that you intend to make provision for certain categories of officers or warrant officers to be excluded from membership of the court martial and you propose to add Service chaplains to that list of those already unqualified to serve. What are the grounds for excluding Service chaplains?
Mr Caplin: We already exclude them, quite rightly in my view, in that the Chaplaincy Service is a separate service, able to look independently and to give people confidential advice and welfare advice in difficult circumstances. We were just discussing earlier that if someone is about to appear before their CO, the advice they may want to seek is from the Service chaplain. That would be wholly undermined if that case eventually got to a court martial and the Service chaplain was part of the jury process. Now, we are extending the Chaplaincy Service, as the Committee will be aware, to cover other faiths as well, so I am confident that we can provide the welfare package that we need for people who are in some form of trouble within the Armed Forces, but if you ask me if I am going to reconsider excluding Service chaplains, the answer to that is no.

Q167 Mr Crausby: So you are going to exclude Service chaplains in order to distance them even further from the court martial process?
Mr Caplin: Absolutely, yes.

Q168 Chairman: So what jurisdiction will they be subject to?
Mr Caplin: Who?

Q169 Chairman: The chaplains.
Mr Caplin: Well, they will still be subject to the jurisdiction of military law of course. I know they are important people, Chairman, as you are, but I am not excluding them from military law; I am merely excluding them from sitting on a court martial so that they can provide the welfare and religious support.
Chairman: But they themselves are subject to the same law. Sorry, I misunderstood that.

Q170 Mr Roy: Minister, all three Services operate a formal system of administrative action which from last month has actually been changed by the Army in relation to the introduction of new arrangements which distinguish between minor and major administrative action. Will that introduction of new arrangements in the Army not lead to greater differences between the Services in this area? Is there not a danger there?
Mr Caplin: Well, I am pleased to tell you, Mr Roy, that the Army, in making these changes, actually talked in detail with the other two Services and this brings harmonisation of the approach much closer.

Q171 Mr Roy: That does not seem to ring true to me. I am not doubting your answer, but the new arrangements which have been introduced in the Army go against the Tri-Service Bill. The Bill seeks to harmonise disciplinary procedures across the three Services yet you have just agreed that the Army has changed the way they operate to make it different from the other two.
Mr Caplin: They have changed some technical areas of their administration process. They have not changed the main process of how they deal with many of the cases they have to deal with. Of course the Army deals with most out of the three Services. I would think that the effect of what the Army have done will be considerably fewer summary dealings in the Army itself than—

Q172 Mr Roy: So you think definitely that the ethos of the Tri-Service Bill remains in tact?
Mr Caplin: Yes, absolutely, and these type of approaches are perfectly acceptable. They are discussed by the various people, Teresa's team, the principal personnel officers for all three Services, and no change, no change at all is going to take place to personnel practices which is not acceptable towards harmonisation and the Tri-Service Bill.

Q173 Mr Crausby: The updating memorandum provides further details of your proposal related to boards of inquiry and you propose to introduce the power to subpoena a civilian witness. Can you tell us in what circumstances you envisage such a power being used?
Mr Caplin: I think it would be very rare that we would have to subpoena a witness, but I think to have the power to do so is right and proper. It may be that a civilian witness can provide us with information relating to a case, but is for some reason reluctant to appear before a board of inquiry. This is about the subpoena, not about those coming forward to give evidence. If that was the circumstance and it was felt by the convening authority that this was an important and material consideration for a board of inquiry, then I think we have to retain the same right as they do in civilian law.

Q174 Mr Crausby: What about boards of inquiry which take place outside the United Kingdom?
Mr Caplin: Well, all of our boards of inquiry take place within our own jurisdiction.

Q175 Mr Crausby: But how would you subpoena a civilian witness?
Mr Caplin: You mean a foreign national in another country?

Q176 Mr Crausby: Yes.
Mr Caplin: I am not sure we would be able to. We would not be able to. That is simply the case. We are talking here about subpoenaing witnesses who come within our jurisdiction.

Q177 Mr Crausby: What about a British national? He might be able to subpoena somebody. Would he be able to do that?
Mr Caplin: I think he could do that.
Mr Morrison: There are practical and legal limits on the extent to which you can use subpoenas for people sitting abroad. That would be a problem whether you were having a board of inquiry that was within the UK or outside the UK. There is a problem of trying to get witnesses who are not themselves British nationals, but for those who are British nationals, we see no reason why this provision should not be applied.

Q178 Mr Crausby: The updating memorandum also says that the MoD is not persuaded that the next of kin should have the right to attend Service inquiries. On what grounds were you not persuaded and how does that square with what is your obvious present thinking about involving Service families more and more?
Mr Caplin: Well, the BOIs, I think as the Committee has recognised in the past, are primarily internal inquiries with a limited purpose. They do not replace the coroner's inquiry; far from it. They always can occur in very, very difficult circumstances and we recognise that, as a ministerial team. The Secretary of State will often see families himself, as you are aware, of those who have died in Service and sometimes be able to deliver board of inquiry findings personally and hand over the reports. That is one of the changes that we have made; we have made sure that families now can get a copy of the report as a matter of course. Of course there will be redactions in there where you have to have them, but again we communicate that and talk to the family about that process. I think what we have been able to do, and this has been a moving process in the last two to two and a half years, is we have been able to make sure that the casualty visiting officer and the welfare process back up right through, if you like, to the board of inquiry and its conclusions the very difficult circumstances that families find themselves in when they have lost a loved one. We understand the difficulty, but it is, after all, an internal inquiry to look at the limited purpose of what occurred at a particular time. It is not a coroner's inquest.

Q179 Mr Crausby: Does it not lead to suspicion? Certainly that has been our experience of Service families that we have met who have lost a loved one because they did not feel part of that inquiry and were not allowed to go there. Does it not sort of make them think that there is some kind of conspiracy? I think certainly it does in some circumstances. Do you not lose something with that lack of absolute transparency?
Mr Caplin: Mr Crausby, I do not want to conflate two of your inquiries together here and hopefully the Committee would not want to do that either, but I simply say that certainly since early 2003 and continuing right up to today, where regrettably we are dealing with the deaths of 10 Servicemen at the moment, as you know, the processes that we use in terms of welfare support for families is constantly changing. Now, I am not going to comment on what is happening prior to that, but I think that today we are dealing with a much better approach to death in Service, and I have to say that that applies sometimes as much as it does to the RAF with the 10 people we lost in the Hercules as it does sometimes to a road traffic accident in Germany. It is still the death of a loved one which has to be dealt with through the casualty visiting officer, through the Chain of Command and to a family back here often in the UK or somewhere else, so we are very, very much aware of that, as Ministers. I can only reassure you that at the Ministry of Defence every single official is aware of the importance that we attach to proper, effective and compassionate approaches when these tragedies occur.

Q180 Mr Crausby: If I lost a child, I would want to see everything and I would be offended by the fact that other people were able to sort of take on board information that I was denied. I get the impression sometimes that that is done in order to save some hurt from the next of kin because the MoD, I sometimes think, does not want the close relatives to know something about their loved one. I understand that, but I have to say I think it is a bit patronising. If I lost a child, I would want to know everything.

Mr Caplin: Well, maybe I could just pick up the use of the word "child". Everyone who joins the Armed Forces is over 16 and they are legally able to do lots of things, including make decisions about joining the Armed Forces, so whilst I accept that young people who join our Armed Forces may unfortunately die in whatever circumstances, I do not think we should suggest that there is something wrong with that part of the process. I do not think with the board of inquiry that a statutory right to attend for the next of kin would be the way forward. I think the approach that we are taking now in engaging with the family, with the next of kin, but providing them with the full report from the board of inquiry I think is a very effective way. I think if you talked to some of the families from unfortunate Service deaths that we have experienced in the last 12 months, I think they would amplify the approach that we have taken.

Q181 Mr Crausby: The current practice is that they may be allowed to do so exceptionally on the authority of the president. What would be the exceptional circumstances that would allow the next of kin to attend?
Mr Caplin: I just come back to what a board of inquiry is; a board of inquiry is about events at a certain time in a certain place, so the next of kin's role could be very limited in terms of the view of the president of the board of inquiry, but I would not really want to speculate on the type of occasion that that might occur, except to say that the inquiry has limited powers. It is not the same as a coroner's court where the next of kin would probably want to appear in those circumstances.

Q182 Mr Roy: Minister, I do not actually agree with you on board of inquiries in relation to parents being allowed to go to them. For the life of me, Minister, I do not see one reason why a mother and father could not be sitting at the back of the room, listening to that board of inquiry. They tell us it is because they are not given that opportunity to go that they think that something is being hidden from them. Now, I do not tend to agree with you on that, but it is a fact that because they are not given the opportunity to go that they, therefore, think that there is a cover-up. I do not see, for the life of me, the reason why the family cannot be given the opportunity to sit at the back of the room just to listen. They know the difference between the coroner's court and a board of inquiry. Every single one of them who has come in front of this Committee has told us that they are well aware of it and constituents of mine came and told me that they know the difference. I would really urge you to think seriously about that because there is this perception that something is being kept from them which is to do with the death of their child, even though the child was 18, 19, 20 or 21.
Mr Caplin: Mr Roy, we try with our board of inquiries to be as open, as full and as frank as we can be and the provision of the report at the end is meant to be one of those processes. The question raised by your colleague, Mr Crausby, earlier was actually about a statutory right to attend. There is clearly a fundamental difference between someone being invited by the president of the board of inquiry to sit at the back of an inquiry and someone having a statutory right to attend. There seems to me a fundamental difference between those two.
Mr Roy: There is no difference there. The statutory right to attend, Minister, is that you have a right to attend, the same as the public have a right to attend here. They can have a statutory right to attend, but not speak.
Mr Crausby: A statutory right to attend, but not speak would seem to be sensible.

Q183 Mr Roy: People have a statutory right to come here today, but not speak.
Mr Caplin: They do not have a statutory right to sit behind actually technically, but not to worry. I do not see what would be gained by that. We have made considerable advances in our processes in relation to our boards of inquiry, our casualty visiting officer and our welfare approach. As I say, I think views from those families who unfortunately lost loved ones in the last 12 or 18 months may well be very different today because of the new processes we have introduced.

Q184 Mr Cran: Redress and complaints. Your own memorandum at paragraphs 35 and 36 said that the system could be improved and then it set out a number of principles and so on that you were going to address, one of which was the principle that the Commanding Officer should be integral to the system. Well, that is fine, but the problem for us is that at our evidence session on 27 October, Mr Julian Miller, the Director General of Service Personnel Policy—I presume that is MoD?
Mr Caplin: Yes, it is.

Q185 Mr Cran: He said to us that the expected improvements should include a system which is more clearly separated from the Chain of Command. It just seems to the Committee, looking at it *a priori*, that these two propositions do not sit together. You tell us why they do.
Mr Caplin: I think the first thing to say in terms of redress is that these are difficult areas and our thinking is still to be fully established. To some extent the Select Committee has a chance to influence—well, it has a chance to influence of course in all areas, but in this particular one we would be very interested in your views on that.

Q186 Mr Cran: Well, that is a really good way of passing the ball back, is it not?
Mr Caplin: I did say earlier that we were consulting and, therefore, I think it is very reasonable for us not to have hard and fast views, but to say that there are areas which are very complex, very difficult and we are struggling with them internally, but if the Select Committee has a view about these areas, then why not.

Q187 Mr Cran: That is perfectly logical, but the answer to this is that you are in the middle of thinking this whole process through?
Mr Caplin: Yes.

Q188 Mr Cran: Mr Miller was just giving his point of view, as it were, at this session and the memorandum was setting out another view. The two propositions do not, it seems to me, sit together.
Mr Caplin: I understand where you are coming from, Mr Cran, and I accept that entirely, but I think that has shown that we are trying to think these issues through in terms of redress.
Mrs Jones: I would add that the panel to which we referred in the earlier evidence and which I think is probably included in the second memorandum, it is that panel where there is the separation from the Chain of Command. Certainly on the redress of grievance, the view is that it should go first to the CO not least because if somebody has a complaint, it should be dealt with at the lowest possible level and there may be something that can be dealt with by the CO and it is quite proper he should have the opportunity to deal with it himself first of all. The idea of removing it from the Chain of Command by reference to a panel is that at the moment a complaint will go up through successive layers within the chain until it reaches a layer where the redress can be granted satisfactorily or refused. We are planning to remove it from the Chain of Command to the extent that complaints will be, if they are serious enough and need to be, referred to a panel which will be outwith the Chain of Command, but still within the Service itself.
Mr Caplin: But that is a very difficult area that we are still contemplating and we have not come to a conclusion on, which is why I said what I did in my introductory answers to your question, that we would welcome other views on this.

Q189 Mr Cran: Okay, we will read your answer when it is down in black and white with great care. The second to last of my questions under this heading is simply the Tri-Service Redress of Complaints Panel. What is your thinking on this?
Mr Caplin: I think Teresa did—

Q190 Mr Cran: Is that the panel you were just referring to?
Mrs Jones: Yes, that is the panel I was referring to.
Mr Caplin: I think on this occasion I was answering your questions directly on the first one, thinking you might have a second question coming on the panel, and I think I was probably right.

Q191 Mr Cran: Absolutely, yes. So your thinking is really quite developed about the establishment of this panel?
Mr Caplin: No. This is a very, very difficult area and we have not developed fully the proposal. On the whole redress issue, and I am being absolutely frank now, if there are views from the Select Committee, we would really welcome hearing them at this early stage. That is the advantage of this rather strange process that we are undergoing where we do not even have a piece of legislation. We have got some ideas as to how it might work, but they are certainly not formulated so as to take us to a process of introduction in a Bill, so it is at that very early stage. For instance, should it have two members or probably three? We do not know. What sort of stars—should it be two-star? These are the sort of questions that we are tackling, along with how the whole process would work and what independence there would have to be from the complainant's Chain of Command. All of those are areas that we will have to look at. I think ultimately what we will also have to reflect on is: if it is a member of the Navy, should it be dealt with by a different Service or should it be dealt with on a tri-Service basis? There is lots to look at in terms of redress.

Q192 Mr Cran: You will certainly have to have decided by the time the Bill comes before us.
Mr Caplin: We will certainly have to have decided, yes.

Q193 Mr Cran: Can you give us any idea of the time-frame by which you will take a decision?
Mr Caplin: I am assuming that we might get some views from the Select Committee in the next six weeks or so. We will undertake to respond to those views in the usual way, so that would be within about three months roughly. I do not want to be coming back here and Bruce saying, "Four months—what have you been up to?", which he has on a number of other occasions.
Chairman: There are just two questions, Minister, on parliamentary scrutiny. The Select Committee on the Armed Forces Bill, the way it was dealt with allegedly by Parliament was a travesty. I am not sure if you were in the Whips' Office then, but there were two Ministers on the Government's side, a PPS, a couple of trustees and, on the Opposition side, two Opposition spokesmen for the Conservatives, an Opposition spokesman for the Liberal Democrats and another trustee on their side.
Mr Crausby: Chairman, I was one of those.
Mr Roy: You will never have been called that in your life!

Q194 Chairman: Trustworthy!
Mr Caplin: Chairman, I do not think I was in the Whips' Office. I was probably in the Leader of the House's office, which makes it even worse!

Q195 Chairman: And Rachel was the other trustee. I thought this was done incorrectly and that it has to be done more by way of backbench scrutiny rather than the Executive and the wannabe Executive scrutinising their own legislation. Now, for this legislation, will it be a committee like the Select Committee on the Armed Forces Bill where Ministers and Shadow Ministers will be part of the scrutiny of this legislation, so you will be scrutinising, or your successor will be scrutinising his own Bill, which I find lamentable, a travesty, deplorable, and in a one-hour speech, I had a Whip standing two feet away from me, glaring at me for an hour and I was very, very, very angry, or are we

going to have the proposed legislation coming to this Committee for scrutiny and then once it has come to this Committee for scrutiny, then it goes into the pot for the normal process of legislation, or a good idea would be something like a reinforced Defence Committee with spokesmen from the Government, say, a Minister, the Opposition and the Liberal Democrats? I would like to know your provisional thinking on this please.

Mr Caplin: Well, all of those are still possible as we meet today because I have to enter into discussions with the Leader of the House's office and the usual channels as to how we should approach this, and clearly this is not wholly a matter for me at the Ministry of Defence; I have to take into account the views of Her Majesty's Opposition and everyone else who has a right to comment on this. I hope that we will be able to get some views on that certainly by the time that maybe we respond to the Select Committee. I am well aware of what happened in 2000 and 2001. There was also, I think, a recommendation that the 2005 Bill should properly go to potentially a committee of both Houses or a special committee, and of course the House has made a lot more use of special committees since 1997–98. The principle is that there must be proper and effective parliamentary scrutiny of this Bill and it is absolutely essential to us. This is a big Bill, it is likely to be 300 to 400 clauses, so in terms of changing military law, it is essential it has proper parliamentary scrutiny, and I cannot state that enough. I think that you, Chairman, know me well enough, given my previous roles, to know that I will certainly be, in the discussions that I have with the usual channels, looking for the best solution for Parliament in properly scrutinising this piece of legislation.

Q196 Chairman: Well, that is very good because I am not suggesting that this Committee is the sole repository of people with interests or expertise in defence, but it has a fairly high percentage of the Members who are interested in defence and we would have the apparatus to support and to provide the necessary additional expertise which would make it a reasonably effective form of scrutiny. This is not going to be surely a party-political issue, so it is not going to rise to an intensity of debate because this is, I would have thought, a fairly consensual subject within the political process, so obviously others will think on this, Minister. My last question is that in your letter to us of 25 November, you said that you were "giving careful consideration to the possible future arrangements for the renewal of Service law, but have not reached a firm view". Have you now reached a view and, if so, what is it? If not, when do you expect to reach a decision and what options are being considered?

Mr Caplin: I am afraid the answer today, Chairman, is the same as it was on 25 November in that we have not reached a final view about that, but I would certainly be willing to share that with the Committee as soon as we have.

Q197 Chairman: Well, thank you all for coming along

Mr Caplin: Thank you very much, Chairman.

Written evidence

Letter from the Parliamentary Under-Secretary of State for Defence to the Chairman

Adam Ingram wrote to you on 24 May last year about the project to replace the three Service discipline Acts with a single tri-Service Act (TSA). You may find it helpful to have an update.

The policy development work for the new legislation is continuing. The focus remains on trying to establish how best to harmonise the Services' differing disciplinary powers and procedures, so that the TSA will fulfil the objective of improving the administration of discipline in those circumstances where the Services operate together. We are looking closely at the arrangements for summary discipline and for courts martial, building on those aspects that are common between the Services and seeking to ensure that their requirements are appropriately reflected in the new procedures. At the same time, we are considering other areas covered by the legislation, such as the system for members of the Armed Forces making complaints. This is at present essentially the same in all the Services, but this is an opportunity to try and develop procedures that better meet the likely future expectations of our people.

The Government and the Armed Forces attach considerable importance to the TSA project, and this is reflected in the substantial resources that are being devoted to working out both the principles and the detail of the legislation. Although the work on policy development is taking a little longer than we had envisaged, this is not affecting our overall timetable. This is based on our hope that the next five-yearly Armed Forces bill, due in the 2005–06 session, can be the vehicle for the TSA legislation. However, this will obviously be subject to the availability of Parliamentary time, for what is expected to be a very large Bill. In the meantime, it will be our intention to assist the Committee, and Parliament as a whole, by providing details of the main proposals for the TSA once we have firmed these up.

Dr Lewis Moonie MP

13 June 2003

Letter from the Parliamentary Under-Secretary of State for Defence to the Chairman

Lewis Moonie wrote to you on 13 June last year about the project to replace the three Service Discipline Acts with a single Tri-Service Act. I undertook in my follow-up letter of 16 July to let you have a note on the project's latest position shortly before each year's Continuation Order debate. You will be aware that this year's debate in the House of Commons in Committee will take place on Thursday 29 April.

I acknowledged in last year's update that policy development was taking longer than had been envisaged. I am pleased to be able to say that agreement has now been reached on the harmonisation of summary and court martial disciplinary powers and processes across the three Services. The harmonised system has evolved from the present powers and reflects the basic principles of fairness, consistency and efficiency combined with the need to support operational effectiveness, particularly through the better and transparent alignment of discipline with command. We are removing anomalous differences in treatment between officers and ratings or other ranks and reflecting the civilian system as far as it is possible to do so. As well as harmonising Service discipline, the Act provides an opportunity for a sensible modemisation and provides the statutory basis for Service discipline for the next generation.

The main changes proposed include a range of harmonised summary offences and powers which, in essence, would involve a significant reduction in naval commanding officers' powers and some increases for Army and RAF commanding officers. But there will be safeguards applicable to all three Services, to check the exercise of their current and proposed wider powers. The other main proposals involve commanding officers having powers to deal with officers and warrant officers in addition to powers to deal with non-commissioned personnel; the removal of the current power of the Reviewing Authority to quash a commanding officer's finding in exceptional cases with all such cases being referred to the Summary Appeal Court; the creation of a joint prosecuting authority and courts administration system; the introduction of one type of court martial, comprising a judge advocate and three or five lay members depending on the charge; the establishment of a standing court martial and the Judge Advocate General becoming the single appointing authority for Judge Advocates in all three Services. Work is continuing on other areas covered by the legislation, such as the system for members of the Armed Forces making complaints and Boards of Inquiry.

We hope that the next five-yearly Armed Forces Bill, due in the 2005–06 session, can be the vehicle for the tri-Service legislation. This will obviously be subject to the availability of Parliamentary time, for what is expected to be a very large Bill.

It is my intention to give Parliament more details of our main proposals for the tri-Service legislation before the Bill is formally introduced and I shall be happy to discuss these with Interested Members of both Houses. I am considering how Members might be involved more formally in considering our proposals in advance of publication and I hope to be in a position to discuss this with you well before the summer recess.

Ivor Caplin MP

23 April 2004

Letter from the Parliamentary Under-Secretary of State for Defence to the Chairman

As you are aware in my winding up speech in the debate on Armed Forces personnel on 13 May (Hansard col 560), I stated that I would write to you about my proposal to submit to the Committee evidence on the Tri-Service Bill which is due for introduction in 2005–06. We had, of course, spoken about this before the debate.

This will be a very big and I hope largely uncontentious Bill although it will cover many personnel issues. The legislation we are formulating is of major significance to the future operational and training environment of all three Services. We need to get it right to ensure that it underpins operational effectiveness while meeting the demands of modern criminal law. Although a tri-Service team has been working on it since 2001, we need to respond to developments and the scope and detail involved means that I do not expect it to be available as a complete draft until relatively close to introduction.

I am keen as I said in the House to expose our ideas in a coherent fashion at as early a stage as possible to those most closely interested. I therefore propose that in the Autumn I should provide the committee with a self contained memorandum on the Bill which would set out the key principles underpinning the legislation and give details of the main policy proposals including, for example, discipline, Boards of Inquiry, redress and so on. Where draft clauses are ready, these would be included. This would enable the Committee to consider the proposals, take initial evidence and produce an initial report early in 2005 which will assist us with further work.

I recognise also the substantial body of experience and interest of peers who are keen to be involved in the scrutiny of our proposals as soon as possible. I do not think consideration by the House of Commons Defence Select Committee need inhibit such scrutiny. Although I understand the constraints that apply to any written evidence that I would submit to your Committee, I hope that you would consider making that evidence more widely available, in advance of any report, as is sometimes your practice. In parallel I will certainly look at what more we can do, for example through presentations, to explain to the Committee and more widely to members of both Houses, the thinking behind the Bill's provisions.

I very much hope that the Committee will welcome involvement in the scrutiny of this Bill on the basis set out in this letter subject to your acceptance. I will put the necessary arrangements in place in order to meet the deadline for the Memorandum stated above.

Ivor Caplin MP

28 June 2004

Letter from the Parliamentary Under-Secretary of State for Defence to the Chairman

Thank you for your letter of 12 July about pre legislative scrutiny of the Tri-Service Bill. I am very pleased that the Committee will be able to contribute in this way. I recognise, of course, the constraints of time and the existing full programme under which you are operating. I hope therefore it will assist the Committee if I ensure that the memorandum is with your Clerk before the House returns from the Conference recess on 11 October.

Ivor Caplin MP

19 July 2004

Memorandum from the Ministry of Defence

TRI-SERVICE ARMED FORCES BILL

Introduction

1. This memorandum sets out the Government's approach to the harmonisation and modernisation of Service law. It describes the main conclusions we have reached about criminal and disciplinary matters and outlines our developing thinking in other key areas, notably Boards of Inquiry and redress of grievance procedures. Subject to Parliamentary time being available it is the Government's intention to use the opportunity presented by the next five yearly Armed Forces Bill, due in 2005–06, to provide for these changes within a single system of Service law.

Background

2. The statutory authority for the Services' disciplinary and criminal justice systems is provided for in the three Service Discipline Acts, the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957, collectively known as the Service Discipline Acts (SDAs). A note about the history and main provisions of these Acts is at Annex A.

3. The 1998 Strategic Defence Review (SDR) acknowledged the key principle that a system of Service law is essential to operational effectiveness. But it concluded that there would be advantages to be gained from combining the three systems into a single Act, while recognising that this would be a substantial and complex undertaking.

4. Following initial scoping work, a Tri-Service Act Team was set up in September 2001 to conduct a thorough review of the Armed Forces' discipline policies and procedures and non discipline-related legislation in the SDAs. The team comprises Service and civilian legal and policy staffs. The initial focus of the work was on the Services' disciplinary systems. This involved a critical review of operational requirements justifying the retention of current legislative and policy differences between the Services. In reviewing these, for example the differing powers of Commanding Officers (COs) in the three Services, we are taking into account all relevant factors, including recent operational experience.

5. This is also an opportunity to modernise Service legislation generally, much of which has not been amended since the 1950s, and to replace some provisions in older statutes which deal with aspects of Service law. More specifically, we are seeking to make improvements in areas such as redress of grievance procedures and the framework for holding Service Boards of Inquiry. This memorandum concentrates on the disciplinary aspects of Service law and the approach to the Bill although many of the principles identified apply equally to the wider, non-disciplinary proposals.

6. We expect this to be a large Bill, in the order of 350–400 clauses. To give a sense of the scale and scope of the Bill, an outline of its proposed contents under the main subject headings is at Annex B.

The Requirement for Service Law

7. All three Services regard a military system of law as essential to the continued operational effectiveness (OE) of our forces across the wide spectrum of situations in which they serve[1]. The maintenance of the discipline essential to the effectiveness of a fighting force is as necessary in peace as in war: a force which cannot display the qualities of obedience to lawful orders, observance of the law and appropriate standards of self-control and conduct in time of peace cannot hope to withstand the much more demanding circumstances of operations, including armed conflict, occupation and peace keeping. Moreover, the distinction between say peace-keeping operations and armed conflict may not be clear cut, may change rapidly and in any event, our forces always have to be readily deployable on operations at short notice.

8. The authority of the CO is critical to the delivery of operational effectiveness. He or she is therefore at the centre of the system of discipline, responsible for the behaviour of those under their command, both among themselves and generally, in a way that civilian employers are not responsible for their employees. Service courts and COs together are uniquely placed to understand the circumstances of Service life and the significance of misconduct by Service personnel, especially where misconduct occurs in a Service context.

9. A person subject to Service law is guilty of an offence for any act which is an offence under the law of England and Wales, or would be an offence under that law, if committed there. And in remaining subject to the law, including the criminal law, which binds other citizens, they continue to enjoy many of the same rights, including the right to have a criminal charge dealt with by a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law. In addition, however, servicemen and women subject themselves to duties and the risk of charges and penalties to which a civilian, unless also subject to Service law overseas, is not subject or exposed. Some of these Service offences are similar to offences under the law of England; for example looting. Others are peculiar to the Armed Forces; an important example of which is disobedience to lawful commands.

The Principles that Must Underpin Service Law

10. The principles against which the disciplinary policy proposals have been tested and which could apply equally to the non-disciplinary proposals are that, with the main aim of maintaining or enhancing OE[2] across the Services as a whole, any new system should be:

(a) *fair* and command the respect of personnel through being seen to be fair;

(b) *aligning discipline and command* because it is essential to operational effectiveness for COs to have disciplinary powers over those whom they command;

(c) *consistent*, whenever the circumstances of an offence make it appropriate, across single, bi- and tri-Service environments;

(d) *expeditious* and conducive to the prompt application of justice;

(e) *efficient* and straightforward to use—so as to avoid over-burdening COs and others involved in the system; and

(f) *European Convention of Human Rights (ECHR) compliant*.

[1] "The fundamental purpose of a military justice system is to foster and promote the discipline and self-control required for the maintenance of the capability to act as an efficient fighting force, that is to say, operational effectiveness." Witness statement dated 12 July 2001 of Air Chief Marshal Sir Anthony Bagnall, the Vice Chief of the Defence Staff. Regina v Boyd. Regina v Hastie, Regina v Spear (On appeal from her Majesty's Courts Martial Appeal Court) (Consolidated Appeals) [2002] UKHL 31.

[2] Operational effectiveness may be defined as ***the ability of a unit or formation to function as a cohesive force to perform the operations, missions or actions for which it is organised or designed.***

11. The integrity of the Service criminal justice system, which deals with both criminal and disciplinary matters, is crucial. It is especially important where only the Service system of justice may be available to deal with allegations of offences committed by Service personnel and to punish appropriately those who are found guilty. The system must command the respect both of those who are governed by it and of those outside bodies and individuals who are touched by it. This means fairness to individual personnel, appropriate safeguards and transparency. It must be sufficiently robust to withstand rigorous scrutiny from whatever quarter.

12. It remains our intention that Service law should reflect the provisions of the civilian criminal justice system in so far as it is sensible and practical to do so. This involves recognition equally of the need to sustain the Service ethos and discipline.

Consultation

13. At the start of its work the Tri-Service Act Team undertook visits to a number of Service establishments for discussions with Service personnel of all ranks. There have also been detailed discussions with representatives of the Armed Forces of the United States, Canada, Australia and New Zealand, all of whom have forms of harmonised Service legislation. We received helpful responses to questionnaires sent to the French, Germany and Dutch Defence Ministries. Closer to home we are of course developing our proposals in consultation with other Government Departments and will be keeping the devolved administrations informed. Where appropriate we are also involving other stakeholders such as welfare and families' organisations and the trade unions. A full list of those consulted so far is at Annex C.

Why a Tri-Service Approach?

14. We believe there are strong grounds for creating a TSA. These include:

- The general perception, reflected in the SDR, that a single system of Service law would be more appropriate for Services that are increasingly deployed on joint operations and for which they train together (especially with the advent of six new Defence Training Establishments under the Defence Training Review). In simple terms it is considered that the basic principle should be that, especially within joint commands and units, Service personnel should be subject to the same systems and the same rights and penalties, except where a special rule applying only to the member of one Service is essential.
- The specific concern that because the attachment regulations do not apply to fully joint units, the commanders of such units (ie ones where there is no single Service lead such as the Joint Nuclear Biological & Chemical Regt) do not have disciplinary powers over all those under their command. This runs contrary to the intention that command and discipline should be aligned. The alternative contrived solution that has been adopted in such units is the appointment of separate COs for each Service component to deal solely with discipline. This also creates a risk of inconsistency and disparity in treatment of co-accused.
- The additional concern that, in joint units with a single Service lead, there is a reluctance to use existing attachment regulations which, to an extent, enable all personnel to be subject to the lead SDA[3]. A principal difficulty is the difference in COs' powers between the SDAs. The effect is that personnel tend to be returned to their own Service for disciplinary action, which similarly runs contrary to the intention that command and discipline should be aligned, and raises a risk of inconsistency, which could compromise the perceived fairness of the system.
- In addition, although many of the disciplinary provisions in the individual SDAs are essentially the same, the existence of the separate Acts makes the use, interpretation and amendment of the legislation more complicated and perpetuates different interpretations on a single-Service basis. This makes it more difficult to obtain reasonable consistency in dealing with the same or similar matters, for example in whether to deal with the matter summarily or by court martial than ought to be the case under a single Act. We acknowledge, however, that the objective of achieving consistency under a TSA will also require, over time, a degree of willingness to adapt Service cultures.

15. Against this background, maintaining separate legislation for each of the Services or disciplinary systems with substantial differences between them makes little sense. The increasing number of joint organisations and operations and the uncertainty and potential for delay and discontent that can arise from applying separate systems within such structures and environments require a new approach. **Bringing procedures into a *single system of law* that will by definition operate equally well in single, bi- or tri-Service environments is therefore a key objective.**

[3] The SDAs provide for the temporary attachment of members of one Service to another Service. The effect when a member of a Service is attached is that he becomes subject to the disciplinary code of the Service to which he is attached, but remains also subject to the code of his own Service.

16. This approach has Parliamentary support, notably from the Select Committee on the Armed Forces Bill 2000–01, who were keen to see legislation to reflect the reality of the extensive joint activity between the Services[4].

17. Within the disciplinary context, the law and procedures applicable to all the Armed Forces need also to be sufficiently flexible to operate well in a wide variety of operational circumstances, and without affecting the individual Services' continuing primary responsibilities for the discipline of their personnel.

18. Commanders of joint operations would expect discipline generally to be dealt with at a lower level, and therefore effectively in a unit. And, of course, many personnel participating in joint operations do so typically as members of single-Service formed units capable of self-regulation in disciplinary matters. Nevertheless, a single system of Service law will remove the legislative obstacles to joint operational commanders assuming responsibility for discipline where appropriate and will ensure greater consistency across operational theatres and where co-accused are from different Services. A further benefit of a revised structure for command authority will be to extend to joint organisations, such as the Defence Procurement and the Defence Logistics Agencies, the ability to administer discipline to their personnel.

19. In the circumstances, the strategy that has been adopted is based on the creation of a harmonised, single system of Service law that will underpin OE in all environments. Individual proposals have been developed in this context, while allowing for tolerable variation[5] in procedure only where it is essential to do so.

20. The following sections set out in some detail the proposals about the major areas of discipline, in particular summary jurisdiction under which system the majority of offences are already dealt. Subsequent sections on redress of grievance procedures and Boards of Inquiry identify the approach we are taking in developing proposals, but on which final policy agreement has not yet been completed. Finally, the memorandum outlines other areas of Service law on which work is in hand to achieve harmonised and modernised proposals for the Bill.

Discipline

21. Of all the areas covered by the SDAs, discipline is arguably the most critical for OE, in that it is key to the maintenance of unit cohesion. But it needs to be applied in a way that minimises operational disruption. Although OE has been an important consideration in developing the proposals for disciplinary powers and processes under the TSA, this is not to the exclusion of other factors, primarily the integrity of the Service criminal justice system as a whole.

22. The proposals, many of which are technical, do not affect the fundamentals of the present discipline system, with its focus on the commanding officer, able to deal with the majority of cases summarily as the means of maintaining good order, but with the requirement for the more serious cases to be tried by court martial. Service law has evolved in recent years to take account of developments in case law, in both the House of Lords and the European Court of Human Rights, most recently by ending the use of uniformed judge advocates in Royal Navy courts martial and we remain confident that the system overall is ECHR compliant. These proposals for tri-Service law maintain an approach that is evolutionary rather than revolutionary.

23. The key change within a single system of Service law is that COs will be able more readily to administer discipline to all under their command, of whatever Service. Moreover, there will be no need to maintain distinctions between different types of court martial, either between or within[6] the Services, although it is envisaged that the general presumption for most cases will be that the composition of the court martial will reflect the Service of the accused.

Summary Discipline

24. The detailed proposed powers and procedures for summary discipline are at Annex D. The key issues to be resolved have been the range of civil offences capable of being dealt with summarily and the punishments available to the CO At present, these differ between the Services:

RN

(a) COs may deal with a wide range of civil offences, the only express statutory limitation being in relation to treason and any offence for which the sentence is fixed by law as life imprisonment.

[4] Special Report from the Select Committee on the Armed Forces Bill Session 2000–01 HC paper 154-1.

[5] "I think it is sensible for us to look at a tri-Service Act, but what I would also want to do very carefully is to make sure that we did not lose the baby with the bath water, and that we recognise tolerable variation that needs to exist between the three Service environments" Chief of the Defence Staff Oral Evidence 6 March 2001 Select Committee on the Armed Forces Bill 2001–02 HC 154-II Q1030.

[6] The Army and RAF hold District and General Courts Martial, the RN have only one form of court martial.

(b) RN summary powers of punishment extend to dismissal, 90 days detention and (for substantive senior rates and leading hands) reduction in rate, all of which may, in exceptional circumstances, be combined[7].

Army/RAF

(a) COs may deal with only a limited range of civil offences set out in a schedule in the Summary Dealing Regulations.

(b) Summary powers of punishment do not include dismissal, and the statutory limit on detention is 60 days[8]. Acting rank can be removed in both Services; otherwise the punishment of reduction in rank can only be awarded to lance corporals in the Army.

25. It would undermine the purposes of a TSA to perpetuate differences in summary powers between the Services. The issue has been to agree a harmonised level of powers intended to underpin a single system of Service law and OE, across all three Services. A number of options were examined, including setting the level at either the present RN or Army/RAF powers, but neither of these was acceptable, because they either excessively restricted or unnecessarily extended the powers of one or more of the Services. Our proposals seek to reconcile the two approaches and necessarily reflect a compromise in the overriding interests of harmonisation. On the one hand there will be a significant narrowing of RN summary jurisdiction and sentencing powers involving more cases having to be dealt with at court martial, with the potential for associated delay and an impact on OE involved in assembling a court and witnesses. On the other hand, it will provide for a shift, only where appropriate, to summary dealing from trial by court martial in the Army and the RAF and the addition of sentencing powers, though the expectation is that these extensions of jurisdiction and sentencing powers would rarely be needed in the single-Service environment.

26. *Harmonised Solution.* The agreed solution comprises a new harmonised list of criminal offences and powers of punishment. The key features are:

(a) The list of criminal offences that can be dealt with summarily would be based on the current Army/RAF schedule, plus a small number of additional offences that the RN regard as essential to retain as summary offences.

(b) The maximum punishments to be available summarily to be 90 days' detention and one step reduction in rank/rate for SNCOs and equivalents, and below; the RN powers to dismiss and multi-step reduction in rate are removed.

(c) In all Services, any civil offence not on the current Army/RAF schedule, as well as cases where a punishment of reduction or detention in excess of 28 days[9] is possible, may be dealt with summarily only with the prior approval of higher authority[10].

27. It is not expected that this solution will increase the number of RN courts martial unmanageably nor, because of the safeguards just described, lead to inappropriate cases being dealt with summarily. Based on Leading Counsel's advice, the proposed changes will not affect the position of the summary system as regards compatibility with the ECHR[11].

28. More generally, we have reviewed, with a view to harmonisation and modernisation, the powers of COs in relation to allegations of criminal and disciplinary offences. In doing so we have also of course taken into account recent operational experience. We have concluded that, notwithstanding the availability of legal advice, we should remove the power of a CO to dismiss without any form of hearing, a criminal charge he would be unable to deal with summarily. In the case of the most serious criminal offences triable only by court martial, not only will the CO be required to inform the Service police as soon as reasonably practical, the police themselves will put any proposed charges to the independent prosecuting authority from whom they may take advice from an early stage, while at the same time informing the chain of command.

29. *Right to Elect Trial by Court Martial.* A further difference between the three Services is that all accused facing summary proceedings have the right to elect to be tried by court martial instead, except for naval ratings[12]. This distinction was justified in the past by the need to avoid naval courts martial for the less serious cases[13], since this would impact on operational effectiveness (because in the RN, courts martial can affect the availability of personnel to an extent that is not always so evident in the other Services). The Army and RAF have had the universal right to elect since 1997 and their experience is that the right is rarely

[7] Naval Summary Discipline Regulations limit the circumstances in which these particular powers (including *any* period of detention) can be employed, as well as providing procedural and other safeguards to protect the accused where they are exercised, notably the requirement for approval of a punishment warrant (pursuant to legal advice) by a 2* officer or above.

[8] Further restricted in Summary Dealing Regulations to 28 days unless extended powers have been granted by Higher Authority before the summary hearing.

[9] The current threshold for seeking "extended powers" from higher authority in the Army and RAF.

[10] Higher authority—under Defence Council regulations, a superior officer in the CO's chain of command.

[11] *See* Annex A.

[12] For naval ratings, trial by court martial must be offered where the commanding officer considers that he may award detention, dismissal or disrating.

[13] For example, short periods of AWOL without aggravating circumstances.

exercised[14]. There could be no question of withdrawing this right in the interest of harmonisation, but to perpetuate differences between the Services on the right to elect would mean that individuals in the following circumstances could find themselves in differing or uncertain positions in relation to this key right:

(a) If they were from different Services but in a joint unit.

(b) If they were attached as individuals to units of other Services.

(c) If, as members of different Services (though not in the same unit), they were charged with the same offence.

30. We have concluded (with the support of Leading Counsel) that a right to elect should be made universal. Extending this right will also strengthen the ECHR compliance of the summary system as a whole.

Courts Martial

31. The proposed procedures for courts martial are at Annex E. The key proposals are:

— The creation of a single prosecuting authority to replace the three single-Service prosecuting authorities. We believe a single system of law should be underpinned by joint appointments and organisations. As now the prosecuting authority would be entirely independent of the chain of command and be subject on a non-statutory basis to the general superintendence of the Attorney General.

— A defence arrangement, on which more detailed proposals are still being developed. This will probably not require statutory provision.

— A joint court administration authority. The Army and RAF already share a court administration authority and a study is now considering how it should be joined by the RN authority.

— One type of court martial with the size of the court depending on the more objective test of the offence charged rather than an assessment of the maximum sentencing power as at present for the Army and RAF.

— There should be a standing court martial, rather than ad hoc courts. This will still allow a flexible membership, as at present but will have a number of advantages over the present ad hoc arrangement, notably to dispense with the requirement for a convening warrant for each trial; judge advocates would not have to be sworn in on each occasion; and case management would be simplified.

— A number of technical changes to procedures, including allowing the judge advocate to arraign alone.

32. We have also considered whether judge advocates should be able to sentence alone, particularly where the accused has pleaded guilty. The Service input to sentencing is an essential feature of a separate military justice system. It brings both an understanding of the employment consequences for the accused of any particular sentence and an understanding of the impact of particular crimes in the Service environment where trust between colleagues who live and work so closely together, sometimes in difficult and dangerous circumstances, is critical to unit cohesion. Following a recent judgement of the European Court[15] there is already a single body of civilian judge advocates for courts martial across all three Services. We have concluded that when imposing sentence, the court martial should continue to comprise a Judge Advocate and lay military members.

Redress of Complaints

33. A timely, effective and fair redress system is an essential requirement of good management practice. This is particularly so in relation to Service personnel, who do not generally have the protection of employment legislation and whose terms and conditions of service make withdrawing their labour a disciplinary offence carrying criminal sanctions. Under current legislation a Serviceman is entitled to elevate any complaint relating to his service to the highest level internally, the Service Boards, but with certain significant exceptions, cannot take his case to an Employment Tribunal (ET)[16]. A fair and efficient complaints system is therefore essential to retain the trust of personnel and to support OE. Where the resolution of a complaint is unsatisfactory or slow it has the potential adversely to affect morale and personal effectiveness.

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[14] This is possibly because personnel in all three Services have the right to appeal from summary dealings. If they do appeal, the penalties available to the Summary Appeal Court are capped by the punishment *actually* awarded by the CO. However, a court martial dealing with an accused who has exercised the right to elect is capped by the *maximum* punishment that would have been available to the CO.

[15] Grieves v UK 16 December 2003.

[16] Service personnel have the right to submit complaints to an Employment Tribunal under a number of provisions, notably the following: Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Working Time Regulations 1998, Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, Employment Equality (Religion or Belief) Regulations 2003 and Employment Equality (Sexual Orientation) Regulations 2003.

34. Consideration has been given to whether Service personnel should be brought within the scope of ordinary contract and employment law. This would enable them to take the full range of employment issues to a court or tribunal, including complaints of unfair, wrongful or constructive dismissal, as well as matters that are covered at present, such as race and sex discrimination. With regard to contractual claims, the terms of engagement of Service personnel do not constitute contracts; personnel are servants of the Crown appointed under prerogative powers and serve primarily under statute—the SDAs—plus under a mixture of custom and practice, Orders-in-Council and Regulations (both SIs and Queen's Regulations). To alter this would require a fundamental constitutional change to the status of service personnel and their relationship with the Crown more generally. Even if it were achievable, it would be undesirable. It would have implications for Service ethos and the chain of command on which operational effectiveness depends. The essence of the military relationship is that it is based on command and discipline. The introduction of civil contractual rights into an organisation which frequently requires immediate obedience to orders on penalty of criminal disciplinary action could therefore cause problems. It would for example be incompatible with the Services' ability to prosecute servicemen, say for being absent without leave, as well as for other offences required to maintain a disciplined force at all times. The operational needs and working conditions necessarily set Service personnel apart from other citizens in a way with which ETs are not familiar. It is therefore considered that the current legal position in relation to the application of contract and employment law should not be altered. This makes it all the more important, however, that the internal grievance procedure is demonstrably fair and effective.

35. The current system deals reasonably satisfactorily with the majority of cases which are settled below Service Board level, but there is a general consensus that key areas of the redress system could be improved. These are briefly described below:

(a) The statutory right to state a complaint to the Service Boards means that a number of apparently very minor matters can reach that level involving considerable and sometimes entirely disproportionate time and staff effort. The Boards are legally unable to delegate these functions, so all complaints at this level must be considered by two Board Members—often leading to delay.

(b) Redress procedures have traditionally required a complaint to be considered at a number (varying between the Services) of levels before reaching the Service Board if it is not resolved to the satisfaction of the complainant earlier. On occasions a particular level may have nothing to contribute and may not have the power to resolve the complaint—this inevitably but unnecessarily delays the matter and is in itself a source of complaint. (The number of stages has in most cases already been reduced as a matter of policy).

(c) In cases where there is a right to go to an ET, the complainant is obliged first to use the Redress system and any ET application may be delayed pending its outcome.

(d) Currently, the Board's power to award compensation is unclear, for example whether they are limited to where there has been actual financial loss[17].

(e) An officer has the right, after consideration by the Service Board, to petition Her Majesty on any matter. This is an historical right derived from the fact that an officer holds the Queen's Commission.

(f) There is scope for the perception that the present system results in findings which are overly supportive of the chain of command with a reluctance, sometimes, by higher elements of the chain of command to interfere with the decisions and opinions of their subordinates.

36. The key principles and policy proposals to address these aspects are outlined below, some of which will require further development.

(a) The right of individual Service personnel to state a complaint should continue to be founded in legislation.

(b) The principle that complaints should be resolved at the lowest level possible is paramount, as is the CO being integral to the system. However, when it becomes apparent that the CO (or the next level in the chain of command) cannot resolve the particular complaint, in order to avoid any unnecessary delay, it should be elevated swiftly to the first level that is able to resolve it, even if that is the highest level. This will eliminate those who are unable to add value by investigating the complaint productively.

(c) The establishment of a Tri-Service Redress of Complaints Panel designed to underpin confidence in the system. The Panel would be established at 2* level although could include 1* members[18]. Although capable of dealing with a complaint from any of the Services, its membership would be adjustable so as to be appropriate to the Service of the complainant. In some cases, individuals would retain the right to proceed to the Service Boards, although this would only be where the complaint relates to a decision at Service Board level eg discharge or censure of officers. Although

[17] Where an application to an ET has been made, MOD Claims can, with legal advice, approve compensation in race, sex and discrimination cases. From April 2003, the authority and budget to compensate in such cases was delegated to the Principal Personnel Officer commands.

[18] Membership to be flexible, according to the nature of the complaint, but will allow for both Service and civil service members. Although not essential, consideration will also be given to the desirability, or otherwise, of including an independent member in some cases.

more cases than currently reach the Service Boards may reach the Panel, members will be selected from a wider pool thus reducing delay. The Panel would have the capability of holding oral hearings as necessary and, over time would become more practised in its procedures. It has the attraction of efficiency, speed and a greater degree of independence than exists at present, and also of unburdening the Service Board of their current level of redress caseload, whilst not significantly reducing the highest level to which a complaint may be progressed.

(d) Further development work will be needed to consider the detailed composition and procedures of the Panel and its specific powers, particularly with regard to awarding financial compensation which is being considered in consultation with the Treasury. The Panel will not however have power to make any award that has the effect of overturning policy. In such a case the Panel will be able only to make a recommendation to the Service Boards and other appropriate bodies. Making such a recommendation will formally conclude the redress for the individual but, the Service Boards will be required to consider and respond to the recommendation, the nature of which will be conveyed to the complainant. Although not then part of the redress process, the Service Board's response may (but equally it may not) affect the individual complainant favourably.

(e) The establishment of a Tri-Service Secretariat to provide a focus for the complaints system.[19] This would not necessarily require provision in the Bill. The Secretariat would ensure consistency of approach and standard formats in the submission of complaints. It would be able to task other agencies to investigate specific issues of a complaint, to ensure timely progress of a complaint through the system, and where necessary raise a complaint direct to the Panel. It would liaise with relevant policy departments to attempt to assist early resolution of complaints without recourse to higher levels of decision-making.

(f) There is no intention to weaken the constitutional relationship between officers and the Sovereign. However, as the proposed system will limit the right of all complainants to proceed to the Service Boards, and the Panel will be the final level in the majority of cases, it is considered that officers should only have the right petition the Sovereign in cases where a right of access to the Service Boards is retained. This will mean that those issues which are considered to be central to the constitutional relationship, such as an officer's discharge or censure, will continue to be capable of petition, but those less significant matters, for example, complaints about whether or not an officer was entitled to a particular allowance, will not be able to proceed beyond the Panel level.

Boards of Inquiry (BOI)

37. BOI are internal Service inquiries (set up by statute for the Army and RAF and under the royal prerogative for the Royal Navy) to investigate and report the facts about a matter and to express opinions. This enables the Services to learn any lessons as quickly as possible so as to minimise the risk of the same thing happening again. BOI may be convened into any matter. There is separate statutory provision for lower level inquiries in the Army and RAF (Regimental/Unit inquiries); the main difference between the two being the level at which the inquiries are convened and whether or not taking evidence on oath is mandatory. RN Ships' Investigations operate under the prerogative and broadly reflect Army and RAF lower level inquiries.

38. To fulfil its purpose, the BOI process must be applicable worldwide, including in difficult and dangerous circumstances; it may also need access to sensitive or classified material and sit in tandem with coalition partners' procedures. Nothing should impede witnesses in giving full and frank evidence. Members of the BOI must have no personal interest in the incident under investigation, but the members frequently have relevant backgrounds, which help them understand the context; they also have access to specialist technical advice, which can be external, for example from the Air Accident Investigation Branch. Beyond that, there are checks and balances provided by scrutiny by higher authorities and the review of reports by legal advisers to ensure that the conclusions are justified on the basis of the evidence.

39. Regulations on BOI (SIs which are laid before Parliament) may, in particular, determine when a BOI is mandatory, and provide for rules of evidence, the taking of evidence on oath, securing witnesses, and the protection of witnesses whose reputation might be affected. There is separate statutory provision for rules concerning the lower level inquiries where a key difference is that such rules are made under the authority of the Defence Council, and are not subject to formal Parliamentary scrutiny. Largely equivalent provisions are contained in Queen's Regulations for the Royal Navy supplemented by guidance, with the main difference being that in a Naval BOI or ship's investigation, evidence is not given on oath.

40. There is no justification for removing the statutory basis for Army and RAF BOI. The particular advantage of a statutory system is the ability to provide for additional powers and enforcement as well as greater transparency in serious or sensitive matters. Such provisions are widely regarded as important for inquiries to be effective. The proposals therefore envisage a fully tri-Service statutory provision—a major change for the Royal Navy—which will also enhance interoperability.

[19] The Secretariat would be drawn from those already specifically appointed to deal with complaints in each Service. There are unlikely to be any significant efficiencies without co-location of the three Service elements.

41. It is envisaged, subject to ongoing work, that the TSA itself should provide for a single system of Service Inquiry encompassing the present BOI and regimental/unit Inquiries, extended to cover the Royal Navy. Appropriate provision would be made for:

— the possible purposes of a Service statutory Inquiry;
— the authority to convene such an Inquiry and the basic membership requirements;
— powers to deal with the subject and detail of mandatory inquiries and procedures;
— protection for witnesses where their reputation might be affected; and
— certain powers and penalties including subpoenas and their enforcement.

Other Matters Under Review

42. We are taking the opportunity of creating a single system of Service law to review and modernise existing provisions across the whole spectrum. Work is reasonably advanced, for example, on a review of Service offences. Most of the Service offences are very old ones. Some have not been charged for many years (often not since the Second World War) and as a result have not had the benefit of recent judicial interpretation. The offences are being reviewed on the basis of clarification of the most obvious points of uncertainty and with a view to harmonisation and modernisation as are the maximum punishments available in each case where it will be proposed that the offence is retained.

43. More widely, and in consultation with stakeholders, we are reviewing the application of Service law to accompanying civilians, the operation of Standing Civilian Courts (provided for in the Armed Forces Act 1976) and for child protection legislation (provided for in the Armed Forces Act 1991).

44. We are also considering the structure of the legislation, the appropriateness nowadays of the provisions for the use of delegated powers and the arrangements for the five yearly renewal of Service law by primary legislation and in the intervening years by Order in Council.

45. All this work is taking place against the background of changes in the civilian criminal justice system. This means that, as is normally the case, some changes to Service law will be introduced over the coming months, before introduction of the Bill. This is particularly true of provisions arising from the implementation of the Criminal Justice Act 2003 which is being brought into effect over several years.

Resource Implications

46. Any change in the management and delivery of discipline and the other associated personnel areas covered by the TSA may require both inter- and intra-Top Level Budget transfer of resources. Potential areas of resource change that may emerge include the total numbers of staff needed to manage a harmonised summary discipline and court martial system[20] and the provision of steady-state training for all personnel. Given the intention to implement the new procedures in 2008, an assessment is being undertaken of the staffing levels needed to complete development of the legislation; to draft tri-Service regulations and publications; and to conduct pre-implementation training—all of which will have some cost implications. Some of these activities will have to be undertaken on a concurrent basis, if the planned implementation date is to be achieved. Some medium term increases in staff may be necessary and precise, future resource requirements have yet to be determined.

5 October 2004

Annex A

OUTLINE OF PRESENT SYSTEM OF SERVICE LAW

1. The following paragraphs give a basic outline of the systems of military law applied by each of the Armed Forces. Its purpose is to provide a general background, rather than to reflect the detailed rules.

2. The disciplinary systems of the three Armed Services are underpinned by the three Service Discipline Acts: the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957—collectively known as the Service Discipline Acts (SDA). Before the 1955 Acts, the predecessor Acts for the Army and RAF expired annually and had to be re-enacted by Parliament each year. This reflected the historical legacy of retaining Parliamentary control over the Armed Forces contained in the Bill of Rights of 1688[21]. The reason for limiting the period of existence of the "standing army" was to curtail the power of the Crown. Permanently preventing the Crown from having a standing army made the country vulnerable to invasion, so Parliament authorised the existence of a standing army, but limited its existence to a fixed period so as to ensure that the Crown could not again dominate Parliament.

[20] To the extent that organisations, such as the Prosecuting Authorities and Courts Administration Offices, will be unified under a TSA, there might be scope for savings, although the staff numbers involved at present are relatively modest.

[21] "That the raising or keeping a standing army within the kingdome in time of peace unlesse it be with consent of Parlyament is against law."

3. The current Discipline Acts last only for a year at a time, but may be renewed each year for a maximum of five years by Order in Council[22]. Before the end of the fifth year, they must be renewed by primary legislation—the quinquennial Armed Forces Act, the last of which was in 2001. The quinquennial Act renews the SDAs as well as providing an opportunity to make any necessary amendments to the existing legislation. The SDAs enable offences allegedly committed by persons subject to naval, military or air force law to be dealt with by the Services. They apply worldwide to members of the Armed Forces and, overseas, to certain categories of civilians (including their families) accompanying them. All offences against Service discipline and against the law of England and Wales may be tried, except for certain offences (such as murder, rape and war crimes) committed in the United Kingdom.

4. The CO of a unit is at the core of the discipline system, on the basis that command and responsibility for discipline should be aligned. Thus, any alleged offence is reported in the first instance to the CO who is responsible for ensuring that the matter is investigated. He then can consider whether:

(a) to dismiss the allegation; or

(b) where he has jurisdiction, to deal with the case summarily; or

(c) to refer the case to higher authority.

5. In considering the second of these options, the CO will also consider whether the case is appropriate for *summary* disposal, ie for him to hear and decide the case himself. The CO will have legal advice available from Service legal advisers. The CO and his legal advisers will take into account the limited range of punishments at his disposal and the complexity of the case, both of which may make it unsuitable for summary disposal. Across the three Services, there are some 15,000 summary disposals a year.

6. The CO will pass the case to higher authority either with a view to court martial or with a view to summary hearing where the accused is an officer or warrant officer. Officers and warrant officers can only be dealt with summarily by the "appropriate superior authority" (a superior officer in the CO's chain of command).

7. Where a case is referred to higher authority, that authority will in turn have various options, depending on the offence and the rank of the accused. Perhaps the most important of these is to refer the case to the appropriate Service prosecuting authority with a view to trial by court martial. The prosecuting authorities are independent of the chain of command and are under the general superintendence of the Attorney General. The prosecuting authorities decide, on the basis of a Code for Prosecutors, whether to prosecute and which charges to prefer. There are about 700 courts martial each year.

8. **Points on summary hearing.** The summary hearing before the CO is not considered compliant with Article 6 of the European Convention on Human Rights (ECHR) for a number of reasons including the CO's lack of independence, the absence of legal representation for the accused. The overall *system* is considered to be compliant because of:

(a) the accused's right before any summary hearing to elect trial instead by court martial with the court martial having only the powers of punishment of a CO; and

(b) the accused's right after a summary hearing to appeal to the Summary Appeal Court.

(Both courts martial and the Summary Appeal Court are considered to be ECHR-compliant courts.)

9. There are a number of differences between the arrangements for summary hearing in the Royal Navy and the other Services. For naval ratings[23], the right to elect trial by court martial is limited to cases where the CO is considering awarding sentences of detention, dismissal or disrating (demotion). Furthermore, the naval CO is able to deal with a much wider range of offences than his counterparts in the other Services and to apply more severe punishments. Thus he can award a maximum of 90 days detention (as opposed to 60 days in the other Services); he can dismiss from the Service; and he can reduce in rate a wider range of personnel and by a greater amount—although these more severe penalties are subject to safeguards including the approval of higher authority, which is informed by legal advice. He may also, in certain circumstances try officers and warrant officers summarily. The historical reasons for these differences lay in the Royal Navy's operational circumstances and it remains the case that, if too many offences were to be dealt with by court martial, rather than summarily, this could impinge unacceptably on the operational effectiveness of the fleet through the need to remove witnesses, court members and others from their prime duties, at sea.

10. **Points on courts martial.** The procedures at a court martial are broadly similar to those of the Crown Court. The judge advocate performs most of the functions of a Crown Court judge, but there is a panel (of variable size, but not less than three) of Service officers and warrant officers instead of a jury. The panel decides finding, and the Judge Advocate and panel together decide the sentence. There is a right of appeal

[22] The Naval Discipline Act was placed on this basis in 1971.

[23] ie personnel other than commissioned officers.

to the Courts Martial Appeal Court (in effect, the Court of Appeal by another name). There is an additional Service review of all court martial convictions, which can lead to these being quashed or to sentences being varied, but not to any increase in sentence.[24]

11. Reforms in the Armed Forces Act 1996, introduced in 1997, were intended to reinforce the independence of the court martial system from the chain of command and so make it compatible with the ECHR. A recent judgement[25] confirmed that courts martial are ECHR-compliant courts.

12. Again there are some differences between the Royal Navy and the other Services. It has only one type of court martial, whereas the Army and Royal Air Force have District and General Courts Martial[26], the latter type being intended for the more serious offences (a district court martial has maximum sentencing powers of two years imprisonment). The Army and RAF use civilian judge advocates, appointed by the Judge Advocate General. Similarly, since February 2004, the RN have used civilian judge advocates appointed by the Judge Advocate of the Fleet. He previously selected naval barristers to serve as Judge Advocates.

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Annex B

THE TRI-SERVICE BILL: MAIN HEADINGS AND SCOPE

ENLISTMENT AND TERMS OF SERVICE

DISCIPLINE

SERVICE OFFENCES

Misconduct in action and other offences arising out of service

Mutiny
Insubordination
Desertion and absence without leave
Offences relating to ships and aircraft
Malingering and drunkenness
Offences relating to property
Offences relating to custody
Offences relating to conduct
Miscellaneous offences
[Including offences relating to court martial]
Attempts and aiding and abetting

OFFENCES, CONDUCT CORRESPONDING TO A CIVILIAN OFFENCE

JURISDICTION

Courts Martial
Summary
Double jeopardy

POWERS OF ARREST AND ENTRY, SEARCH AND SEIZURE

CUSTODY

INVESTIGATION AND SUMMARY TRIAL

Investigation and summary dealing

Punishments
The Summary Appeal Court

[24] The review process was ruled to be a violation of article 6 of the ECHR by the Strasbourg court in the *Morris* judgement in 2002 (on the basis that it was non-judicial interference), but the House of Lords subsequently took a different view in the case of *Boyd, Hastie, Spear and others* (because review cannot increase sentence and its outcome is in itself appealable). Given these conflicting judgements, the Grand Chamber of the European Court of Human Rights considered a further case (Cooper) with a view to resolving the issue. The judgement, although finding no violation in the particular case, makes it clear that the court remains uncomfortable with the process.

[25] Cooper v the UK. 16 December 2003.

[26] There is also provision for field general courts martial (FGCM), for use on active service when it is not possible to convene a regularly constituted court martial. It is not intended to retain FGCM. They are incompatible with the ECHR.

Review of summary findings and awards

THE PROSECUTING AUTHORITY

TRIAL BY COURT MARTIAL

The Court Martial incl composition and membership
Proceedings
Sentencing powers: punishments available
Sentencing powers: young offenders
Mandatory etc custodial sentences for certain offences
Orders additional to sentence
Unfitness to stand trial and insanity
Evidence and records etc

SENTENCING PRINCIPLES

SERVICE AND EFFECT OF CERTAIN SENTENCES

Effect of military detention on rank or rate
Commencement and duration of sentence
Postponement, suspension and reconsideration
Review of service supervision and punishment orders

BOARDS OF INQUIRY

MISCELLANEOUS

Including:
Testing for alcohol and drugs
Financial penalty enforcement orders
Costs orders

FORFEITURES, DEDUCTIONS AND MAINTENANCE

Maintenance
Other forfeitures and deductions

CIVIL AUTHORITIES

Jurisdiction of civil courts to try offences

Offences relating to service matters punishable by civil courts
Arrest and detention by civil authorities
Exemptions from certain civil matters

Proceedings for maintenance

REDRESS OF COMPLAINTS

MISCELLANEOUS

Powers of command and attachment to other forces
Powers to make further provision

APPLICATION OF SERVICE LAW

Persons subject to service law

Application of Act to certain civilians
Application of Act to reserve and auxiliary forces
Application in relation to different countries

5 October 2004

Annex C

CONSULTATION

1. *Seminars*

Seminars were held with the Principal Personnel Officers and their staffs at PORTSMOUTH (RN), UPAVON (Army) and INNSWORTH (RAF)

2. *Visits by Tri-Service Act Team (or elements thereof):*

Visits have generally involved discussion groups with officers, senior and junior ranks.

Permanent Joint Headquarters (PJHQ)

HMS NEWCASTLE

HMS GLASGOW

HM Naval Base Portsmouth

RAF HONINGTON (Joint Nuclear Biological and Chemical Regt)

RAF ALDERGROVE (including CO 5 Regiment Army Air Corps)

RAF LEUCHARS

HQ Northern Ireland

Air Officer Commanding 2 Group

Joint Helicopter Command

Joint Pay and Administration Strategy Study Team

Pristina, Kosovo: HQ Multi-National Brigade, Queen's Royal Hussars, Highlanders, 35 Engineer Regiment, Joint Helicopter Force

HQ Royal Marines

HQ London District

7 Armoured Brigade, Hohne, Germany: HQ, Hohne Court Martial Centre (Standing Civilian Court and Judge Advocate), 111 Provost Company Royal Military Police, 32 Engineer Regiment

Cyprus: Commander British Forces, Commander Eastern Sovereign Base Area, Joint Services Signal Unit, Combined Services Support Unit, Cyprus Joint Police Unit, Cheshire Regiment, RAF Akrotiri

Land Command Accident Investigation Team (LAIT)

3. *Individual Team Member Discussions/Visits/Correspondence:*

Deputy Flag Officer Submarine Flotilla

Deputy Chief Executive, Naval Recruiting and Training Agency

HMS ILLUSTRIOUS

Captain Submarine Flotilla 1

HMS RALEIGH

CO HMS CARDIFF

CO HMS CROMER

CO HMS DULVERTON

RAF Cottesmore/Wittering

RAF Marham

RAF Wyton

Inspectorate of Flight Safety

Defence Logistics Organisation

Defence Procurement Agency

Personnel Director's staff (MOD)

5. *Consultation with External Authorities.*

Soldiers, Sailors and Airmen Forces Association (SSAFA)

Naval Personnel and Families Service

Army Families Federation

RAF Wives Federation

MOD Council of Civil Service Unions

Head of Wiltshire Crown Prosecution Service

Legal Secretariat Law Officers (Attorney General's office)

Office of the Judge Advocate General

Judge Advocate of the Fleet

HH Judge Woollam

Other Government Departments including Home Office, DCA, DTI, Cabinet Office, FCO and the Scottish Executive

Advisory, Conciliation and Arbitration Service (ACAS)

6. *Overseas Governments:*

The Australian, Canadian, Dutch, French, German and New Zealand Departments/Ministries of Defence responded to a questionnaire. Visits were made to the United States and Canada. Discussions were held in UK with representatives from Australia and New Zealand.

5 October 2004

Annex D

NEW RANGE OF HARMONISED SUMMARY OFFENCES AND POWERS AND PROCEDURES UNDERPINNING OE ACROSS THE ARMED FORCES

(Most, but not all, of these proposals will be in legislation. Some may be more appropriate to guidance or Service instructions.)

Summary Discipline—Jurisdiction

Proposal: COs should have disciplinary powers to deal with officers and warrant officers, in certain circumstances, in addition to existing powers to deal with non-commissioned personnel.

(This corresponds to the present position in the Royal Navy. In the Army and RAF, officers and warrant officers can only be dealt with summarily by an officer further up the chain of command than the CO (an "appropriate superior authority" (ASA)). It is considered that this can involve escalating some minor cases to too senior a level. However, it is intended that in all three Services there should continue to be the facility to refer the more serious cases involving personnel of these ranks to an ASA.)

Summary Discipline—Powers, Procedure and Safeguards

Proposal: The civilian criminal offences that can be dealt with summarily would be based on the current Army/RAF list, plus eight criminal offences which the RN need to retain as summary offences (the full list is at Appendix 1).

(This would greatly reduce the present range of offences triable summarily by RN COs.)

Proposal: In *all* Services, any of the eight additional criminal offences could be dealt with summarily only with the prior approval of higher authority, ie an officer superior to the CO in the chain of command, informed by legal advice.

Proposal: The Navy would lose its current summary power of dismissal.

(The other Services do not have this.)

Proposal: The standard setting for the maximum summary sentence of Service detention would be 28 days. COs would be able to apply to higher authority before a summary hearing for powers of detention for up to 90 days to be made available in principle. Higher authority would, with legal advice, be able to agree to this or impose a lower limit.

(90 days is the current Navy maximum; the maximum in the Army and RAF is currently 60 days.)

Proposal: Reduction in rank, available as a summary punishment for Senior NCOs and equivalents, and below, would be limited to one rank. It would be available only with the prior approval of higher authority.

(This removes the present power of Naval COs to impose multi-step reduction in rate.)

Proposal: After the summary hearing, if the CO intends to impose a sentence of more than 28 days detention or of demotion, he would be required to refer to higher authority again for a check, with legal advice, on whether there is any clear objection to the sentence proposed before it is pronounced.

Proposal: Accused facing summary proceedings in all three Services should invariably have the right to elect trial by court martial.

(The right is qualified in the Royal Navy at present. The right to elect is more of a safeguard than the civilian right to elect Crown Court trial. If a serviceman elects court martial (a compliant court), the court martial is restricted to the summary powers of punishment of a CO.)

Proposal: Accused should have the right to legal advice where this is necessary to inform the exercise of the right to elect trial by court martial.

(This is a further safeguard to underpin ECHR compliance. There is no bar on accused taking legal advice at present, but the entitlement to do so will be formalised. The basis on which legal advice may be provided is under discussion.)

Proposal: There should be disclosure of relevant papers to the accused on a common basis across the three Services at least 24 hours before the hearing.

(This accords with present practice, but there are some minor differences between the Services in the information that has to be provided.)

Proposal: Accused should have the right to representation by an officer or NCO at the hearing.

(Accused in all three Services are allowed an adviser at present, but there are differences in the extent to which this individual becomes actively involved in the proceedings. To admit legal representation would be to change fundamentally and unacceptably the nature of Service summary hearings. It would also be impractical in almost all cases where forces are deployed.)

Proposal: Accused should be able to call witnesses and to question witnesses, either directly or through a representative.

(One difference at present between the Services—see immediately preceding point—is the extent to which the accused's representative/adviser is able to question witnesses. A harmonised approach should be based on the procedure that is most favourable to the accused.)

Proposal: Where a charge is proved, reasons for punishment should be given at the time of award.

(This is to facilitate consideration of a possible appeal.)

Proposal: There should be a tri-Service sentencing guide for summary disposal.

(Each Service has a sentencing guide, but a common guide makes more sense in a tri-Service context, provided that this allows sufficient flexibility to take account of local factors.)

Proposal: The summary process generally should be developed on the basis of a template common to the Services, but which allows flexibility to take account of differences in the structures of units in the three Services.

(In certain respects there are quite large differences between the summary procedures of the three Services, and it will not necessarily be possible to remove those that appear to flow from the way their units are organised. This, which will largely be a matter for secondary legislation, requires further examination.)

Summary Discipline—Review and Appeal

Proposal: The right to appeal to the Summary Appeal Court (SAC) should not be affected.

(This right was introduced in 2000 as the main protection for summary procedures against ECHR challenge.)

Proposal: There should be a slip rule to enable COs, within a specified timescale, to review (but not increase) sentence in the event of technical errors.

Proposal: There should continue to be a specific review procedure for summary convictions, but reviewing authorities should no longer have the power (in exceptional circumstances) to quash convictions; rather this should be subsumed within their existing power to refer cases of doubt (as to conviction and sentence) to the SAC.

(Removal of the reviewing authorities' "unilateral" power to quash convictions is proposed on the basis that the power is exercised by a non-judicial body, potentially without benefit of any representations by the "prosecution", such as would inform a hearing on appeal.)

APPENDIX 1 TO ANNEX D

Criminal Offences Triable Summarily by Army and RAF COs:

Common Assault.

Criminal damage (subject to a specified financial limit).

Taking a motor vehicle or pedal cycle without consent.

Driving without due care and attention/reasonable consideration.

Dangerous riding of a cycle.

Getting on to or tampering with a motor vehicle.

Interfering with a vehicle.

Driving a motor vehicle with excess alcohol.

Being in charge of a motor vehicle with excess alcohol.

Theft.

Making off without payment.

Unlawful possession of a controlled drug.

Additional Offences Triable Summarily by RN COs to be Extended to the Other Two Services:[27]

Carrying an article with a point or blade in a public place.

Obtaining property by deception.

Obtaining services by deception.

Evasion of liability by deception.

[27] The list of additional offences will be kept under review between now and introduction.

Assault Occasioning Actual Bodily Harm.

Fraudulent use of a telephone (2 alternative offences depending on circumstances)

Possession of an offensive weapon.

5 October 2004

Annex E

COURT MARTIAL PROCEDURES AND POWERS

Courts Martial—Procedures

Proposal: There should be a continuing role for higher authority in consideration of the Service context in prosecutions.

(Consideration has been given to dropping this part of the process, in an attempt to help expedite cases sent to the prosecuting authority. However, it is considered that this would be achieved almost as well by (non-statutorily) time-limiting higher authorities, without foregoing the benefit of the overview that they are able to apply. For the most serious criminal offences triable only by court martial and referred direct to the prosecuting authority, higher authority may provide on request or otherwise information on the service context to the prosecuting authority.)

Proposal: There should be a single prosecuting authority, with a staff of lawyers drawn from the three Services.

(This accords with the general principle that a single system of Service law should be supported by unified appointments and institutions and is especially important to ensure consistency of application and advice. This is subject to detailed work to identify the structure of the new organisation to be headed by the prosecuting authority. He or she would remain independent of the chain of command and under the (non statutory) general superintendence of the Attorney General. There are implications for defence arrangements, where we aim in certain circumstances to provide Service lawyers to give defence advice and representation to Service personnel. We will need to consult the professional legal bodies on any potential conflict of interest issues).

Proposal: There should be a unified court martial administration authority.

(Again, this is on the basis that there should be unified institutions. The administration authorities are based in statute, with their key role (as far as the independence of the court martial system is concerned) being the selection of court martial members—this is now largely done on a random basis.)

Proposal: There should be one type of court martial, comprising a judge advocate and a minimum of three lay members, except for certain serious offences, where the size of the court should be a judge advocate and a minimum of five lay members.

(In practice, naval courts martial and General Courts Martial in the other Services generally have a judge advocate and five lay members, while Army and RAF District Courts Martial have a judge advocate and three lay members and have lesser sentencing powers. There is no evidence that the higher number of lay members increases the quality of justice, although it may be justified in the more serious cases, in order to reinforce the gravity of the matter. At present, in the Army and RAF, the prosecuting authority decides on the type of court martial and therefore, in effect, on the sentencing powers that will be available—this is a less objective test than the offence charged, as is proposed.)

Proposal: A majority vote on finding should be sufficient.

(This is the current position. There is no overriding legal reason for any change, and practical grounds exist for maintaining the status quo, primarily the potential for re-trials.)

Proposal: The casting vote on sentence, when needed, should be exercisable by the judge advocate.

(At present, the president (ie the senior lay Service member) exercises the casting vote. The change is justified by recognition of where the primary expertise on sentencing lies.)

Proposal: The provisions concerning pre-trial hearings should be rationalised.

(This concerns the various types of hearings conducted by the judge advocate alone. Arrangements (which are set out in secondary legislation) differ between the Services.)

Proposal: It should be possible to take a plea at a pre-trial directions hearing.

(This reflects civilian practice and is intended to expedite justice. It will enable the judge advocate conducting the pre-trial hearing and taking such a plea immediately to order such pre-sentence reports as are necessary, so that the full court, when convened, can proceed immediately to sentence.)

Proposal: It should be possible for the judge advocate to arraign alone.

(This involves the accused pleading to the charges in front of the judge advocate alone and has the significant advantage of avoiding a court being exposed to mixed pleas and, as a consequence, avoids the risk of a requirement for a second or separate trial. It does not interfere with the court's wider fact-finding and sentencing roles.)

Proposal: The Services' legal aid schemes should be put onto a statutory footing and be administered by a unified authority.

(Consideration is being given to putting the Services' legal aid schemes onto a statutory footing (at present they are non-statutory, but mirror the civilian scheme as closely as possible). This proposal is, however, on hold until proposed changes to the civilian system are implemented.)

Proposal: A standing court martial should be established.

(At present, courts martial are ad hoc. Reconstituting them as a standing court would offer the benefits of being able to dispense with the requirement for a convening warrant for each trial; judge advocates would not have to be sworn in on each occasion; and case management would be simplified. This is not a novel principle in the Service system—the Summary Appeal Courts and Standing Civilian Courts are already standing courts.)

Courts Martial—Review and Appeal

Proposal: The review procedure for court martial finding and sentence will be abolished.

(The Grand Chamber of the European Court did not find a violation in the particular circumstances of the Cooper case in its judgement in December 2003, but it is clear that the procedure was considered to be an unusual one and it attracted some criticism. It is a procedure which dates back to a time when a court martial would not necessarily have any lawyers involved either as judge, prosecutor or defence counsel. In addition there was no appeal to the CMAC against sentence until 1997. In those circumstances it was important that a post trial procedure took place to ensure fairness to the defendant. However, with the significant improvements now in place in the court martial system and the introduction of the same rights of appeal to the Court of Appeal (to CMAC) as civilians, there is no longer a necessity to retain this non-judicial process which, although it can have advantages for some defendants, follows a determination by an ECHR compliant court.)

Proposal: A Slip Rule should be introduced enabling the trial judge advocate to correct any technical errors within 28 days of the end of a trial.

(This would mirror practice in the civilian courts.)

COURTS MARTIAL—JUDGE ADVOCACY

Proposal: The Judge Advocate General should be the single appointing authority for judge advocates, both in post and to all individual trials.

(The separate appointment of Judge Advocate of the Fleet will lapse.)

5 October 2004

Further memorandum from the Ministry of Defence

STATISTICS ON DISCIPLINE AND OTHER MATTERS

Note: Royal Marines are included in RN figures for the periods they are subject to the NDA and in the Army figures for the periods they are subject to the Army Act.

1. SUMMARY HEARINGS/TRIALS AND POWERS

(a) *Summary hearings/trials—by type and number of offences*

Year	*Offence Type*	*RN*	*Army*	*RAF*
2001	Violence	132	620	46
	Absence	1,095	2,339	384
	Theft/Fraud	43	134	29
	Sexual	3	3	0
	Drink/Drugs	359	1,377	73
	Military/Other	1,392	9,888	385
	Total	**3,024**	**14,362**	**930**
2002	Violence	128	494	56
	Absence	1,088	2,480	597
	Theft/Fraud	28	102	32
	Sexual	2	12	0
	Drink/Drugs	309	1,297	129
	Military/Other	1,378	10,339	631
	Total	**2,933**	**14,724**	**1,483**
2003	Violence	153	444	69
	Absence	1,344	2,549	508
	Theft/Fraud	52	103	26
	Sexual	0	7	0
	Drink/Drugs	341	1,345	123
	Military/Other	1,756	9,368	587
	Total	**3,646**	**13,816**	**1,335**

Notes:

1. Figures include trials/hearings by ASAs. Army ASAs: 2001—59; 2002—42; 2003—60. RN: 2001—NK; 2002—12; 2003—18 (there are few RN ASAs as RN COs can deal with some officers and WOs). RAF: 2001—5; 2002—8; 2003—6.
2. Services collect data in different ways, there is no agreed classification of offences and the data is not complete in all cases. RN only began collecting statistics for summary offences in April 2001 and the figures for 2002 are known to be incomplete. All figures relate to the number of offences proven; trials/hearings for an individual can involve more than one offence. The above figures can therefore only give an indication of the numbers and types of offence.
3. Neither the Army nor the RAF hold records of charges dismissed by COs as the outcome of a summary hearing. For the RN, the numbers are uncertain, but it is known that one individual was acquitted in 2002 and five in 2003.
4. No records are held by the RN or the RAF of the number of cases leading to prosecution. The Army is checking whether the Provost staff maintain any records.
5. Limited information is held centrally on cases relating to individuals who work in joint units. The RAF believe that something in the order of 13 such individuals were charged in 2001, six in 2002, and 15 in 2003. For the Army, the respective number of offences charged were 565, 494 and 595. RN data on two major, joint units is available: 33, 37 (approximate) and 24.

2. Courts Martial

(a) *Number of trials or offences—Service personnel*

Year	*Offence Type*	*RN*	*Army*	*RAF*
2001	Violence	35	292	24
	Absence	1	132	6
	Theft/Fraud	33	80	220
	Sexual	4	34	3
	Drink/Drugs	17	25	9
	Military/Other	13	65	11
	Total	**103**	**632**	**273**
	Total trials	**59**	—	**114**
	RN total accused	**62**	—	—
2002	Violence	35	215	14
	Absence	5	128	8
	Theft/Fraud	28	62	15
	Sexual	2	24	9
	Drink/Drugs	18	28	4
	Military/Other	19	49	11
	Total	**107**	**506**	**61**
	Total trials	**53**	—	**63**
	RN total accused	**57**	—	—
2003	Violence	36	172	11
	Absence	11	114	0
	Theft/Fraud	40	61	42
	Sexual	5	24	7
	Drink/Drugs	8	25	8
	Military/Other	48	75	18
	Total	**145**	**471**	**86**
	Total trials	**58**	—	**76**
	RN total accused	**61**	—	—

Notes:

1. Services collect data in different ways and there is no agreed classification of offences. The RN and RAF figures relate to the number of offences tried; Army figures relate to the numbers of individuals tried by court martial. An offender may have more than one offence charged against him in a trial. More than one offender may appear at a trial.
2. RAF figures for theft/fraud for 2001 distorted by incidents at one station.

(1) *Type of Court—Army and RAF*

Year	*Army GCM*	*Army DCM*	*RAF GCM*	*RAF DCM*
2001	77	555	9	105
2002	66	440	5	57
2003	52	419	7	69

Notes:

1. RAF figures for DCM for 2001 distorted by incidents at one station.
2. The numbers for the Army relate to the number of individuals appearing at the particular type of court martial. Joint offenders may appear at one court martial.

(2) *Punishments.* The details of the punishments imposed by courts martial punishments are attached separately at Annex A.

(3) *Elections.* Number of trials where accused elected trial by court martial (NB no universal right of election in RN)

Year	*RN*	*Army*	*RAF*
2001	20	—	5 (4 discontinued)
2002	19	—	6 (4 discontinued)
2003	19	—	8 (2 discontinued)

Note: Figures for the Army are not held but it is believed that about 5% of individuals elect.

3. Appeals and Petitions

(a) *Appeals to the SAC. Figures show appeals/successful by variation in whole or in part*

Year	*RN*	*Army*	*RAF*
2001	26/7	341/194	26/14
2002	20/5	334/163	26/16
2003	11/4	373/203	37/23

Notes:

1. Some appeals are withdrawn before reaching the SAC.
2. Appeals can be submitted by the Reviewing Authority direct to the SAC.

(b) *Petitions to the Reviewing Authority (RA). Court martial trials—number of individuals petitioning the RA/number of petitions granted in whole or in part.*

Year	*RN*	*Army*	*RAF*
2001	7/4	108/33	45/3
2002	7/0	101/19	10/0
2003	7/1	81/15	17/0

(c) *Appeals to CMAC. Number of appeals to CMAC/number where findings or sentence were quashed or varied.*

Year	*RN*	*Army*	*RAF*
2001	1/0	30/7 (4 mitigated; 3 quashed, including one retrial)	33/1
2002	4/1(mitigated)	33/3 (mitigated)	Numbers awaiting clarification
2003	2/1 (quashed)	18/1 (mitigated)	3/0

Notes:

1. Individuals can appeal to the House of Lords after appealing to the CMAC under the same conditions as other criminal appeals from the Court of Appeal.
2. RAF figures for 2001 distorted by incidents at one station.
3. RAF does not maintain statistics for appeals. Information provided by Appeal Court staff.

4. Redress of Complaint

(a) *Number of cases by type/number where redress granted. Complaints are those dealt with at the second level (above the commanding officer); records are not maintained of complaints resolved at the first level (commanding officer).*

Year	*Type of complaint*	*RN*	*Army*	*RAF*	*Numbers of Complaints proceeding to Employment Tribunal*
2001	Employment/conditions of service	5/1	67/8	15/6	
	Performance Report	2/0	71/8	7/3	
	Pay and Allowances	54/28	77/5	7/0	
	Other	2/2	59/4	26/11	
	Total	63/31	274/25	55/20	RN: 11. Army: 104. RAF: 19
2002	Employment/conditions of Service	9/3	42/1	8/1	
	Performance Report	1/0	57/8	9/5	
	Pay and Allowances	24/13	27/1	8/2	
	Other	1/0	55/1	25/6	
	Total	35/16	181/11	50/14	RN: 7. Army: 39. RAF: 11

Year	*Type of complaint*	*RN*	*Army*	*RAF*	*Numbers of Complaints proceeding to Employment Tribunal*
2003	Employment/conditions of Service	6/1	32/2	12/3	
	Performance Report	1/0	31/1	12/3	
	Pay and Allowances	11/6	38/0	6/4	
	Other	3/1	44/1	29/6	
	Total	21/8	145/4	59/16	RN: 3. Army: 27. RAF: 10

Notes:

1. "Other" includes matters such as the award of medals, medical issues, equality, harassment and bullying.
2. RN figures. The large number of pay and allowances complaints for the RN in 2002 was as a result of Pay 2000. Complaints settled or withdrawn before reaching the deciding officer are not included. Some of the ET cases were settled or withdrawn before being heard by the Tribunal.
3. RAF figures. Complaints withdrawn before reaching the deciding officer are included in the totals. Some complaints are still under consideration.
4. Army figures. Some complaints from each year are still under consideration. ET applications for 2001 are high because of three group cases relating to part-time employment, sexual orientation and equal opportunities.
5. Number of complaints proceeding to ET—% of total not included as complaint may proceed to ET at any time within statutory limit and this may be before the complaint is submitted internally to a level above the CO.

(b) Service Boards. Numbers dealt with by Service Boards; time taken for final decision of Board.

RN

Year	*Total*	*Under 6 months*	*6–12 months*	*13–24 months*	*24–36 months*
2001	27	6	15	6	0
2002	13	4	6	2	1
2003	8	4	3	1	0

Note: the times are from receipt of the complaint by HQ staff to the decision by the Admiralty Board.

ARMY

Year	*Total*	*Number of cases closed*	*Average time in weeks*
2001	21	20	62
2002	46	46	55
2003	56	10	76

Note: total figures relate to the year in which the case was submitted to the Army Board. Average times are for those cases now closed from receipt of the complaint by the Appeals Wing staff to the decision taken by the Army Board. It includes time where a case has been stayed due to parallel ET applications and this distorts the average.

RAF

Year	*Total*	*Under 6 months*	*6–12 months*	*13–24 months*
2001	21	9	12	0
2002	20	7	9	4
2003	22	6	9	7

Notes:

1. Timescales relate to the date when the complaint was received within the HQ for staffing to the decision made by the Air Force Board.
2. In addition, there were 234 Pay 2000 cases in 2002 that took on average 16 months to reach a decision by the Air Force Board.

(c) Petitions to HM The Queen. Numbers dealt with by HM The Queen; time taken for final decision.

Year	*RN*	*Army*	*RAF*
2001	1 (under 12 months)	0	1 (under 12 months)
2002	0	4 (outstanding; one awaiting outcome of ET)	0
2003	0	4 (outstanding)	1 (21 months)

Note: Timescales for Army and RAF relate to the time the complaint was received in the HQ for staffing to the date of the response from HM The Queen. For the RN, the time begins with receipt of the complaint for an initial decision by the Admiralty Board.

5. Boards of Inquiry

(a) *Number of boards convened; how many were as a result of death or serious injury.*

Year		*RN*	*Army*	*RAF*
2001	Death/serious injury	5	—	19
	Total		**—**	**33 (3 convened by CO)**
2002	Death/serious injury	6		8
	Total		**—**	**13 (3 convened by CO)**
2003	Death/serious injury	5	—	11 (2 convened by CO)
	Total		**—**	**16**

Notes: RN statistics relate to death only—data on injuries or other matters is not collected. Army: no central records maintained. No records are maintained on lower level inquiries.

6. Other Action

A note on administrative action is attached at Annex B.

7. Human Rights

A note on past cases and forthcoming judgements is attached at Annex C.

Annexes:

A. Court Martial Punishments—2001–03.

B. Administrative Action.

C. Human Rights.

Annex A

COURT MARTIAL PUNISHMENTS—2001–03

RN

Punishments	*2001*	*2002*	*2003*
Imprisonment/custodial order	2	1	1
Military detention	20 (and 10 also dismissed; 6 sentences suspended, 4x stoppages)	27 (and 8 also dismissed; 10 sentences suspended, 1x fine, 2x stoppages)	31 (and 9 also dismissed; 12 sentences suspended, 7x stoppages)
Dismissal with disgrace	0	0	
Dismissal	4 (and 1x disrating)	2	6 (and 1x disrating, 2x stoppages)
Fine	12 (and 2x severe reps, 1x rep)	8 (and 2x severe reps, 2x stoppages)	6 (and 1x reprimand)
Severe reprimand	3	1	2
Reprimand	2	5	1
Forfeiture of seniority	4 (and 3x severe	1 (and fine with	3 (and 3x severe

Punishments	*2001*	*2002*	*2003*
	reps, 2x fines,1x dismissed ship)	severe rep)	reps)
Dismissed ship	—	—	2
Disrating	1	2	1
Deprivation of Good Conduct Badges	—	1	—

Note: In addition to the single punishment for 2002 of deprivation of Good Conduct Badges, a number of other offenders were also deprived of their good conduct badges and Long Service and Good Conduct Medals.

Army

Punishment	*2001*	*2002*	*2003*
Imprisonment/custodial orders	25	26	19
Military detention	229	186	171
Dismissal with disgrace	4	5	0
Dismissal	96	116	84
Fine	87	83	85
Severe reprimand/reprimand	6	1	7
Reduction in rank	30	21	29
Other	12	8	6

Notes:

1. Numbers relate to individual punishments. Where an individual receives two distinct punishments, both punishments are included where the second punishment is serious.

2. "Other" includes forfeiture of seniority, admonishment and minor punishments.

Army

Punishment imposed	*2001*	*2002*	*2003*
Imprisonment/custodial orders	1	0	1
Military Detention	31	18	16
Dismissal with disgrace	0	1	2
Dismissal	7	10	4
Fine	49	13	22
Stoppages	36	3	4
Severe Reprimand	19	2	3
Reprimand	3	0	0
Reduction in rank	12	4	5

Annex B

ADMINISTRATIVE ACTION

Are there other informal systems [ie in addition to summary dealing and courts martial] in any of the Services for dealing with discipline (ie warnings) and what are they? If relevant, the number of cases dealt with informally in this way.

1. There are no informal systems in any of the Services for dealing with alleged offences committed within the Armed Forces jurisdiction by servicemen.

2. As a responsible employer however, each of the Services operates a formal system of administrative action. This is not used as an alternative to disciplinary action but is to deal with cases, by way of formal established procedures, where personnel have displayed professional shortcomings or have failed to act in accordance with the rules (values) and standards expected of them. Administrative action is used to correct these professional and employment failings and safeguard operational effectiveness.

3. Administrative action by the Services may include the imposition of sanctions as a result of social misconduct[28] and following the reporting of a civil conviction (including driving under the influence of alcohol). This is in addition to administrative action which is regarded as non-blameworthy (ie unsuitable for flying training) and the type of behaviour which although, unrelated to indiscipline, impacts upon professional standing (eg alcohol abuse, indebtedness, inefficiency). The sanctions available range from warnings to discharge and resignation.

4. Although each Service's system varies in terminology and procedure, the general principles are the same. RN Personnel, Legal, Administrative General Orders 0202-0204 deal with administrative censures for Officers and 0302 for ratings and PLAGO 0101 with social misconduct; Army General and Administrative Instruction(AGAI) Number 67 covers both Officers and soldiers and the RAF are governed by Air Publication 3392 Vol 5 and 4 for Officers and airmen respectively.

5. Additionally, from 1 January 2005, the Army intend to introduce a new system whereby AGAI 67 is to be used to deal with minor shortcomings unless there is a specific reason why a serviceman should merit disciplinary action. Minor failings (eg poor turnout, bad soldiering, performing duties below the expected standard and absence for periods up to 48 hours) will be identified and the appropriate commander (from LCpl upwards) will determine whether the service test has been broken. If the behaviour fails the service test, a proportionate sanction or oral warning is applied. The sanctions include show parades, extra duties, regimental work, recorded oral warning. A system of reviewing the award will be instituted to accompany the greater use of administrative action.

6. The above procedures do not affect the normal practice whereby a rating, soldier or airman may be warned to make improvements over a three month period to his or her performance before any formal action is taken. This measure is considered restorative and remedial and not punitive.

7. Statistics

These statistics cover the total number of administrative awards given for Officers for action following civil convictions, driving under the influence of alcohol, negligence/misconduct and social misconduct. The awards range from censures to resignation.

Officers

	2001	*2002*	*2003*
RN	7	5	13
Army	34	42	31
RAF	26	22	18
Total	**67**	**69**	**62**

Other ranks

RN

There are no recorded cases of Warrant Officers receiving administrative censures and the following number of service penalties were awarded for ratings following civil convictions:

2001—135

2002—114

2003—152

Army

Units and commands are only required to report sanctions for Officers up the chain of command. Although soldiers will have the sanction recorded on their Conduct Sheet, there is no means by which an Army wide search can be carried out. That said in the year 2003–04 approximately 75 officers and soldiers were reported for social misconduct and, 375 officers and soldiers convicted for driving under the influence of alcohol.

[28] The service test, "have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service".

RAF

These figures include all types of administrative action taken other than formal warnings.

2001—66

2002—51

2003—72

Annex C

HUMAN RIGHTS

What legal judgements have led to changes to the SDAs, in particular ECHR and HL judgements?

Are there any other cases pending and, in broad terms, what do they relate to?

No domestic cases have led to changes to the SDAs.

The following ECtHR cases have led to changes to the SDAs:

— *Findlay v UK* (1997)—violation of Article 6—led to the changes to the court martial system in each of the SDAs which were made by the Armed Forces Act 1996 intended to reinforce the independence of courts martial and of those making decisions about court proceedings from the chain of command.

— *Hood v UK* (1999)—violation of Article 5—was part of the consideration that led to changes to the system of custody/close arrest in the Armed Forces Discipline Act 2000 which provided for a judicial authority to determine whether a suspect or accused should remain in custody prior to trial, as well as amending unconnected provisions relating to the summary discipline system.

— *Grieves v UK* (2003)—violation of Article 6—led to the change in the appointing authority for naval judge advocates and judicial officers as specified in the NDA57 which was made by the Naval Discipline Act 1957 (Remedial) Order 2004.

We are awaiting judgment from the ECtHR in the following cases:

— *Miller, Morrison & Gillespie v UK*—article 6—relates to the transitional arrangements that were put in place between the *Findlay v UK* judgment and the coming into force of the Armed Forces Act 1996. The ECtHR has adopted a judgment and we will receive it on 26 October.

— *Bell v UK*—articles 5 and 6—relates to the pre-Armed Forces Discipline Act 2000 systems of custody/close arrest and of summary dealing.

— *Martin v UK*—article 6—relates to the trial by court martial of a civilian dependent for a murder in Germany under the pre-Armed Forces Act 1996 court martial system.

Further memorandum from the Ministry of Defence

Further information requested following the evidence session on 27 October 2004.[29]

Q9: A note on discipline issues arising on Joint Operations

This note sets out the arrangements that have been put in place in Iraq to deal with discipline matters in units which comprise members of more than one Service. These arrangements are in part a response to some of the difficulties in joint units outlined in para 14 of the Main Memorandum.

1. INTRODUCTION

1.1 There are a number of units which have been, or are, engaged in Op TELIC which have members from more than one of the services. Where individuals are serving with units of another service, they remain subject to the legislation of their own service, and therefore to its disciplinary procedures. However, there are a number of units which include significant numbers of personnel from more than one service. They are all "non-formed units" ("NFUs"), which are a grouping of personnel formed into an ad hoc unit for the operational theatre.[30] An example of such a unit is the Combined Military Assistance and Training Team. There are in existence formed bi and tri-Service units, but none is currently in Iraq.

[29] Ev 1.

[30] There are in existence formed bi and tri-Service units, but none is currently in Iraq.

1.2 In consultation with PJHQ, Front Line Commands and PPOs it was agreed that the NFUs in OpTELIC met the criteria of Joint Service Organisations as defined in the Naval Military and Air Forces (Attachment) Regulations 1964. The effect is that all members of the NFUs who are not members of the principal service (ie the service with primary responsibility for the NFU in question) are attached to that service. At the same time, they remain members of their own service. They are therefore subject both to the Service Discipline Act of the principal service and to the Service Disciplinary Act of their own service. The single service with primary responsibility has been agreed for all NFUs.

1.3 In relation to the NFUs, PJHQ have adopted an approach based partly on attachment. This has applied since 1 November 2004. It is described in detail below.

1.4 It is to be noted that most of the personnel of the NFUs in Iraq are either RAF or Army. The legislation governing these two services are very similar in most details of procedure, powers and jurisdiction. This facilitates the arrangements described below. Arrangements involving Naval Law and the law of either of the other two services would create additional complications, because of the more substantial differences between the Naval Discipline Act 1957 and the legislation governing the other two services.

2. Summary Discipline

2.1 Before the adoption by PJHQ of the approach described in more detail below, the practice in Iraq had been as follows. In minor cases which could have been dealt with by summary discipline, disciplinary procedures were not used. Instead the offender was dealt with administratively (ie by measures similar to those available to ordinary employers). In more serious cases within the summary jurisdiction, the matter was held over for disciplinary dealing at the end of the tour. In the most serious cases (but still within the summary jurisdiction) the offender was returned to his parent (single service) unit to be dealt with by his CO in his parent unit. Command and summary discipline were not aligned within the NFU.

2.2 The PJHQ approach, making use of attachment, is that for summary discipline purposes, the legislation of the principal service of the NFU is applied by the CO. The CO of the NFU can be from any service, but, if not a member of the NFU's principal service, he or she will (like other members of the NFU) be attached to the principal service. The CO, of whatever service, will apply summary discipline in accordance with the legislation of the principal service.

2.3 Where the CO is to hear a charge against someone who is not a member of the principal service, the CO will be able to obtain advice from disciplinary staff of the accused's service on the impact that different punishments will have on the accused, if the case is proved.

3. Cases Referred to Higher Authority

3.1 If a CO considers that a case should be dealt with by court martial or (if the accused is a warrant officer or officer) by summary dealing by appropriate superior authority ("ASA"), he must refer the case, to higher authority ("HA"). In broad terms, the HA decides whether the case is referred with a view to court martial or (in the case of proposed summary dealing of an officer or warrant officer) with a view to being dealt with by the ASA. In the NFUs the HA will be an officer, senior to the CO, and from the principal service of the NFU. He may be located in the UK or in theatre.

4. Cases Referred to the ASA

4.1 If the case of a warrant officer or officer is referred to the ASA for summary dealing, the ASA will be within the NFU's chain of command, but will not necessarily be a member of the principal service. An explained in paragraph 2.2 above in relation to summary dealing generally, the ASA will apply the law of the NFU's principal service. Where the accused is not from the principal service, the disciplinary staff of the accused's will provide advice to the ASA on the impact that different punishments will have on the accused if the case is proved.

5. Courts Martial

5.1 In the case of court martial the approach is to apply the procedures and legislation of the accused, and not of the NFU's principal service. If the accused is a member of the principal service, the result is of course the same. If the accused is not from the principal service, the procedures will be as follows. In the first instance the matter will be reported to the accused's CO in the NFU. If the CO considers that the case should be referred to the HA with a view to court martial. If the accused is not a member of the principal service and the HA considers that the matter should be referred with a view to court martial, the HA will not refer the case on to the prosecuting authority of the principal service. Instead the matter will be transferred to the accused's system of law. This will involve the HA referring the case back to the CO of the NFU with a direction to stay further proceedings under the law of the principal service. The accused will be returned to his parent unit, and the papers in the case referred to the CO of that unit. If that CO considers it appropriate, he or she will refer the case to higher authority for that unit. That higher authority will then decide whether to refer the case with a view to court martial under the law of the accused's parent unit.

5.2 Moreover, in cases in which the accused is a member of the principal service of the NFU, he or she will normally be repatriated. As a result, in all cases involving a member of a NFU, court martial will not take place in theatre (this is an exception to the general policy that court martial should take place in theatre where possible).

5.3 If a case involves several accused from more than one service, separate courts martial will normally be arranged to hear the case of other personnel from each service. However, to reduce inefficiency or where required in the interest of justice, the separate service prosecuting authorities may agree a single court martial under the legislation of the principal service of the NFU.

Q 11: The Memorandum refers to the DPA and the DLO and says that a revised structure for command authority will extend to these organisations. How will the revised structure affect personnel working in other parts of the MOD?

A revised structure for command authority could apply to personnel serving in all parts of the MOD and the system would be flexible enough to be applied to new organisations or changed structures in the future. The Act would provide the framework that would allow such organisations to be involved in the disciplinary process as it does now for single-Service organisation. Importantly, this would enable the disciplinary function to be carried out by officers within these organisations who would be able to deal personally with those who fall under their day-to-day command or management, regardless of Service.

At present, the vast majority of disciplinary cases in the DPA, DLO and other such organisations are dealt with on a single-Service basis by COs of nominated units (or at higher levels) outside the organisation in question. Discipline is an integral part of command or the management function but this system keeps them apart. Dealing with disciplinary matters remotely from the organisation can also result in an inconsistent approach within the organisation if individuals of different Services are dealt with in different ways by different COs who may have received legal advice from a different source. Similar issues of command and consistency arise where COs of truly joint units cannot deal with individuals of another Service who are under their command. Where under attachment regulations an individual becomes subject to a system of service law that is not the system of his or her own Service, there are differences in powers and penalties that may be unfamiliar and it is often thought preferable to allow the parent service to deal with them. This then upsets the principle of aligning discipline with command.

The proposed new framework will mean that discipline can be aligned with command in all organisations or units. A single system of service law will mean that the officers' ability to deal with an offence and the sanctions available will be the same for all individuals, whatever their Service. A consistent approach, and therefore fairness, becomes especially important where a particular incident involves co-accused from different Services. Nevertheless, commanders would need to understand the implications of their action when dealing with a member of another Service, but advice would be available to assist COs in this matter.

The extent to which the DPA, the DLO and other organisations would decide to appoint COs to deal with discipline has not been fully explored but it will most probably vary between organisations and could also vary within the organisation. Some structures or parts of an organisation may lend themselves more readily than others to such a system. For example, it could be problematic to establish a suitable chain of command in those parts of an organisation where there are large numbers of civilians in the structure. (Furthermore, it could be argued that for organisations that are largely focussed on staff-work, where the population is relatively senior and the organisation is not a part of the more traditional command environment, the separation of the discipline role from the management role is not so critical.) For joint units, however, where there is an operational role and the population is largely military, the new system is crucial and aligning discipline with command will enhance the operational effectiveness of the unit. COs appointed to command such units have wide-ranging command responsibilities, including discipline, and for them the new system will apply automatically.

Q 16: The percentage of offences in the RN which are committed on board ship and an illustration of the types of offences which are committed

The RN holds data on the number of offences committed by naval personnel appointed or drafted to HM Ships (as opposed to shore units) at the time that the offences were committed, and which were tried summarily on board. In 2002 and 2003, the numbers of offences were 1,508 and 1,883 respectively, in both years approximately 50% of the total number of offences tried summarily. Statistics held do not identify how many of these offences were actually committed on board, although discussion with FLEET Commanders and legal staff suggests about 75%, if absence without leave is included. This reflects that a number of the offences committed by personnel serving on board HM Ships occur when on shore leave: eg on night leave during a ship's maintenance period in its Base Port, or during a foreign port visit. At the summary level the offences during 2002 and 2003 ranged from disobedience to standing orders, failure to attend for duty, absence and drunkenness (which together comprise the bulk of offences) to instances of assault and dishonesty at the less serious end of the spectrum.

With respect to offences tried by court martial, there were, in 2002 and 2003, 57 and 61 accused respectively. Of these 70% were alleged to have committed offences, either on board or while appointed or drafted to an HM Ship. At the time of trial 64% were still serving in seagoing units. The offences ranged from cases of absence and insubordination, including where the accused had opted for trial by court martial, to navigational offences and the more serious offences of violence and dishonesty.

Q 21: Brigadier Andrews mentioned that from 1 January 2005 a range of "low level" offences are to be dealt with administratively in the Army rather than summarily. What types of "low level" offences are to be dealt with administratively from next year and what sanctions will be available? Are these administrative arrangements already in operation in the Royal Navy and the RAF? If so, what types of offences and how many are dealt with in this way?

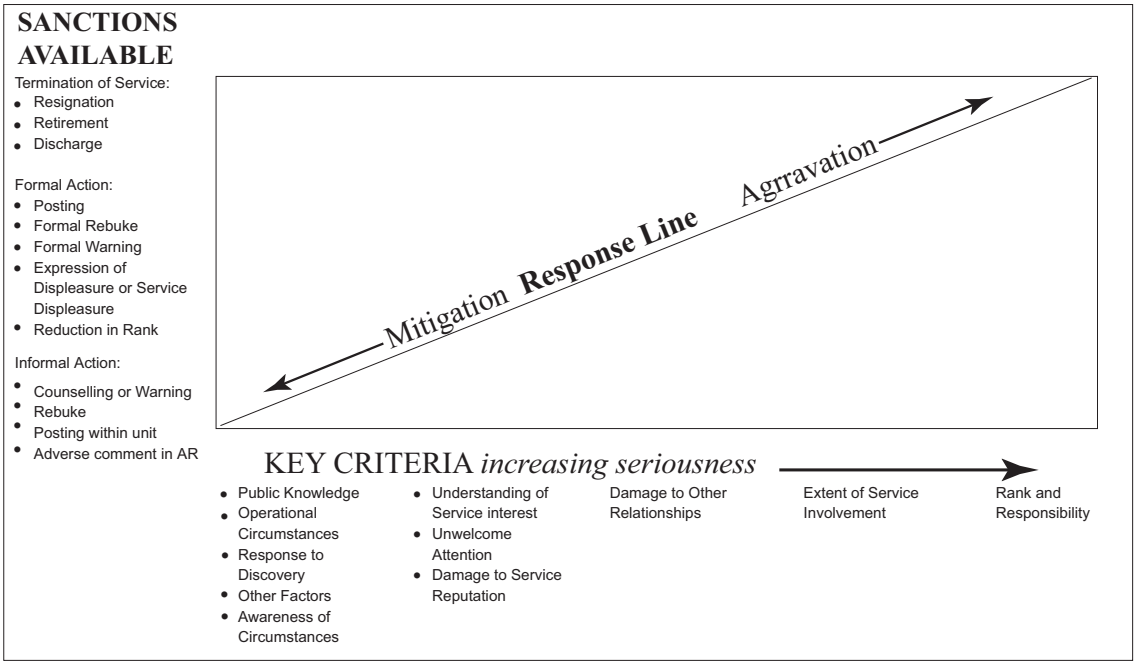
Current Administrative Action system

All three Services currently operate a formal system of administrative action—quite separate from their criminal disciplinary systems—using established procedures to deal with personnel who have displayed professional shortcomings or have failed to act in accordance with the values and standards expected of them. Administrative Action is based on the Service Test—have the actions or behaviour of a serviceman adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service—and sanctions are awarded dependant upon rank and the type and level of misconduct. Whereas the primary purpose of disciplinary action is to punish offenders, the main aim of administrative action for misconduct is to safeguard the efficiency and operational effectiveness of the Service.

Administrative Action may be taken for social misconduct (eg Cpl instructor having sexual relations with female recruits; Capt having affair with wife of Cpl in his direct chain of command), misconduct often the result of a civil conviction (eg Capt sentenced to three months imprisonment for perverting the course of justice; convictions for driving under the influence of alcohol where loss of licence has an impact on operational effectiveness) non- blameworthy conduct (eg unsuitable for flying) and the type of behaviour which although unrelated to indiscipline, impacts upon professional standing (eg alcohol abuse, indebtedness, inefficiency).

In all three Services a formal procedure exists which consists of investigation by the CO followed by the submission of a report, with recommended sanction by the CO to higher authority. The report proceeds through the chain of command by a clearly defined procedure and the sanction is awarded at the appropriate level. Although each Service has different terminology and procedures, the general principles are the same.

For social misconduct a variety of sanctions exist, dependent on Service and rank of the person concerned, and the appropriate award is given based on the following scale:



In relation to the other types of misconduct which arise, the sanctions in the Army vary from reduction in rank for other ranks, recorded rebuke, expression of displeasure or severe displeasure to calling upon an Officer to resign his commission or retire and WOs/NCOs and soldiers can be discharged. In the RAF misconduct can be dealt with administratively by recorded counselling, Formal Warning and the raising of a Special Report which can result in compulsory exit, an Air Force Board censure (letter of grave displeasure

or dissatisfaction) and disposal below Air Force Board level. For airmen the sanctions which may follow include posting, reduction in rank, re-mustering or re-branching and termination of service. The RN award Commanding Officers logging, or a higher award of administrative censures to Officers such as Admiralty Board's severe displeasure or displeasure, Commander-in-Chiefs severe displeasure to officers and in some instances to warrant officers.

New Army system as at 1 January 2005

The Army have changed their policy with effect 1 January 2005 when they will distinguish between Minor and Major Administrative Action.

Minor Administrative Action is intended to provide commanders at all levels with a swiftly delivered and reviewed, legal, fair and formally regulated way of dealing with minor failings in standards or performance which are typically professional or employment shortcomings. Examples of "low level offences" which could attract this type of action are poor turnout; dirty rifles; minor insubordination or dissent; poor punctuality; inappropriate behaviour in a mess and absence from duty for up to 48 hours.

When deciding how to deal with an individual's failings, the service test is to be used as a guide—have the actions or behaviour of a serviceman adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Army? For example, dirty boots, poor turnout or a dirty rifle are the failings of a serviceman which will weaken his personal operational effectiveness, and therefore his contribution to the overall operational effectiveness of the Army.

However, if a serviceman's behaviour is persistently unsatisfactory or a criminal offence is suspected, a commander has a statutory duty to report the facts up the chain of command for disciplinary or major administrative action.

The authorised minor sanctions are:

(a) Show Parades—A maximum of five can be awarded at any one time, each no longer than 45 mins in duration whereby the soldier is to appear at a specific time and place in the designated attire. The intention is to emphasise good timekeeping and ensure equipment and clothing is at a suitable state of maintenance and upkeep.

(b) Extra Duties—A maximum of five can be awarded at any one time and range from resubmitting a task that has been poorly completed (eg service paper) to being given extra duties such as duty driver or orderly officer.

(c) Regimental Work—A maximum of three periods may be awarded, each no longer than four hours. The work has to be constructive and for the benefit of the unit as a whole, properly led and planned.

(d) Returned to Unit—This is an option available on non-career courses when behaviour is not up to standard.

(e) Absence for up to 48 hours and regularisation of leave—Minor administrative action may be taken for periods of unauthorised absence from duty of more than four hours but no more than 48 hours. For each day or part of a day, one day's leave may be deducted from a serviceman's annual leave entitlement.

(f) Recorded oral warning—This may be issued without a history of minor sanctions, in tandem with a minor sanction or as the next step after minor sanctions have failed to produce the improvements in performance required. No mention of this can be made in an annual appraisal, however the Annual Report may reflect a serviceman's shortcomings over the reporting period and reflect the fact that they were drawn to his attention.

If the serviceman wishes to contest the sanction he may request a review of his case by the appropriate reviewing officer whose options will be to uphold, mitigate or quash the original award. The review is to be conducted as soon as possible. If the serviceman remains unsatisfied, he has the statutory right to seek redress.

It should be noted the use of minor administrative action is not intended to apply to minor informal rebukes and corrections that are taken in the normal course of Service life. These are taken to be the basis for the maintenance of routine discipline within the unit, to which the principles of proportionality and common sense apply.

Minor Administrative Action is to be distinguished from the newly termed Major Administrative Action. This remains the same as the current system and deals with the whole range of minor to major misconduct. Major Administrative Action is taken for more serious failings and a Report may be raised in response to a failure in a serviceman's performance that merits a Major Administrative Action and a sanction more severe than a warning or minor sanction. The Report may be raised for:

(a) breach of a Formal Warning;

(b) unsuitability that is significant or continuing or blameworthy;

(c) inefficiency, that is significant or a repeated failure to fulfil professional obligations and duties; or,

(d) misconduct.[31]

After determination, Major Administrative Action can lead to the award of career sanctions (letter of censure, rebuke, expression of displeasure or severe displeasure, reduction in rank) and in the most serious cases, termination of service for gross misconduct.

The RN and RAF have not separated their Administrative Action into Minor and Major sanctions and continue to use their current system, which is also based on the Service Test. The statistics for all three Services were included at Annex B to Armed Forces Bill—Statistics on Discipline and other Matters.

Q 35: What is the number of cases in the RN dealt with summarily where compensation has been awarded and what is the range of such compensation? [The Committee focused on offences of assault occasioning actual bodily harm during the evidence session, but is also interested in other offences dealt with summarily by all three Services in which compensation has been awarded.]

The Commanding Officer's Power to Award Compensation in cases other than Personal Injury

Currently, at summary level COs in all three Services can award compensation in the form of a punishment termed "stoppages." This punishment is available whenever an offence has occasioned any expense, loss or damage, and involves recovery by way of direct deduction from an offender's pay. For the purposes of summary hearing, such deductions are restricted to a maximum of 28 days' pay.

The award of stoppages is used in the case of offences unique to the Services (eg damage to, and loss of public or service property; misapplication and waste of public or service property) and in relation to criminal offences charged under the Service Discipline Acts (eg criminal damage and theft). In 2002 and 2003, 301 and 357 awards were made respectively, the overwhelming majority being for less than £500.

Compensation for Personal Injury

In addition to the power briefly described above, RN Cos can award compensation by way of stoppages in the case of an offence which has occasioned personal injury. Invariably these will be cases of common assault, or the straightforward and less serious offences of ABH capable of summary disposal.

The power to award compensation by way of stoppages is hedged with safeguards, and this is particularly so in the case of compensation for personal injury (eg requirements concerning the provision of legal advice and, in the case ABH, for the RN CO to submit his proposed punishment to a Flag Officer for approval—this would only be given following the receipt of legal advice on the legality of proceedings and the proposed sentence). In addition, RN Cos have guidance available to them in a publication known as the "Green Guide;" this is based in so far as personal injury compensation is concerned on that issued to lay Magistrates in the Magistrates' Courts Sentencing Guidelines. As a result of these safeguards, and the sentencing restrictions at summary level, only a limited number of ABH are dealt with summarily:

2002: 6 ABH tried summarily—compensation awarded in five cases (varying between £75 and £250).

2003 8 ABH tried summarily—compensation awarded in six cases (varying between £100 and £500).

In addition, during 2002 and 2003 RN Cos dealt with, respectively, 62 and 74 offences of common assault with compensation being awarded in five and eight cases. The level of award was proportionately lower than in the cases of ABH, reflecting the less serious nature of the offence of common assault.

Under a Tri-Service Act the proposed safeguards in place when hearing ABH charges summarily and awarding compensation will include the requirement for extended powers before such charges could be heard, the right of the accused to elect court martial on informed advice, and the requirement for a CO to take legal advice on the issue of compensation. In addition, the maximum award that a CO will be able to make in relation to personal injury will be further restricted to £1,000.

Q 64: The role of the Judge Advocate General (November 2004)

1. The Judge Advocate General is appointed by the Sovereign on the recommendation of the Lord Chancellor. He is removable only by the Sovereign for inability or misbehaviour, again on the recommendation of the Lord Chancellor, to whom he is responsible.

2. His functions are :

(a) to monitor the criminal justice systems of the Army and Royal Air Force so as to ensure they work efficiently and properly, and will withstand public scrutiny while at the same time reflecting the needs and interests of the Services;

(b) to appoint judge advocates to be members of and to conduct proceedings at courts martial, also to conduct any proceedings preliminary to courts martial;

[31] This incorporates racial and sexual discrimination, bullying and harassment, dishonesty or deceit, social misconduct, drug/alcohol abuse, irresponsible indebtedness, civilian criminal convictions.

(c) to appoint judge advocates as members of the summary appeal court, to specify the judge advocate for the hearing of an appeal, any proceedings preliminary to an appeal and to exercise the jurisdiction of the summary appeal court sitting alone;

(d) to appoint judicial officers to decide applications to keep persons subject to service law in custody pending investigation into alleged offences or, if they have already been charged, pending their trial;

(e) to appoint judicial officers to decide applications for search warrants;

(f) to specify the magistrate for any sitting of the Standing Civilian Court;

(g) to tender advice to reviewing authorities in respect of findings and sentences of courts martial and the Standing Civilian Court; and

(h) to maintain custody of records and notes of proceedings of courts martial and the Standing Civilian Court, and to furnish records of proceedings of courts martial to the Registrar of the Courts Martial Appeal Court when requested.

3. If it appears to the Judge Advocate General that the finding of a court martial involves a point of law of exceptional importance which in his opinion should be determined by the Courts Martial Appeal Court, he may refer the finding to that court.

Q 101: Is it the MoD's intention that the Tri-Service Bill should be considered by Parliament in the same way as previous Armed Forces Bills, ie by an ad hoc Select Committee in the House of Commons?

The five yearly Armed Forces Bills have been remitted to an ad hoc Select Committee after Second Reading. In our view there have been advantages to this approach. It ensures detailed consideration of the significant policy proposals within a wider context and a broadly non partisan forum. The powers of a Select Committee enable this level of scrutiny to range more widely than a Standing Committee on a bill and given the significant of the change to a single system of service law envisaged under the tri-Service Bill it is important that the scrutiny of the proposals are subject to as thorough an examination as possible.

No final decision has been taken. It will ultimately be a matter for the business managers and discussion through the usual channels, but we are working on the assumption that the Tri-Service Armed Forces Bill will also be considered by a Select Committee in addition to its other Parliamentary stages. The Select Committee on the 2001 Bill expressed its belief that such a process of some kind would continue to be necessary and valuable for future Bills—and indeed provided a model which could be followed with benefit for other types of legislation. They pointed out some minor defects to the procedures and hoped these would be taken into account in the course of considering future scrutiny of the tri-Service Act.

The membership of such a Committee is not strictly a matter for the MOD. As the Select Committee noted in 2001[32]

> "It has been accepted practice in the past for a Defence Minister and a front bench Opposition spokesman to be appointed to the select committees on the quinquennial Armed Forces Bill, because these committees have the power to amend the Bill, and it is therefore felt necessary for a Minister to participate in the Committee's proceedings. There was also a departure from previous practice in that, on this occasion, this Committee included no members of the Defence Committee"

SUPPLEMENTARY QUESTIONS

The memorandum explains that the MOD are reviewing Service offences and sentencing with the aim of modernisation and harmonising them. Is MOD seeking to achieve harmony with the equivalent civilian offences and sentences, or to achieve harmony across the forces?

The review of service offences has focussed primarily on harmonising and modernising the offences and sentences across the Services, although the existing differences are not significant. It is not generally the intention to provide for Service offences which are equivalent to civilian offences. Most Service offences reflect the particular circumstances of Service life and operations and have no equivalence in the civilian system, eg failure to attend for duty, and misconduct in operations.

In some cases there are Service offences which, although they have analogous civilian offences, are being retained because of the particular implications of the offence for a disciplined service. For example the Service offence of damage to Service or public property overlaps with the civilian offence of criminal damage, but a key difference is that the Service offence will cover negligently doing an act which causes or is likely to cause damage while the civilian offence only covers intentional and reckless actions.

An example of modernising offences is in respect of the Service offence of obstructing operations, which is one of a number which requires wilfulness on the part of the accused. This expression has given rise to inconsistencies of interpretation in the civilian criminal courts and is also archaic. This is likely to be replaced by reference to the "mens rea" or mental element of the specific offence wherever it occurs.

[32] HC 154 ordered to be printed 13 March 2001.

Finally, the work has involved a review of the maximum sentences of each offence. As part of this we have taken account of the maximum sentence for analogous civilian offences, so that, for example, it will be proposed that the current maximum of life imprisonment for the offence of damage to, and loss of, public or service property should be reduced to ten years, in line with the civilian offence of criminal damage.

Will the Service law continue to require annual renewal, and will it require renewal by primary legislation at least once every five years.

One of the recommendations of the Select Committee on the Armed Forces Bill 2001 was that

> "the Select Committee on the tri-Service Bill (whether it is the Defence Committee or an ad hoc committee) should examine the procedures for renewing the Act and for scrutinising it, and recommend how it should be handled".

We are giving careful consideration to the possible future arrangements for the renewal of Service law, but have not yet reached a firm view.

When does MOD expect to reach conclusions on the provisions related to delegated powers?

Is it the MOD's intention to extend the range of matters that can be amended by regulations (rather than primary legislation)?

The MoD's intention is to keep the balance between primary and secondary legislation broadly the same as at present. However, the Committee may wish to note:

(a) The changes to the structure and jurisdiction of commanding officers and Service courts will probably require some changes to the existing powers, for example, the determination of the number of members of a court martial will be related to a list of offences set out in a statutory instrument.

(b) Consideration is being given to amplifying the provisions on rules of court to clarify that certain civil court procedures may be adopted.

(c) There are certain provisions of recent (especially Home Office) criminal law legislation for which it is intended to make equivalent provision in the Bill (for example on sentencing) and it is possible that there will be one or more new order-making powers within those provisions.

It may be necessary to make provision for some transitional arrangements by subordinate legislation, and the Bill will, as is normal, contain provision for transitional arrangements. The new arrangements covering the disciplinary and criminal justice system and other issues covered by the TSA will be brought into effect in one stage rather than gradually and, therefore, some of the large number of arrangements covering all matters that are in train when a new system is introduced will be provided for by subordinate legislation.

It is also our intention to retain in the TSA a provision equivalent to section 31 of the Armed Forces Act 2001. This section provides a general order-making power which enables the Secretary of State to make for the Armed Forces provisions equivalent to those contained in any future civilian criminal justice legislation or any existing legislation that it amends. Any order under this power will be made by statutory instrument subject to the negative resolution procedure except in the case of an order which amends any primary legislation when orders will be subject to the affirmative procedure.

Although not directly relevant to the Committee's question, the Committee may wish to note that work is proceeding on the rationalisation and harmonisation of the various forms of subordinate instrument referred to in the Service Discipline Acts and a number of other Acts related to the Armed Forces and to be included in the TSA. This legislation provides variously (especially in such areas as pay, allowances and other terms of Service) for subordinate legislation in the form of statutory instruments, Orders in Council, Royal Warrant, Defence Council Regulations (DCR) and Queen's Regulations (QR). The form of subordinate legislation to be adopted is normally prescribed in the enabling Act which gives the Secretary of State and the Defence Council the statutory authority to make orders, rules and regulations by statutory instrument, DCR or, in a small number of cases, QR. Although this work is not scheduled to be completed until the end of the year, it is not our intention to extend the range of matters that can be amended by regulations. It is likely that the usual form of subordinate legislation in the TSA will be a statutory instrument under the negative resolution procedure while more routine and operational procedures will be detailed in DCRs and QRs as appropriate. As part of this work in some cases where the RN, in particular, currently make regulations under the Royal Prerogative, such as in relation to Boards of Inquiry, this power will be replaced by statutory provisions made by subordinate legislation as is already the case for the other two Services.

Further memorandum from the Ministry of Defence

Further information requested following the evidence session on 2 February 2005.[33]

Q 156. *The average waiting time for a case to go to court martial in each of the three Services (2004)*

The time waiting for a case to go to court martial is taken from the date that court martial is directed by the Prosecuting Authority.

ROYAL NAVY

138.8 days

ARMY

89 days

RAF

98 days

Q 161. *The number of cases changed by the review procedure for court martial finding and sentence in 2004 in each of the three Services*

ROYAL NAVY

In 2004, the Reviewing Authority reviewed 63 trials. 21 cases were changed on review, in 15 of which the finding was quashed as a direct result of the judgement of the Court Martial Appeal Court (CMAC) in the case of Dundon[34]. In the remaining six cases the sentence was changed.

ARMY

In 2004, the Reviewing Authority reviewed 522 trials. Sentence was changed in 31 cases and in a further case the finding was quashed and a retrial authorised.

RAF

In 2004 the Reviewing Authority reviewed 45 trials. Sentence was changed in six cases.

Q 164. *The number of current judge advocates (if any) who will have to step down as a result of the proposal to increase the minimum qualification for the appointment to seven years.*

None

Further memorandum from the Ministry of Defence

MoD's first memorandum says that the Service Discipline Acts enable offences allegedly committed by persons subject to naval, military or air force law to be dealt with by the Services. They apply worldwide to members of the Armed Forces and, overseas, to certain categories of civilians (including their families) accompanying them. All offences against Service discipline and against the law of England and Wales may be tried, except for certain offences (such as murder, rape and war crimes) committed in the United Kingdom. What about the law of Scotland or Northern Ireland?

As the main memorandum says, all three Services regard a military system of law as essential to the continued operational effectiveness of our forces across the wide spectrum of situations in which they serve. One of the ways of ensuring fairness in the system is to apply this consistently wherever in the world those

[33] Ev 20.

[34] The CMAC took into account the judgment of the ECtHR in the case of Grieves (*Application no. 57067/00* Strasbourg, 16 December 2003) and held that trial by uniformed judge advocate breached article 6 of the ECHR. Changes to RN procedures including through the Naval Discipline Act 1957 (Remedial) Order 2004 which provides for the appointment of civilian judge advocates by the Judge Advocate of the Fleet, himself a civilian, are now in effect. Having determined the breach, the CMAC held that the appellant's conviction should be regarded as unsafe. They could not envisage any circumstances in which an article 6 breach arising from want of independence and impartiality in the tribunal would possibly lead to the conclusion that the conviction was safe. The CMAC expressed the opinion that in those pre-Grieves cases awaiting review, "*it seems likely that this court will quash any convictions confirmed on review*".

subject to service law are serving. Historically, it has been the law of England and Wales to which Service law is related (indeed, the Service Discipline Acts themselves are made under the law of England and Wales). But the determining practical point is that it would be impossible sensibly to apply several different legal systems to the Services, particularly in defining when and to whom any would apply. This would be inherently unfair as well as complex and cumbersome.

It is worth pointing out, however, that all Service personnel serving in Scotland or Northern Ireland are subject to their separate civilian criminal jurisdictions as well as to Service law and, where they have jurisdiction, may be dealt with by the civil authorities accordingly.

For Courts Martial there is a right to appeal to a Courts Martial Appeal Court and also a procedure known as Service Review where all court martial convictions are reconsidered. In terms of the Service Review, who actually does this?

The reviewing authority in each of the Services is the Defence Council, or any officer to whom the Defence Council delegates this power. In practice, reviewing authority powers are delegated to one or two star level (and Colonels in certain posts in the Army). The reviewing authority receives legal advice on its decisions from the Office of the Judge Advocate in the case of the Army and the RAF; and from the Judge Advocate of the Fleet in the case of the Royal Navy, though this does not fetter the discretion of the reviewing authority.

February 2005

Further memorandum from the Ministry of Defence

Introduction

1. This memorandum sets out further work in hand on the Tri-Service Armed Forces Bill since the original memorandum sent to the Committee dated 5 October 2004.

2. It provides further information now agreed for Boards of Inquiry, and also covers proposals for proceedings in Courts Martial, Courts Martial sentencing powers, and provisions relating to imprisonment and detention. Many of these proposals are essentially technical and much of the work currently in hand concerns detailed provisions arising from the need to harmonise and modernise proceedings in Service tribunals and procedures in other elements of the Services' separate criminal justice systems. A final section sets out proposals on a range of wider non disciplinary matters all of which have had to be reviewed as part of producing a single body of law, though some will be provided for in secondary legislation.

Boards of Inquiry (BOI)

3. The memorandum dated 5 October 2004 set out the purpose of BOI, some of the considerations involved in making them effective and gave a brief outline of the main provisions that would be made—though some of these will be more appropriate for secondary legislation made under the Act.

4. We do not envisage any change to the statutory purpose of BOI. They will remain internal inquires to investigate and report on the facts of a matter and to express their opinion on any question arising out of any matter referred to them. This supports the key aim of preventing the recurrence of an incident.

5. The legislation will also continue to make provision for who may convene a BOI and who may be a member of such a Board. The convening authorities for statutory inquiries will, as now, be primarily based on the chain of command and authorised by the Defence Council. The Defence Council will retain its convening powers to ensure the requirement for a Service Inquiry is met. The rank and number of members of a Board will also not change, ie the president will be an officer not below the rank of Lieutenant RN/ Captain/Flight Lieutenant and subject to Service law, and not less than two other members who will be either subject to Service law or Crown servants.

6. The primary legislation will give powers to convene Service Inquiries into any matter and we propose to update the matters into which Inquiries must be held. The provisions in the primary legislation are currently permissive, but the secondary legislation makes it mandatory to hold a BOI into, for example, death of those serving military sentences of imprisonment and detention in military prisons overseas, but such establishments no longer exist. We intend to provide for some matters (to be defined in secondary legislation) to be made the subject of a mandatory inquiry. In future we would expect, for example, unnatural death and serious injury to be so defined excluding combat deaths and injuries and in other exceptional circumstances which would have to be recorded.

7. We have considered the circumstances in which provision should be made for evidence to be given on oath and concluded that it should be in all statutory inquiries. It is difficult to assess precisely their value in Service inquiries. In the Army and RAF, evidence is routinely given on oath. This can add gravitas to the proceedings and might influence a witness to give more consideration to his evidence. Conversely, giving

evidence on oath could inhibit some witnesses when full and frank evidence is essential. But oaths are not a cause of delay, nor need they make an Inquiry adversarial. Differentiating when they should be used would unduly complicate the system.

8. We would also like in principle to introduce the power, exercisable by a judicial officer, to subpoena a civilian witness, enforceable through the UK civilian courts, but recognise the potential limitations in its operation in circumstances where the inquiry takes place outside the UK or the witness is not from the UK. This is to meet the circumstance, which has already occurred, where a key witness, who is not subject to Service law, (and cannot be compelled to attend and give evidence), refuses to do so. This significant new power reflects the increasing use of civilian contractors in service activity. A subpoena could be used only where the evidence is considered essential to the Inquiry, and the existence of the power might itself be sufficient to compel a witness to attend voluntarily and certainly we would expect these to be issued only in exceptional circumstances.

9. We are clear that the protection for certain individual as whose reputation or professional competence may be called into question by the findings of the Inquiry should be retained. Such individuals should be allowed, as now, to be present at the proceedings, to be represented and to question witnesses. It should also be provided that, as now, evidence given by a witness cannot be used against an accused in subsequent Service disciplinary proceedings. Any action against an individual resulting from an inquiry must be in an entirely separate disciplinary or administrative process with all the protection for the individual that those systems provide.

10. Finally, we are not persuaded that next of kin should have a statutory right to attend Service inquiries, which are essentially internal matters, although (as is currently the practice) they may be allowed to do so exceptionally on the authority of the President. We are particularly conscious in this respect that the BOI will not be the final word on unnatural death, which properly rests with the Coroner's court. We have however addressed, as a matter of administrative policy recent concerns of next of kin so that we better respond to their interests than in the past.

The Court Martial: General Provisions

11. In broad terms the policy is to replace the single-Service *ad hoc* courts martial with a single tri-Service standing Court Martial which will consist of a judge advocate and a minimum of either three or five lay members depending on the offence charged. The main related proposals were set out in Annex E to the main memorandum dated 5 October 2004.

12. We have also concluded that we should increase the minimum qualification for appointment as a judge advocate. At present the minimum qualification (a five year general qualification) is below that prescribed for judicial office in the Crown Court or the Magistrates' Courts. Even at the lower end of the spectrum a court martial may deal with the more serious matters that are dealt with in Magistrates' Courts while at the other end of the spectrum it may deal with cases as serious as any dealt with in the Crown Court. The Bill will therefore provide that the minimum qualification for appointment as a judge advocate be a seven year general qualification within the meaning of section 71 of the Courts and Legal Service Act 1990 and equivalent Scottish and Northern Irish qualifications. This change reflects the minimum qualification for judicial office in the Magistrates' Courts and will also align the minimum qualification period for appointment as a judge advocate with the minimum qualification period for appointment as an assistant judge advocate general under the Courts Martial (Appeals) Act 1951.

Minimum ranks and eligibility of members of Courts martial

13. While we do not intend to make substantive changes to the minimum rank of the lay (military) members of courts-martial, we have reviewed the categories of officers and warrant offers who are qualified or eligible to be members of the court.

14. Regardless of the number of lay members sitting for a particular trial, the minimum qualification for an officer to be member of the Court Martial will be that he has held a commission for a minimum of three years. This is an increase from the current minimum period (two years) for membership of a district court martial under the 1955 Acts, but reflects the fact that this lesser form of court martial with limited powers of punishment will no longer exist.

15. Again as now, a warrant officer will only be qualified for membership of the Court Martial if the accused is below the rank that the warrant officer holds. For example, in the Army, a warrant officer first class (WO1) will be qualified to be a member of the Court Martial for the trial of a warrant officer second class (WO2). There is only one class of warrant officer in the RAF, but as they are considered equivalent to an Army WO1, an RAF warrant officer would also be qualified to be a member for the trial of an Army or RN WO2.

16. We intend to make provision for certain categories of officers or warrant officers to be excluded from membership of the Court Martial in some or all circumstances. In particular we propose to add two new categories to the list of those already unqualified to serve:

(a) any officer or warrant officer who is a member of the Service police; and

(b) any officer who is a member of the Royal Army Chaplain's Department, the RAF Chaplaincy Branch or the Naval Chaplaincy Service (there are no warrant officer chaplains).

We will also apply across all three Services the express provision that the lay members selected for a trial should not all come from the same unit, ship or establishment as each other.

Court MartiaL Proceedings

17. We have also made progress on defining the detail of Court Martial proceedings under a Tri- Service Act. Some matters were set out at Annex E of the 5 October memorandum. Much of this work involves harmonising existing provisions in the separate Acts to take account, for example, of Navy only provisions relating to the holding of courts martial on board ships and adjournments from one ship to another or the need to sit continuously except for certain days or "unless prevented by weather". Other provisions relating to the sitting of courts martial in open court but with the ability to sit in camera or closed court will be harmonised and the provisions relating to how rules of evidence should be provided for, where the policy intent is that Service law is able to keep pace with the law of evidence applicable in England and Wales, and, wherever possible, to reflect that law.

18. In addition we shall harmonise and modernise the existing provisions to safeguard the defendant's right to a fair trial through his ability to challenge both members of the court and the judge advocate. Any challenge by the defendant generally should be before the prosecution opens its case, but the possibility of the defendant making an application to the judge advocate after this point should not be excluded. In the civilian system if a defendant realises after the case has been opened that he knows a juror, Counsel will make an application to the judge, who must then decide whether to discharge the individual juror or the whole jury. If a similar application is made to the judge advocate he will decide whether to discharge the individual lay member or all of the lay members. As in the civilian system, the prosecution should also be able to challenge a member of the court for cause prior to the opening of the prosecution case.

Court Martial Punishments

19. The punishments available to the Court Martial when sentencing Service personnel have been reviewed, particularly in relation to provisions enacted under the Criminal Justice Act 2003. We intend to follow many of those provisions, for example in relation to matters to be taken into account in sentencing, general restrictions on imposing discretionary custodial sentences, pre sentence reports, sentencing guidelines and reasons for sentence. But we have concluded that we should not introduce for the Court Martial the power to make community orders in respect of Service personnel. This is because the range of punishments already available is sufficient to meet our needs and the orders would be inappropriate in a military environment in many instances.

20. A major change in the 2003 Act is to sentences of imprisonment for periods of less than one year. Wherever possible, our policy is to reflect the civil system and it is therefore proposed to introduce custody plus, custody minus and intermittent custody as sentences for the Court Martial. This will improve the sentencing powers of the Court Martial and provide for greater consistency with the civilian system. We will propose, however, minor differences between the civilian and Service provisions for the supervision part of the sentence to accommodate the Services' needs. Our proposals have been drawn up in consultation with the Home Office and Department for Constitutional Affairs, especially as we would like to provide for civilian courts to have jurisdiction over punishments imposed by the court (for example in respect of supervision periods under a custody plus order) where the offender is no longer subject to Service law.

21. For young Service offenders aged under 18, we propose to introduce a sentence equivalent to a Detention and Training Order which is the standard custodial sentence in the civilian system for this age group. Importantly, this provides for a period of supervision after release which is not part of the current custodial order. The period of custody would be served in civilian institutions.

22. We have also considered the punishments of a service nature and only propose minimal alteration so that they are harmonised across the Services. In one case a punishment (called 2nd class for conduct) which exists currently only for the Navy will be renamed and apply to personnel from all three Services. While the Navy has found this a useful rehabilitative punishment, particularly at sea, the name is perceived as anachronistic and inappropriate for a tri-Service punishment. Its elements and effects are better described as a "service supervision and punishment order" including, as it does, limited forfeiture of pay, extra work and deprivation of leave over a limited period. The punishment, which will also be available summarily, would apply only to offenders who, at the time of being sentenced, are below NCO rank.

23. We have also examined the implications of sentences of imprisonment by the Court Martial. One such consequence of such a sentence by court martial under the present law is that the offender is automatically dismissed from Her Majesty's service. This has proved to be a problem when the Courts Martial Appeal Court has, on occasion, believed it necessary to vary the sentence of the court martial to one where dismissal would not automatically follow. The reasons for such variation have centred on the financial implications of dismissal where the effect was found to be disproportionate to the offence. This can occur where a Serviceman loses his expectation of an immediate pension (albeit he retains his preserved pension rights) under the Armed Forces Pension Scheme because he has not quite completed sufficient service to reach that

point. The effect will not change significantly under the new Scheme where a payment and income stream at the Early Departure Point will replace the immediate pension. It is therefore proposed that the automatic link between sentences of imprisonment and dismissal is removed to give the Court Martial a better range of options in sentencing offenders and so avoid the kind of situation mentioned above. Nevertheless, the expectation is that the court will be most reluctant to retain an offender where it sentences him to imprisonment and that retention will occur only in most exceptional circumstances.

24. By comparison, dismissal is not automatic for a Serviceman convicted and sentenced to imprisonment by a civil court, but the Defence Council may exercise its discretion to dismiss the offender.

25. If a warrant officer or below is sentenced to dismissal or dismissal with disgrace, he is automatically reduced to the lowest rank. If an officer is similarly sentenced to imprisonment, there is no power to reduce the officer's rank or affect his commission. Instead, the Defence Council may withdraw his privilege to use his rank as a courtesy title in civilian life. While accepting that there should be differences between the conditions of commissioned and non-commissioned service, we consider that there is a case for drawing them closer together under such circumstances. We are therefore likely to propose, subject to consultation, that where an officer is dismissed by the court, he should automatically forfeit his commission.

Imprisonment and Detention

26. A key area under consideration has been the different provisions, essentially between the Army and RAF on the one hand and the Royal Navy on the other relating to imprisonment and service detention—(which is not to be confused with the sentence of detention in respect of young offenders available to civilian courts in England and Wales). One of the differences is the extent to which the provisions are currently in primary and/or secondary legislation and, therefore the need to harmonise the approach as well as their substance. It follows that a significant proportion, indeed possibly most, of the policy proposals will be effected by secondary legislation made under the Tri-Service Armed Forces Bill. It is important therefore that the rule making power in the Bill is drafted sufficiently widely to give adequate vires for the detailed matters for which the rules will have to provide.

27. All three Services have secondary legislation dealing with the rules for imprisonment and detention of those subject to Service law who have been sentenced to a term of imprisonment or detention within a Service facility. When the Rules were drawn up all three Services had prisons (military and air force prisons and naval detention quarters) and detention facilities at their disposal. Although each Service would deal with their own Servicemen, provisions existed for them to serve any sentence at another Service's establishment which could be in UK or overseas.

28. Today, there are no Service prisons. All sentences of military imprisonment (defined in the present law as imprisonment imposed by a court martial) are served in civilian prisons in the UK. There is now only one Military Corrective Training Centre (MCTC) based in UK, which caters for all three Services and the existence and regime of which will be familiar to members of the Committee. MCTC is an Army establishment to which sailors and airmen are also sent and its aim is to hold under restriction those men and women who have been awarded military detention and to provide the facilities, instruction and guidance whereby:

(a) those who are to return to normal military service will improve their service efficiency, discipline and morale and will determine to become better service personnel; and

(b) those who are to be dismissed should enhance their potential for self-sufficiency and responsible citizenship.

29. Under the Tri-Service Armed Forces Bill, it will be proposed that all three Services will be governed by the same Rules, removing the current reliance on attachment regulations.

30. Although there is a considerable difference in imprisonment and Service detention as sentences, there is at least an appearance of an anomaly in the length of automatic remission which applies to them which is one third remission for a sentence of detention and one half remission for a sentence of imprisonment. While there is an argument that with no civilian comparator there is no need for automatic remission at all, we have concluded, given the loss of liberty involved, that we should reflect the civilian system albeit with some modification. As a result we are likely to propose that we shall retain the current system of one third remission to be complemented by a system of additional remission which is earned for good conduct and industry. Together, the remission that will be granted or earned will amount to a maximum of 50% of the original sentence. The ability to gain additional remission will be available only to those who have been sentenced to 56 days or more detention as this sentence (with automatic and additional remission of 28 days deducted) represents the minimum effective regime within MCTC.

31. The resulting system is akin to the total civilian period available but additionally recognises the benefits of an incentive based system at MCTC. As part of this approach, we will propose the reintroduction of a form of forfeiture of remission as a punishment, but which can be imposed only following an ECHR compliant disciplinary hearing. The power to award a small number of additional days is valuable for the maintenance of discipline and consistent with the disciplinary system available in civilian prisons.

32. All sentences of imprisonment are served in civilian institutions in UK. The difficulty with current procedure is that because offenders are sentenced in accordance with sentencing guidelines of England and Wales, the sentence has taken account the amount of remission they would receive under the law of England and Wales, but Scottish release provisions apply if they are committed directly to a Scottish prison. While this currently works to the man's advantage as more remission is granted in Scotland, the reverse will be the case when provisions under the Criminal Justice Act 2003 are commenced. Regardless of where the advantage lies, we believe this anomaly should be removed, not least because of the potential for unfairness of co-accused serving sentences in prisons in different jurisdictions. We will therefore make provision for all personnel sentenced to imprisonment to be committed to prison via the MCTC. They will be committed to a civilian prison in England or Wales and the prisoner who wishes to serve the sentence in a Scottish prison nearer to home may apply for transfer in the same way as a Scottish prisoner convicted by a civilian court in England and Wales.

Billeting and Requisitioning

33. One area currently provided for in all three Service Discipline Acts is billeting and requisitioning in the UK. The provisions are similar for all three Services. They have not been substantively amended since the 1950s, are clearly outdated and complex in both terminology and subject. They have not been used for many years and do not satisfy the modern operational requirement, have largely been overtaken by commercial enterprise. They were clearly written around major home defence operations or a war scenario rather than a specific requirement for current or future operations or Military Aid to the Civil Authorities (MACA).

34. We believe that the powers contained in the Civil Contingencies Act 2004, specifically in s 22 concerning the scope of emergency regulations which may "make provision (which may include conferring powers in relation to property) for facilitating any deployment of Her Majesty's Armed Forces" sufficiently cover any potential Service requirements of billeting and requisitioning of vehicles in the UK. Moreover they do so in a more flexible way, not least in relation to what can be appropriated, how it can be used and its application to cover the operational requirement. But it is equally appropriate that the higher threshold for activation by the Secretary of State should apply (an emergency or impending emergency as opposed to in the public interest), considering the robust powers the Act provides. The 2004 Act does not have effect, however, where there is subsisting equivalent legislation. In order to make the position clear and consistent we therefore propose to repeal the relevant provisions in the Service Discipline Acts and rely in future on the Civil Contingencies Act 2004.

Other Matters

35. Work is continuing on a wide range of other matters including provisions governing terms and conditions of service, where we do not anticipate substantive changes and detailed matters relating to investigations and the creation of the Joint Service Prosecuting Authority to replace the single Service Prosecuting Authorities, as well as less familiar provisions relating, for example, to deserters and absentees and exemptions for personnel from being sheriffs and paying tolls.

36. As noted in answer to the Committee's question sent on 26 November, we have carried out a review of Service offences focussed primarily on harmonising and modernising the offences and sentences across the Services. This element of the work is not yet complete but we will send the Committee a separate note when we have done so, as we will on other significant matters, in line with our commitment to keep the Committee informed of progress.

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