RESEARCH PAPER 00/12
4 FEBRUARY 2000

The *Armed Forces Discipline Bill* [HL]

Bill 53 of 1999-2000

The Human Rights Act 1998 incorporates certain provisions of the European Convention on Human Rights into UK law and comes into effect on 2 October 2000. With this in mind, and in line with the Government's human rights agenda, the Ministry of Defence has reviewed the Services' discipline system. The *Armed Forces Discipline Bill* is the result of this review and addresses areas of military discipline where there are concerns that the system may not be compliant with the Convention.

The key areas addressed by the Bill include rules on pre-trial custody, election for court-martial trial, and the introduction of a new summary appeal court.

This paper will examine the provisions of the *Armed Forces Discipline Bill* and review the issues that arose during its passage through the House of Lords.

The Defence Select Committee will be taking evidence on the Bill on 10 February 2000.

Mark Oakes

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ISSN 1368-8456

Summary of main points

The Human Rights Act 1998 incorporates certain provisions of the European Convention on Human Rights into UK law and comes into effect on 2 October 2000. With this in mind, and in line with the Government's human rights agenda, the Ministry of Defence has reviewed the Services' discipline system. The *Armed Forces Discipline Bill* is the result of this review and addresses areas of military discipline where there are concerns that the system may not be compliant with the Convention.

The key proposals contained in the Bill establish further checks and balances on the chain of command. They include:

- The creation of independent judicial officers who would decide whether suspects and defendants are kept in custody before trial. At present this is decided by commanding officers.

- An expansion of the right to elect court-martial trial

- The introduction of a right to appeal to a new summary appeal court, consisting of an independent judge advocate and two lay Service officers. The summary appeal court would not have the power to increase sentences.

The Government has described the Bill as technical and has justified the changes on the grounds that failure to amend the Services' discipline system would render it subject to challenge in United Kingdom Courts. They maintain that the possibility of frequent and successful challenges to the system would produce an untenable situation that would seriously undermine military discipline. The Government states that the Bill has the full support of the Chief of Defence Staff, Sir Charles Guthrie, and the Chiefs of Staff of all the Services.

The Opposition has described the Bill as 'unnecessary', 'unfortunate' and 'flawed' and has called for its withdrawal for further examination. The principal concerns raised in the House of Lords have centred around the practicalities of implementing the provisions of the Bill under active service conditions, its effect upon the authority of commanding officers, and whether there is a need for the establishment of summary appeal courts. The general view of the Opposition was that more was being put into the Bill than is strictly necessary for compliance.

The Government tabled some minor amendments to the Bill. No substantive Opposition amendments were accepted.

This paper puts the *Armed Forces Discipline Bill* in context, provides background to the issues surrounding military discipline and reviews the points that arose during its passage through the House of Lords.

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I Background and Context

A. The Human Rights Act[1]

The United Kingdom has been under an obligation to ensure that its legislation and administrative procedures are compatible with the European Convention on Human Rights since 1953, when the Convention entered into force for this country. In order to reduce the risk of incompatibility and to facilitate access to judicial remedy for those claiming that their rights under the Convention have been infringed, the Government introduced the *Human Rights Act 1998*, which incorporates provisions of the Convention into domestic statute law. The *Human Rights Act 1998*, which is already in force in Scotland and will be brought into force in England and Wales and Northern Ireland on 2 October 2000, is designed, as its long title says, to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". In particular it will:

- require that, as far as possible, all primary and subordinate legislation is interpreted by the courts and others in a way that makes it compatible with the rights under the Convention;

- enable courts from the High Court upwards (the High Court of Justiciary in Scotland) to make declarations of incompatibility where they cannot interpret primary legislation in such a way as to make it compatible with the Convention;

- enable the courts to disapply subordinate legislation which cannot be interpreted in a way which makes it compatible with the Convention, unless it is primary legislation which prevents the removal of the incompatibility;

- require all public authorities to act in a way which is compatible with Convention rights. "Public authorities" include courts and tribunals, central government, local government, the police and any other "persons certain of whose functions are functions of a public nature" if the nature of the particular act complained of is not private. It does not include the Houses of Parliament (except the House of Lords in its judicial capacity) or people exercising functions in respect of proceedings in Parliament;

- enable individuals who believe that their rights under the Convention have been breached by a public authority to seek judicial review or to rely on their rights as a defence in civil or criminal proceedings.

The Convention rights protected under the *Human Rights Act 1998* are set out and defined in Schedule 1 of the Act. They are summarised in the titles of the various articles of the Convention as follows:

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[1] Information supplied by Mary Baber, Home Affairs Section

ARTICLE 2 RIGHT TO LIFE
ARTICLE 3 PROHIBITION OF TORTURE
ARTICLE 4 PROHIBITION OF SLAVERY AND FORCED LABOUR.
ARTICLE 5 RIGHT TO LIBERTY AND SECURITY
ARTICLE 6 RIGHT TO A FAIR TRIAL
ARTICLE 7 NO PUNISHMENT WITHOUT LAW
ARTICLE 8 RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE
ARTICLE 9 FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION
ARTICLE 10 FREEDOM OF EXPRESSION
ARTICLE 11 FREEDOM OF ASSEMBLY AND ASSOCIATION
ARTICLE 12 RIGHT TO MARRY
ARTICLE 14 PROHIBITION OF DISCRIMINATION[2]

The *Armed Forces Discipline Bill* reflects the need to bring other statutes into line with the provisions of the *Human Rights Act*. It represents an attempt to balance two concerns: military discipline and human rights. The main lines of criticism, likewise, are broadly twofold: those which stress the need to maintain service discipline through realistic procedures embedded in the particular context of the military, and those which desire procedures most closely approximating those which apply in the civilian justice system.

B. Civil and Military Law

A person joining the armed forces becomes subject to military law under the *Army Act 1955,* the *Air Force Act 1955* or the *Naval Discipline Act 1957* (collectively known as the SDAs). This does not mean that this person is no longer subject to civil law, but rather that his or her civilian status is modified by the superimposition of a military status. On the whole, the result is that certain rights and freedoms are restricted in order to preserve military discipline and readiness. For example, a civilian who fails to attend his or her place of work cannot be subject to criminal proceedings, but a member of the armed forces who does so without leave commits a punishable offence under the SDAs.

Certain parts of the *Armed Forces Acts* apply also to certain categories of civilians. These include civilians overseas who are either employed by the armed forces or who are dependents of someone who is subject to military law. Offences committed by such persons may be dealt with by courts-martial or by summary proceedings, or, in the case of army and air force law, by standing civilian courts. Standing civilian courts were set up in 1977 (under the *Armed Forces Act 197*6) and are similar to a stipendiary magistrates' court. The magistrate is a member of the Office of the Judge Advocate General specially sworn-in to take on that duty. The court has authority to imprison for periods of up to six months, to

[2] This means discrimination in the enjoyment of the other rights protected under the Convention. It is not a free-standing anti-discrimination provision

impose fines and to make orders similar to community service orders in the civilian jurisdiction. Arrangements for the application of Service law to Service dependents and British employees based overseas have existed since 1748.[3]

It has long been government policy that the provisions of Service law governing civilians are as close as possible to those governing civilians in UK courts.[4] A similar general aspiration has also been followed in respect of Servicemen and Servicewomen. At the same time it is recognised that some special circumstances do prevail which make a complete identity between the two systems impossible.

C. The System of Discipline in the Armed Forces

The Explanatory Notes to the *Armed Forces Discipline Bill* summarise the system of discipline in the armed forces as follows:

> If an offence is going to be dealt with within the armed forces' system, the Services will be responsible for investigating it and for determining whether a suspect needs to be held in custody during the investigation. Service authorities will also decide whether to prosecute and, if so, will draw up the charges. The decision as to whether an accused should be held in custody pending trial is taken by the Services. Cases are heard in one of two ways: either summarily or by court-martial.[5]

The commanding officer (CO) will usually be the individual who will undertake an initial investigation into a charge. Once this preliminary investigation is complete, the CO may decide to dismiss the charge, deal with it under summary procedure or refer it to Higher Authority further up the chain of command. The Higher Authority, on the basis of preliminary legal advice and in consideration of the best interests of the Service, may decide to refer the matter to the Service prosecuting authority or back to the unit CO to be dealt with summarily. The prosecuting authority acts very much in the manner of the Crown Prosecution Service in civil cases. The Service lawyers will decide whether to bring a prosecution or not and which charges should be brought.

1. Courts Martial

There are three types of courts-martial, General Courts-Martial (GCMs), District Courts-Martial (DCMs), and Field General Courts-Martial. The latter are only convened in times of war and permit an offender to be dealt with quickly near the field of hostilities. A GCM tries other ranks charged with more serious offences and officers tried with any offence. A DCM

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[3] HC Deb 21 November 1990, c356
[4] ibid
[5] Armed Forces Discipline Bill, Explanatory Notes, Para 5.

has limited powers of sentence and may not impose a prison sentence exceeding two years. Minor offences are dealt with summarily by unit commanders.

Courts-martial comprise a panel of officers and a judge advocate. The judge advocate will be a normal civilian judge or a senior lawyer with experience of Service law, responsible to the Judge Advocate General. The role of the judge advocate has changed in recent years. Before changes made in the *Armed Forces Act 1996*, the judge advocate was effectively a judge who was called in to assist the court, but was not a member of it. In theory, the lay members of the court could differ with the judge advocate on a matter of law if they provided written reasons for doing so. Under current procedures the judge advocate essentially acts in the same manner as a judge in a civilian Crown Court. He advises the Court on points of law, practice and procedure. He can also make pre-trial directions and has a vote on sentence. Sentences and convictions are determined by a simple majority of the court.

The number of offences dealt with by the courts-martial system between 1990 and 1995 is as follows, with the number of persons convicted in brackets: [6]

Year	Royal Navy	Army	RAF	Total
1990	35	917	145	1,097 (989)
1991	45	718	153	916 (884)
1992	76	763	149	988 (892)
1993	107	677	128	912 (774)
1994	104	600	91	795 (676)
1995	95	430	104	629 (515)

According to the MOD, since January 1999, the average time a suspect in the Army spends under close arrest awaiting trial for serious offences is 80 days. The other two Services had no recorded cases over the past three years of suspects held in custody.[7]

In December 1999, a Written Answer provided by John Spellar, the Armed Forces Minister, stated that the average duration of a contested trial at court-martial is on average about two and a half days.[8] The average daily cost of a court-martial for each Service was given as follows:

Naval Service	£1,200
Army	£1,600
RAF	£1,700[9]

6 HC Deb 28 July 1997, c78w
7 HC Deb 20 December 1999, c357w
8 ibid
9 ibid

The courts martial system has been the subject of considerable legal criticism in recent years. In the mid-1990s, *Findlay* and a number of other plaintiffs brought cases before the UK courts and, subsequently, the European Court of Human Rights, claiming that the courts-martial system, in various ways, was not fair and was not consistent with the Convention. Further details on the *Findlay* case can be found under section D1 below.

2. Summary Justice

Under the system of summary justice, a unit commander, or a subordinate commander to whom the duty has been delegated, can deal with minor offences committed by service personnel. A summary proceeding is not a trial, the rules of evidence do not apply, and lawyers are not present. The aim of summary justice is to deal with less serious offences in a swift and effective manner. Strict rules of procedure and rules of evidence are not used, on the grounds that this would complicate and slow down the whole process. In addition, the sheer number of cases coming under the summary form of justice might make a more formal legal approach impractical. In 1995, the most recent period for which figures are available, the number of offenders dealt with by summary proceedings was as follows:[10]

Service	Number of Offenders
Royal Navy	273
Royal Marines	327
Army	4,107
Royal Air Force	1,557

The overwhelming majority of sentences resulting from summary proceedings are non-custodial. For example, of the 1,557 offenders in the RAF dealt with under summary proceedings in 1995, only two were imprisoned and 55 kept in Service detention.[11] The *Armed Forces Act 1996* introduced a safeguard to the summary process by allowing any Serviceman tried for a summary offence to elect trial by court-martial. According to MOD estimates, since 1997, less than one per cent of personnel across the three Services have elected for court-martial rather than face a summary hearing.[12]

D. The Armed Forces Bill Procedure

The system of administering discipline in the armed forces is kept under constant review, with the main means of legislative change being the five-yearly *Armed Forces Acts*. The present procedure dates from the 1950s. *The Army Act 195*5, the *Air Force Act 1955* and the

10 Defence Analytical Services Agency, *1995 Disciplinary Statistics*, May 1997
11 ibid
12 HC Deb 20 December 1999, c357w

Naval Discipline Act 1957, stand to lapse unless Parliament positively decides that they should continue. Every five years an Armed Forces Bill is brought forward which proposes that the three Acts should continue, with whatever amendments are proposed, for a further year. It also provides for further annual extensions by Order-in-Council to be approved by affirmative resolution of both Houses of Parliament until the next five-yearly review. In practice this means that the Government and Parliament have a major opportunity to review military law every five years with opportunities for brief debates (usually 1½ hours) to review the working of the law every intermediate year. A new Armed Forces Bill is expected to be introduced in the 2000-2001 session of Parliament. The first Armed Forces Bill was passed in 1961.

1. The Armed Forces Act 1996

The *Armed Forces Discipline Bill* aims to build upon reforms contained in the *Armed Forces Act 1996*. This act made changes reinforcing the independence of courts-martial and extensions to the right to choose courts-martial to reflect the provisions of the European Convention on Human Rights. During the debate on the Second Reading of the *Armed Forces Discipline Bill*, The Minister of State for Defence Procurement, Baroness Symons of Vernham Dean, outlined the *Armed Forces Act 1996* reforms:

> The last Armed Forces Act, in 1996, contained major reforms that we in Opposition were pleased to support. A theme of these changes was the transfer from the service chain of command of authority to take certain decisions concerning the trial of offences under the service discipline Acts. This was in recognition of the need to remove the impression, however mistaken, that the chain of command could have an undue influence over court martial proceedings. [13]

One of the key motivations behind the amendments made to the courts-martial system in the *Armed Forces Act 1996* was the judgement of the European Court of Human Rights (ECHR) in the case of *Findlay vs the United Kingdom.*

In 1990, whilst serving in Northern Ireland, Lance Sergeant Findlay ran amok with a loaded pistol, threatening to kill himself and certain of his colleagues. At a court martial held on 11 November 1991 Findlay pleaded guilty to two charges of making threats to kill, three charges of common assault and two charges of conduct to the prejudice of good order and military discipline contrary to section 69 of the *Army Act 1955*. He was sentenced to two years imprisonment, reduction of rank and dishonourable discharge.

His application to the ECHR claimed that on various points the court martial itself and subsequent sentence reviews contravened Article 6 of the European Convention on Human Rights, which guarantees the right to a fair and impartial trial. Mr Findlay claimed, *inter alia*, that medical evidence that he was suffering from Post Traumatic Stress Disorder (PTSD)

arising from his service in the Falklands War had not been given sufficient weight, that he was given no reason for the level of sentence and that subsequent post-hearing review procedures were largely administrative. In 1994, in a separate action, the MOD agreed to pay Mr Findlay £100,000 in compensation for their failure to treat his PTSD and an earlier back injury. On 21 January 1997 the ECHR held that the British court-martial system did breach Article 6 on the basis that it lacked independence and impartiality. The judgement stated:

> …the applicant's fears about the independence of the court martial could be regarded as objectively justified particularly in view of the nature and extent of the Convening Officer's roles, the composition of the court martial, and its *ad hoc* nature. [14]

Regarding the impartiality of the court-martial the European Court declared that:

> …the tribunal must be subjectively free from personal prejudice or bias, and must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[15]

The ECHR expressed particular concern regarding the role of the convening officer. Under the pre-1997 system if a commanding officer felt that a court-martial was necessary, he would inform his commander, who would then become the *convening officer*. It would be his responsibility to decide if the court martial should proceed, to appoint the prosecutor and the members of the board. It was often the case that these members would be officers who were in his chain of command. Moreover, the convening officer also took the role of *confirming officer*, who ratified the finding of the court-martial. He could quash any finding of guilt but could not impose a finding of guilt in the place of an acquittal. The confirming officer was also able to vary the sentence but only downwards.

Under the 1996 Act the convening officer was replaced by a new prosecuting authority in each Service, similar to the Crown Prosecution Service in England or the Procurator Fiscal in Scotland. The prosecuting authority alone decides whether or not to prosecute, and on what charges.

Further background to the 1996 Act can be found in Library Research Paper 95/125, *The Armed Forces Bill,* dated 8 December 1995.

II The Armed Forces Discipline Bill of 1999-2000

A. Overall purpose of the Bill

The Government has described the *Armed Forces Discipline Bill* as fitting into the governing principles of its legislative programme; namely, the themes of "enterprise and fairness and

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13 HL Deb 29 November 1999, c667

14 RUSI International Security Review 1998

15 RUSI International Security Review 1998

the creation of a modern Britain".[16] It claims that the reforms in the Bill will establish further checks and balances on the chain of command and will give military personnel charged with an offence similar legal rights to civilians. The changes are said to be 'technical' and will preserve the essential structure of the current system while at the same time bringing it into line with the European Convention on Human Rights.

The Bill can essentially be broken down into two main themes, the first dealing with pre-trial custody and the second with summary proceedings. The key proposals include:

- The creation of independent judicial officers who would decide whether suspects and defendants are kept in custody before trial. At present this is decided by commanding officers.

- An expansion of the right to elect court-martial trial

- The introduction of a right to appeal to a new summary appeal court (SAC), consisting of an independent judge advocate and two lay Service officers. The SAC would not have the power to increase sentences.[17]

The argument for further change was made by the Minister of State, Baroness Symons of Vernham Dean:

> As with the 1996 changes, the reforms proposed now are concerned with establishing checks and balances on the chain of command--this time in two areas not fully addressed in 1996. The first of these relates to the arrangements for the pre-trial custody of those being investigated or awaiting trial for alleged offences under the service discipline Acts. The second concerns summary disciplinary proceedings; that is to say, cases that are heard by the accused's commanding officer.[18]

Further details were provided by John Spellar, the Armed Forces Minister:

> Service discipline procedures are kept under regular review and we have been considering the scope for further improvements. As a result, we intend to introduce a requirement for a judicial officer to decide within prescribed time limits whether a suspect or accused needs to be detained prior to charge or trial respectively. This would apply to a summary hearing before the commanding officer and to trial by court martial. We also propose to introduce a right of appeal from summary hearings to a new summary appeal court. To ensure clarity in the distinction between this new right of appeal and the existing right to elect to be tried by court martial, we propose to alter the procedures for exercising the court martial option. Where at present a

16 HL Deb 29 November 1999, c666
17 MOD Press Release 17 November 1999
18 HL Deb 29 November 1999, c668

> defendant is able to exercise this option at the end of a summary hearing, but before sentence, this right would in future be exercisable before the hearing.[19]

Another effect of the Bill is to consolidate aspects of the SDAs by harmonising rules on discipline across the three services. This ties in with an earlier commitment to a tri-service discipline act made in the Strategic Defence Review (SDR):

> We believe that there would be advantages to be gained from combining the three Service Discipline Acts into a single Act. Those differences which the Services need to retain for operational reasons would be kept but reduced to the absolute minimum. That would require a complete rewrite of the legislation but would allow the Services to define their needs for the next millennium and translate them into legislation where necessary. That would be a substantial and complex undertaking which will take some years to complete, but one which we consider would be very worthwhile.[20]

At the Committee stage of the Bill, Lord Peyton of Yeovil moved the following Amendment:

> Before Clause 1, insert the following new clause—
>
> **("Consolidated text of Acts**
> **CONSOLIDATED TEXT OF ACTS**
>
> . On the day on which this Act comes into force, the Secretary of State shall lay before Parliament a copy of the consolidated text of the following Acts--
> (a) Army Act 1955,
> (b) Air Force Act 1955, and
> (c) Naval Discipline Act 1957.").[21]

He explained the reason for the amendment:

> I am concerned with the simple point that those in the Armed Forces who have to handle this legislation should have it presented to them in a form at least as acceptable as possible. I am not now talking about someone's ability to understand it--or the possibility of it being understood by anyone--but about the number of documents which those responsible for implementing the law have in front of them when they are trying to find out what the position is. The amendment seeks slightly to reduce the difficulties, in that it would make it possible for those concerned with the legislation to have in front of them not two versions of an Act but one.[22]

Strong support for this amendment was give by Lord Renton. He also suggested that there was room for greater consolidation of the three SDAs:

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19 HC Deb 19 November 1999, c14w
20 Strategic Defence Review, Supporting Essay 9, para 57.
21 HL Deb 16 December 1999, c311
22 HL Deb 16 December 1999, c311

> Furthermore, I am sure that no one will dispute the fact that over the past 60 years--perhaps a little longer--there has been a fortunate tendency for the three Armed Forces to draw closer together, not only in peace-time but also in war. That being the case, I should have thought that to have one discipline Act for all three Armed Forces would be a very great practical advantage.[23]

Such concerns at the complexity and unwieldy nature of the SDAs has been expressed before. The Select Committee on the Armed Forces Bill in 1991 complained that scrutiny of the Bill was made difficult by

> the complexity of the three Acts that it seeks to amend. Since they became law in the 1950s, the Service Acts have been repeatedly amended, with sections and subsections both inserted and repealed. The result is frankly a mess.[24]

In response to Lord Peyton of Yeovil's amendment, Baroness Symons of Vernham Dean acknowledged the difficulties in following the three Acts, but added:

> However, the Committee will know that it is the practice of departments introducing primary legislation that amends already heavily amended legislation to prepare updated texts of the existing legislation and place those in the Libraries and the Public Bill Offices of both Houses. That is an aid to Parliament's consideration of the amending legislation. On that basis, updated copies of the Army and the Air Force Acts 1955 and the Naval Discipline Act 1957 have been prepared and were recently placed in the Libraries of both Houses.[25]
>
> The Acts will be further amended if Parliament enacts the present legislation. In the next Session we expect to introduce the quinquennial armed services Bill. That Bill will cover a wide range of different issues. I am sure that Members of the Committee would not expect me to anticipate those in any detail at this stage. It follows that at around this time next year we will have prepared further updated texts on the discipline Acts and we will put those further updated texts on the discipline Acts in the Libraries of both Houses. I hope that that process is found to be of value. I am sure that many noble Lords still deal with matters, as I do myself, very much on a paper basis, but the updated texts are also available electronically.[26]

She added that the Government may, in the longer term, move towards a tri-service discipline Act:

> We acknowledge that there has been a longstanding intention to consolidate the service discipline Acts. I strongly agree with a great deal of what the noble Lord, Lord Peyton, said about the need to consolidate the Acts. That point was made by a number of noble Lords. However, I would say that this is a task of a rather different

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23 HL Deb 16 December 1999, c312
24 HC 179, Sess. 90/91, Para 44
25 Dep 00/173, 00/174, 00/175
26 HL Deb 16 December 1999, c315

> order and one which has to produce a new baseline of service legislation. The Government are considering moving now to a tri-service discipline Act. I hope that that provides the assurance which was sought by the noble Lords, Lord Molyneaux, Lord Renton and Lord Burnham, and by the noble and learned Lord, Lord Mackay of Drumadoon. It is important to stress that that will be a major undertaking. We expect to receive advice. It will take some time for us to consider the best way forward but we must have a look at consolidating the Acts. Such a consolidation would supersede the current legislation.[27]

According to the Government, the Bill has the support of the Chief of Defence Staff, Sir Charles Guthrie and the Chiefs of Staff of all the Services. Baroness Symons of Vernham Dean said in Committee:

> I shall quote exactly what Sir Charles has agreed that I may say in this Chamber. The services at all levels wish to introduce compliant disciplinary procedures as soon as possible. Ideally, they would like revised procedures introduced during the current legislative Session. He emphasises that this is the firm recommendation of the Chiefs of Staff.[28]

B. Custody: Clauses 1-10

1. Current procedures

The basic procedures regarding the custody of Service personnel are described in section IC above. However, there are some variations across the three SDAs and these are summarised in the Explanatory Notes accompanying the Bill as follows:

Navy

> The continued custody of persons subject to the Naval Discipline Act 1957 following their arrest arises from the authority of the Crown, but there are internal regulations governing such custody. These safeguard the detainee in requiring an initial and immediate examination by the CO of the need for close custody and, thereafter, a daily review by the CO of the continued need for close custody. Close custody involves deprivation of liberty and continuous supervision. The CO applies criteria similar to those in the Bail Act 1976, namely that an individual may be detained if there are substantial grounds for believing that the accused would:
>
> - fail to surrender for custody,
>
> - commit an offence whilst on bail,

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[27] HL Deb 16 December 1999, c315
[28] HL Deb 16 December 1999, cc371-372

- interfere with witness or otherwise obstruct the course of justice, or
- be a danger to himself.

After every eight days in custody without the detainee having been brought to trial, the CO is required to refer the need for continued close confinement for decision by higher authority, this being someone further up the chain of command.[29]

Army

The regulations permitting the retention in arrest of persons subject to the Army Act 1955 provide safeguards in that the matter is reviewed both by the CO, on a regular basis, and by the CO's higher authority. The person detained is able to appeal against his arrest and is entitled to be kept informed about all aspects of his arrest. In this context, arrest may mean that the individual is held in close arrest or is subject to restrictions on movement. The criteria applied by the CO are similar to those in the Bail Act 1976.[30]

Air Force

The powers under the Air Force Act 1955 are similar to those in the Army Act 1955. Internal regulations make it clear that an accused should only be kept in close arrest whilst awaiting trial in exceptional circumstances. Where a person is detained in arrest, he is required to be brought before his CO within 48 hours. The CO has to carry out a review of the need to retain the accused in arrest every 16 days, and the accused is able to make representations prior to each such review.[31]

2. Proposed Changes

The introduction of an independent judicial officer is the key change proposed to the custody process by the Bill. Under the new proposals, a suspect will not be held in custody for more than 48 hours without authorisation by a judicial officer. Once a suspect has been charged, the judicial officer will only be able to authorise detention for periods of no more than eight days. In assessing the need for continued custody the judicial officer will apply criteria similar to those used in the civilian system. The judicial officer will normally be a judge advocate or a naval judge advocate, whose main function (as described at item C1 above) is to preside at courts-martial.

Baroness Symons of Vernham Dean summarised the main changes relating to custody as follows:

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[29] Explanatory Notes paras 13-14
[30] Explanatory Notes para 15
[31] Explanatory Notes para 16

Clauses 1 to 10 contain our proposals relating to pre-trial custody. At present, the commanding officer has the main responsibility for deciding whether a suspect or an accused should be held in custody pending charge or trial. There are safeguards to ensure that this responsibility is exercised appropriately and that no one is held in custody unnecessarily. However, these safeguards are all internal, involving the chain of command within the services.

In the Bill, we are proposing to strengthen these internal checks and to formalise them in primary legislation. The legislation will require the commanding officer to review the need for continuing custody no later than 12 and 36 hours after the time of arrest. The commanding officer will apply Police and Criminal Evidence Act criteria. I shall describe those in a moment.

We believe it right that there should also be external and independent checks on decisions that affect an individual's liberty. We therefore intend to introduce a requirement for a judicial officer to approve continuing custody in excess of 48 hours. The judicial officer will decide whether continued custody is justified while investigations continue, applying criteria similar to those used by magistrates in the civil courts. These Police and Criminal Evidence Act criteria relate to the need to demonstrate both that inquiries are being conducted diligently and expeditiously and that more time is required to obtain and preserve evidence. If the judicial officer is not satisfied that those conditions are fulfilled, the individual must be released. In any event, the judicial officer may not approve custody beyond 96 hours. If by that point the individual has not been charged, he or she must be released. I can assure the House that neither the 48 nor 96-hour periods will be regarded as norms. The aim will remain either to charge or to release the individual as soon as possible.

If an individual is charged, the question of the need for continued custody pending trial must be assessed anew. Again the commanding officer will take the initial view on this, this time applying similar criteria to those laid down in the Bail Act 1976. These include issues such as an assessment of the likelihood of an offence being committed or of witnesses being interfered with if the individual is not held in custody.

If the commanding officer considers that there is a case for continued custody, the issue must be referred promptly to the judicial officer who will also apply criteria laid down in the Bail Act 1976. If the judicial officer decides that the accused should be held in custody, he may only order custody for a maximum of eight days or for 28 days if the accused has consented to this longer period. The question must thereafter be readdressed by a judicial officer at intervals of no more than eight or 28 days as appropriate.

Clearly, the judicial officer is a key player in all the procedures I have just described. Clause 7 describes who may be appointed as a judicial officer for this purpose; normally, it will be a judge advocate or a naval judge advocate--in other words, one

> of the figures who exercise independent judicial functions at courts martial. Judge advocates also have a role in other aspects of the proposals in the Bill. [32]

The judgement of the European Court of Human Rights in the case of *Hood v UK*, has been an important factor in motivating the review of the arrangements for pre-trial custody. On 27 November 1994, David Hood a soldier with the British Army, was arrested for being absent without leave (his fourth such absence). He was later sentenced to eight months imprisonment and dismissal from the service. In his case before the European Court of Human Rights, one of his complaints was that his CO could not be considered impartial in relation to authorising his pre-trial detention and that this was in violation of Article 5 of the Convention. The Court, which gave its judgement on 18 February 1999, concluded that the applicant's complaints were justified. The *Armed Forces Discipline Bill* attempts to address the issues raised in the Hood case by introducing an independent judicial officer to determine whether a suspect should be held in custody.

3. The debate in the Lords

During the passage of the Bill through the House of Lords, considerable concern was expressed about the practicalities of implementing the changes made to the rules on custody, particularly under active service conditions. Some felt that the Bill would undermine military discipline.

Lord Burnham summed up the Opposition's concerns as follows:

> Our problem is that the Armed Forces, which will be affected by the Bill if enacted, work over a wide and differing field. What may be acceptable in the garrison towns of Colchester and Aldershot may not be practicable or in the least possible at the sharp end in East Timor or Kosovo. Under the terms of the Bill, detention must be authorised by a judicial officer. It is a nice thought to imagine a civilian judicial officer wading through the jungles of East Timor to authorise the commanding officer to put into close arrest a Gurkha who has run amok.[33]

Lord Carver stated that:

> It seems to me that in practical terms it would not be possible, under severe active service conditions, to apply most of the provisions of the Act.[34]

Lord Burnham moved three substantive amendments in an attempt to ensure that special consideration was given to active service conditions. For example, at Third Reading Lord Burnham moved the following amendment:

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[32] HL Deb 29 November 1999, cc668-669
[33] HL Deb 29 November 1999, c672
[34] HL Deb 16 December 1999, c320

> Page 2, line 38, at end insert (", and
>
> (c) that having regard to all the circumstances (including over-riding operational requirements) prevailing at the relevant time it is not practicable for the investigation to be launched diligently and expeditiously")[35]

The Government rejected Lord Burnham's amendment on three grounds. They argued that the amendments would have overriden the provisions of the Bill which limit to 96 hours the total time that an individual may be held in custody without charge. Baroness Symons explained the significance of this:

> In relation to the convention, we have been advised that in order to comply with the principle of fairness, 96 hours is the maximum period of custody without charge that is likely to be compatible. On that point alone, it is my understanding that we do not have flexibility and I appreciate the reasons for that. [36]

Secondly, they argued that the new legislation provides enough flexibility regarding custody that may be needed in difficult operational circumstances. Baroness Symons explained:

> The legislation allows the person who made the arrest to keep an individual in custody without charge until the commanding officer has received a report from the arresting officer advising him of the individual's arrest and has made his own decision on whether to keep the individual in custody. Additionally, the Bill requires the commanding officer to make his decision on custody only "as soon as practicable".[37]

The Minister also pointed to provisions in the Bill to allow for the functions of the commanding officer in relation to custody to be delegated, thus avoiding distracting commanding officers during operational circumstances.

The points made by the Government on the existing flexibility in the Bill received support from Lord Carver. He stated:

> I accept that sufficient flexibility has been provided to make it possible, if constant reference to the judge advocate is not practicable under the circumstances, for the review to be delayed.[38]

Several Lords cited Article 15 of the European Convention on Human Rights – 'Derogations in time of war or other public emergency' as a means of securing some level of exemption for

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[35] HL Deb 24 January 2000, c1327
[36] ibid
[37] HL Deb 24 January 2000, cc1331-1332
[38] HL Deb 24 January 2000, c1330

the Armed Forces from the provision of the Convention while under ‘active service conditions’.

In Committee, Lord Burnham tabled the following Amendment:

> Before Clause 1, insert the following new clause—
> **("Active service exclusion**
> **PERSONS ENGAGED UNDER ACTIVE SERVICE CONDITIONS**
>
> . Engagement under active service conditions on the part of a person to whom the provisions of this Act would otherwise apply shall constitute for the purposes of Article 15 of the European Convention on Human Rights 1951 and the Human Rights Act 1998 a state of public emergency in relation to that person.").[39]

Baroness Symons responded:

> The article is quite specific in its provisions. Those are that any state may take measures derogating from the convention--and I quote, as did the noble Lord, Lord Campbell of Alloway—
>
> "to the extent strictly required by the exigencies of the situation"--
> and this may only be
>
> "in time of war or other public emergency threatening the life of the nation".
>
> I believe it would be difficult to argue that the range of circumstances covered by the noble Lord's amendment would qualify for a derogation under Article 15. The noble Lord's amendment refers to "active service conditions". In another amendment they are defined as "active operational duties". I am sure that I do not need to remind noble Lords of the range of operational activities undertaken by our Armed Forces. They are all important. But I do not think any of us would suggest that they all amount to war. Of course they do not. Neither do they all amount to dealing with emergencies which threaten the life of the nation.
>
> Of course, we could try to argue that the operations in, for example, East Timor are of such a nature as to justify a derogation under Article 15 of the convention. This would be an issue on which we would ultimately need to persuade the Court at Strasbourg. We should have to demonstrate that we were at war or that the life of the nation was under threat. We should then have to demonstrate that our suspension of the relevant article of the convention was a proportionate act in the circumstances. I do not need to tell the Committee what expectation I have of the possibility of success in those circumstances. That was the point made by the noble Lord, Lord Campbell of Alloway.

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[39] HL Deb 16 December 1999, c317

> I stress to the Committee that there are other issues at stake here. First, there is the Government's full commitment to the principles of the convention. The noble Lord, Lord Burnham, is right. This is an argument which goes to the principle of the legislation. It is the principle of being compliant with the convention that the Government seek to uphold in this legislation. The proposed amendment would run counter to that principle and to that policy as well as to the spirit and the letter of the convention.[40]

Role of the Judicial Officer

Several Lords were concerned by the possible effect the new judicial officers might have on the authority of commanding officers. At Second Reading Lord Burnham said:

> The judicial officer, who plays such a large part in the Bill, will take away much of the control and authority that a commanding officer has over his unit. The amended Section 75C of the Army Act proposed by the Bill states:
>
> "If, on an application by the commanding officer of a person arrested…a judicial officer is satisfied that there are reasonable grounds for believing that the continued keeping of that person in military custody is justified",
>
> he may authorise it. I presume the commanding officer has no say in the matter at all and the periods for which custody may be used are very short. Again, that may be alright in Catterick or Colchester, but not in the front line or in a submarine under the polar ice cap. [41]

Clause 4: Custody during court-martial proceedings
Clause 5: Release from custody after charge or during proceedings

The Government moved several amendments to Clauses 4 and 5 in Committee, which were aimed at ensuring that "as much flexibility as possible is available to the services in the day-to-day administration of the new system of custody".[42] Baroness Symons stated that the amendments were:

> …necessary to overcome practical difficulties, which have been identified in the procedure of carrying out custody reviews. These may occur between the appointment of the judge advocate and the commencement of the trial, or in the period between finding and sentence if there is an adjournment. The main effect is to allow any judicial officer to conduct custody reviews up until the date of the trial and during an adjournment.[43]

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[40] HL Deb 16 December 1999, cc323-324
[41] HL Deb 29 November 1999, cc672-673
[42] HL Deb 16 December 1999, c340
[43] ibid

Clause 6: Arrest during proceedings

Government amendments were also made to Clause 6. As with the above clauses, the amendments devolve responsibility or jurisdiction to other individuals in instances where there could be problems in contacting an individual at short notice. The Minister explained:

> As drafted, after finding but before sentence, the courts martial may direct the commanding officer of the accused to give orders for the accused's arrest. However, if the court adjourns for any reason, it may disperse temporarily. Therefore, to avoid the obvious difficulties of recalling all three--or more--members solely to direct arrest if it seems necessary, the amendment vests the power of arrest with the commanding officer for these purposes. I believe that that meets the sort of flexibility that I know is very dear to the heart of the noble Lord, Lord Burnham.
>
> The second change arises from a potential difficulty which may arise if the judge advocate decides to direct the commanding officer to order the accused's arrest. In practice, it is unlikely that the accused's commanding officer would be present at the trial. It may be very difficult to contact him at that particular moment, especially if he is based overseas. Therefore, the amendments widen the provision to give the power of arrest to those who are already empowered under these Acts to arrest someone for committing an offence. This definition includes the commanding officer. The amendment does not allow the power to be exercised other than at the direction of a judge advocate.
>
> Finally, the amendments have been made to ensure that any direction for the arrest of the accused will remain valid, even though the court has subsequently had to be dissolved for whatever reason. The amendments also clarify that the first custody review held after the arrest of the accused shall be dealt with by the judge advocate who gave the original direction. Any subsequent reviews that are necessary may be heard by any judicial officer.[44]

Use of video link technology

Clause 8, on custody rules, includes the introduction of the use of live television links as a means of fulfilling the new custody rules, particularly when the logistical circumstances may be difficult. This clause was amended slightly by the Government at the Committee stage, in order to broaden the use of this technology to all custody hearings and not only those being brought before a judicial officer. The amendments also aimed to clarify the fact that live television links and visual transmissions could be undertaken via other media such as the Internet.

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[44] HL Deb 16 December 1999, c342

With regard to the practicalities of using such equipment, the Minister said:

> I hope to offer the Committee some reassurance on that point. I shall refer to the Army in particular, since it is likely to have the greatest number of personnel in remote locations. The Army would seek to use video link technology where operational or training circumstances mean that a face-to-face hearing is not possible within the required time-frame.
>
> It is important to remember that time moves on. The services are fully capable of exploiting successive advances in technology, which they already deploy with great success. Video technology is in day-to-day use. It was in constant use throughout the recent crisis in Kosovo. The armed services see no reason why that technology should not be deployed equally successfully in other operational environments and for purposes such as those envisaged in the Bill.[45]

C. Election for Court-Martial Trial: Clauses 11-12

1. Current Procedures

Since the *Armed Forces Act 1996*, an accused facing summary proceedings in all Army and RAF cases, and in all but the most minor Royal Navy cases, has the right to elect trial by court-martial instead of being dealt with summarily by his or her CO. The 1996 Act expanded the right to elect trial by court-martial due to fears that summary proceedings alone might not be compliant with the European Convention on Human Rights. It was felt that broadening the right to trial by a court that is in compliance with the Convention, would allay such concerns.

2. Proposed Changes

The key change to the right to elect for court-martial trial proposed under the *Armed Forces Discipline Bill* is to offer this right to the accused *prior* to the CO hearing the evidence of the charge. This change is closely linked to the proposed establishment of a summary appeals court (see item E below). The Explanatory Notes state:

> With the introduction in this Bill of a summary appeal court, the procedures for electing trial by court-martial have been reviewed. In order to allow the accused the right to be dealt with from the outset by a court complying with the Convention, the accused is now to be offered this right prior to the CO hearing the evidence on the charge. The right to elect court-martial trial will in future, be available at the outset of any summary proceedings and at any subsequent time should the authorities amend or change the charge. In the Royal Navy, election for court-martial trial is already made prior to the CO hearing the charge.[46]

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[45] HL Deb 16 December 1999, c351

[46] Explanatory Notes, para 35

An additional feature of the proposed new rules governing the right to elect court-martial trial is that in order to ensure that the accused is not disadvantaged by choosing a court-martial trial, the sentencing powers of the court-martial will be restricted to those that the CO could have exercised had he heard that particular charge. However:

> ..Should the prosecuting authority amend a charge and refer it back to the CO, the CO may decide that it is an offence that should be tried by court-martial, without the accused having the option of being dealt with summarily. In this case the sentencing powers of the court martial would not be restricted to those of the CO.[47]

Baroness Symons of Vernham Dean justified the changes in the procedures thus:

> As I explained earlier, at present, an accused in the Army, being dealt with summarily, is given the option of trial by court martial after his commanding officer has determined that the charge has been proved, but before sentence is passed.
>
> This procedure has certain of the characteristics of an appeal, in that the accused has some idea of what his fate may be when he decides whether or not to involve a higher court. We consider it more sensible to alter the arrangements so that an accused will make the choice between being dealt with summarily or by court martial before the summary hearing. Indeed, this is already the position in the Royal Navy.[48]

She added:

> Should the accused decide to be tried by court martial, the sentencing powers of the court will be limited to the maximum that the commanding officer could have awarded had he dealt with the case. This is to ensure that there is no disadvantage, real or perceived, for the accused in choosing to be tried by a court that is independent of the commanding officer and the chain of command.
>
> I want to emphasise that this safeguard does not mean that the accused will be getting off with an inappropriately light sentence. If the commanding officer is of the view that the offence is a serious one, he would still be able to recommend court martial trial in the first place.
>
> However, the decision on whether a case should be tried by court martial rests not with the commanding officer, but with each service's prosecuting authority, which broadly fulfil functions akin to those of the Crown Prosecution Service.[49]

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[47] Explanatory Notes, para 36
[48] HL Deb 29 November 1999, c670
[49] HL Deb 29 November 1999, cc670-671

3. The debate in the Lords

At the Committee stage of the Bill, Earl Attlee moved an Amendment aimed at reversing the effect of Clause 11, i.e removing the right to elect court-martial before the CO has heard the evidence against a charge.

> I do not understand why the accused will be in a better and fairer position if he is able to elect to go for courts martial earlier, especially as he will now have the opportunity to appeal to a compliant court after summary jurisdiction. That is provided for under later clauses of the Bill.
>
> At Second Reading I explained how it might well be disadvantageous for the accused to elect for courts martial when he was unaware that the commanding officer was minded to dismiss the charges. The CO will never prejudice his position by giving any indication, however informal, that he is minded to dismiss any charges.

He added:

> The Minister will no doubt pray in aid Clause 12 which limits the courts martial to the powers which the CO would have had if the accused had not elected for courts martial. However, the Committee needs to understand that the CO's powers are extensive. For a minor case, the courts martial could apply a much more severe penalty than the CO would have applied. The CO will of course know the accused well and he can take all the factors into consideration when determining sentence. On the other hand, members of the courts martial must not have any knowledge of the accused. Furthermore, they are also well used to hearing well-constructed pleas of mitigation. Indeed, they will have heard it all before.
>
> Will the Minister confirm that I am right in believing that members of a courts martial may knowingly apply a more severe sentence than they believe the CO would have applied, although obviously not one outside the CO's powers under summary jurisdiction? Am I right in believing that the members of a courts martial will not have to put themselves in the mind of the CO and instead they may come to their own decision based upon the evidence before them? Furthermore, am I right in believing that the courts martial may take into consideration the probability that the soldier has elected for courts martial despite it being a minor case?[50]

Baroness Symons of Vernham Dean responded by arguing that Clause 11 was necessary in the context of the requirements of the Convention. She pointed out that with the proposal to establish a summary appeals court there could be confusion between this right of appeal and the right to elect for court-martial if Clause 11 were removed.

> As the Committee will know, the Bill proposes to establish a summary appeal court. Apart from what the Government see as the intrinsic fairness of providing a proper

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[50] HL Deb 16 December 1999, cc357-358

> mechanism for appealing against any summary findings, that new procedure is necessary to put beyond doubt the question of compatibility with the convention.
>
> However, we do not wish there to be any confusion between the new right of appeal and the existing right to elect trial by court martial. We believe that there could be such confusion if we leave the procedures for electing trial by court martial as they are. That would be part of the effect of the amendments which we are discussing.
>
> That is because in the Army and Royal Air Force the accused is not given the right to elect for trial by court-martial until after the commanding officer has found the charge proved. As I said on Second Reading, that procedure may be considered to have some of the characteristics of an appeal. The other effect of the amendments is to formalise that. The election for trial by court-martial after the commanding officer has indicated his finding but prior to sentence will be an appeal if this amendment is accepted.[51]

However, she did acknowledge that the effect of the changes would be monitored closely.

> The noble Earl, Lord Attlee, asked if a court martial can knowingly apply a more severe sentence than they think the commanding officer might have applied. Yes, that is possible but there is no intention to do so deliberately. As I am sure the noble Earl is aware, both the commanding officer and the court martial have a range of identical sentences available to them. The court martial would not attempt to second-guess commanding officers. As I am sure the noble Earl would expect me to say, members would be expected to use their experience and judgement when reaching their verdicts.
>
> Once they have been introduced, we will monitor closely the new proceedings. If it becomes clear that there is need for modification we shall consider, as indeed we always can, what options are available to us for remedial action.[52]

D. Functions of Prosecuting Authority: Clause 13

Clause 13 introduces *Schedule 2* to the Bill. This schedule amends the SDAs in relation to the functions and role of the prosecuting authority concerning cases where an election for court-martial trial has been made.[53]

1. Current Procedures

At present an individual can only elect trial by court-martial after the CO has found the charge proven. If a defendant elects to be tried by court-martial, the case is passed to the prosecuting authority. If the accused then changes his mind, the prosecuting authority is required to send the case back to the CO so that the original finding of guilt can be recorded.

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51 HL Deb 16 December 1999, c360
52 HL Deb 16 December 1999, c361
53 Explanatory Notes, para 40.

2. Proposed Changes

The new Bill proposes that an individual will be able to choose the option of court-martial trial before the case is heard summarily. If the individual exercises this right and then changes his mind, the case returned by the prosecuting authority will be heard from the beginning when it is dealt with summarily by the CO. The changes amend *section 83B* of the Army and Air Force Acts 1955. The Royal Navy act does not require amendment as it already allows an election to be made before summary trial.

Other notable changes were outlined at Second Reading by the Minister:

> Clause 13 and Schedule 2 make the necessary procedural adjustments to cover the powers of the prosecuting authority under the new arrangements for electing trial by court martial. Typical of these is where a case has been referred to the prosecuting authority as the result of a defendant choosing to be tried by court martial, and the authority then takes the view that the original charge is inappropriate. We are proposing that the prosecuting authority may not in normal circumstances alter the charge without the defendant's consent.[54]

3. The debate in the Lords

During the Bill's passage through the House of Lords, the discussion regarding court-martials centred upon Clause 11 i.e. the principle of electing court-martial trial rather than the procedural changes contained in Clause 13.

E. Summary Appeal Courts: Clauses 14-25

1. Current procedures

If a case is heard summarily, the accused currently has no right of appeal to a higher court. Instead, the accused may request that the matter be reviewed by a higher service authority than his or her commanding officer.

2. Proposed Changes

The Bill proposes to introduce a right of appeal to a summary appeal court established under each of the three SDAs. The new court will consist of a judge advocate and two independent officers, usually from the appellant's service, but from outside his or her chain of command. This new right of appeal will supplement the right to elect trial by court-martial described in section C above, by offering individuals who have been dealt with summarily a second route to a court compliant with the European Convention on Human Rights.

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[54] HL Deb 29 November 1999, c671

Baroness Symons of Vernham Dean outlined the procedures of the summary appeal court:

> The procedure at appeal hearings in the summary appeal court will, as far as possible, mirror that of the Crown Court hearing on appeal from a magistrates' court. The hearings will be open to the public. The summary appeal court will not be able to award a sentence more severe than that imposed by the commanding officer.
>
> We wish to avoid any confusion that may arise from the introduction of this right of appeal. As I explained earlier, at present, an accused in the Army, being dealt with summarily, is given the option of trial by court martial after his commanding officer has determined that the charge has been proved, but before sentence is passed.
>
> This procedure has certain of the characteristics of an appeal, in that the accused has some idea of what his fate may be when he decides whether or not to involve a higher court. We consider it more sensible to alter the arrangements so that an accused will make the choice between being dealt with summarily or by court martial before the summary hearing. Indeed, this is already the position in the Royal Navy. [55]

3. The debate in the Lords

The proposal to establish summary appeal courts was cited by several Lords as the one that might most seriously undermine the position of the CO. The need for the summary appeal court was questioned by Lord Carver at Second Reading:

> I am even more concerned at the proposal to establish summary appeal courts. That seems to me the greatest potential threat to the authority of the commanding officer. The accused man or woman will already have had the choice of deciding whether to be tried by his commanding officer or by court martial, and will have chosen the former. To allow him then say that he does not like the commanding officer's decision and to refer either finding or sentence, or both, to a separate court not only fundamentally undermines the commanding officer's authority, but, as several noble Lords have said, will take time and will involve considerable effort and expense.
>
> I draw your Lordships' attention to paragraph 41 of the explanatory notes on the Bill, provided by the Ministry of Defence, which states:
>
> "The Bill will introduce a right of appeal to a summary appeal court established under each of the three SDAs"—
>
> that is to say, the service discipline Acts—

[55] HL Deb 29 November 1999, c670

> "This supplements the right to elect trial by court-martial described in the previous section of these notes, by offering to those who have been dealt with summarily a second avenue to a court that is compliant with the European Convention on Human Rights".
>
> I emphasise the words "supplements" and "second avenue". I suggest that there is no need to supplement or to provide a second avenue in order to comply with the convention. All that is needed is to leave the rule about election of trial by court martial in summary proceedings as it is today under the 1966 army and air force Act; that is to say, that the accused can elect trial by court martial once the commanding officer has found the charge proved. That provides the accused with an avenue of appeal--that is, to a court martial--against finding and sentence. It is only the unnecessary change proposed in Clause 11 to the right of election before summary proceedings which might--although I doubt it--justify the establishment of summary appeal courts. [56]

Baroness Symons of Vernham Dean responded as follows:

> The noble and gallant Lord, Lord Carver, concentrated his remarks on the summary appeal courts. I was asked why the Government have decided that offering the right to elect for trial by court martial is not sufficient to meet our needs in ECHR terms. The new system that we propose provides a further check which will enable an accused person to make a free choice as to the mode of trial, knowing that he will always be able to face an ECHR- compliant tribunal.
>
> It is arguable that the present arrangements, which were drawn up with the convention in mind, rely too heavily on the individual creating a situation that is compatible with the convention. It depends on his or her choice as to whether he or she is tried by a compliant court. I understand that that was thought sufficient when the Armed Forces Act 1996 was being prepared. Our legal advice is that it is now considered that a right of appeal is also necessary to make the procedures associated with summary dealings compatible with the convention. So I am afraid that, for those who have raised the question of whether the summary appeal court is necessary, the answer is: yes, in terms of the evolving thinking on the matter since 1996, that is indeed the advice. [57]

The issue was again raised in Committee by Lord Carver, Lord Craig of Radley, Lord Bramall and Lord Campbell of Alloway. Lord Bramall stated:

> But the point that my noble and gallant friends have made, and with which I entirely agree, is that more is being put into this Bill than is strictly necessary for compliance. Indeed even the Minister, when discussing the right of appeal against a summary sentence, said only,
>
> "that to continue with the present arrangements may not be compatible with the convention".

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[56] HL Deb 29 November 1999, c687
[57] HL Deb 29 November 1999, cc698-699

> I am sure that her words were carefully considered. She continued,
>
> "and would allow the possibility"—
>
> not the probability—
>
> "of a challenge to the powers of the commanding officer".
>
> Many of us think that if necessary this should be tested because if, as I said in the Second Reading debate and my noble and gallant friends have said, a soldier can have free and direct access to a European Convention on Human Rights compliant court--that is, a courts martial, with its own right of appeal--the right of appeal against the commanding officer's summary sentence to a special court would seem to be superfluous.
>
> Perhaps the forces could live--as I said before--with this business of electing trial from the outset, but, as my noble and gallant friend has pointed out, how much better the present system whereby before passing sentence the accused is asked whether he will accept the award or prefer to be tried by courts martial. This would greatly speed up justice and of course, as has been said in another context, justice delayed is justice denied. It would remove that uncertainty--one of the fundamental principles of discipline is that it should be consistent and well understood as well as fair--and it would not undermine the all-important authority of the commanding officer, on whom everything depends in terms of morale and performance. It would, of course, make Clauses 11 and 14 to 25 unnecessary.[58]

At the Report stage Lord Campbell of Alloway, in a further attempt to remove the need for summary appeals court, tabled an amendment proposing the establishment of a military appellate court that would be concerned solely:

> with the determination of convention issues arising in the course of the disciplinary process under the service discipline Acts on appeal from courts martial or courts martial appeals court in order to ensure compatibility with the convention.
>
> The amendment is drafted on the assumption that Clause 11 and Clauses 14 to 25 do not stand part at Third Reading .[59]

Lord Campbell of Alloway argued that his ‘armed forces (human rights) court’ would be cost effective as it would “only be convened ad hoc; as and when the occasion arises”[60] As to the composition and functioning of the court it would be:

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58 HL Deb 16 December 1999, c366
59 HL Deb 18 January 2000, c979
60 HL Deb 18 January 2000, c980

> constituted by the Lord Chancellor and the Secretary of State in consultation, the appointment of a senior member of the judiciary having relevant expertise of the highest order to preside, sitting with two or four duly appointed members of the Armed Forces.
>
> As there is no binding system of judicial precedent and as the articles of the convention are to be interpreted with flexibility on a case-by-case basis, the form of judicial resolution proposed by Amendment No. 1 is surely to be preferred. Would either a commanding officer or the summary appeal court, as constituted under Clause 17, have the requisite expertise to determine compatibility? Interpretation of the articles in the light of a mass of evolving jurisprudence assuredly warrants the attention of a senior member of the judiciary with the relevant knowledge and expertise,… [61]

Lord Campbell of Alloway and several other Lords, cited statements made by the Lord Chancellor during the Third Reading of the *Human Rights Bill* as the principal motivation behind the establishment of a military appellate court. Lord Kingsland stated:

> My Lords, at Third Reading of the Human Rights Bill on 5th February 1998, the noble and learned Lord the Lord Chancellor said:
>
> "I urge your Lordships to be of the view that the convention is a flexible instrument. It poses no threat to the effectiveness of the Armed Forces. I have given an indication about willingness to consider designating military courts as the appropriate forum for the consideration of complaints on convention grounds by Armed Forces personnel. On that basis I invite the noble Lord to withdraw his amendment".--[Official Report, 5/2/98; col. 768.] [62]

Baroness Symons of Vernham Dean responded by stating that the MOD had looked into the question of designating military courts to deal with Convention issues arising in the military but had in the end decided they were unnecessary. She reiterated that "the staffs of all three services were clear that, after careful consideration of the matter, they saw no justification for setting up, training and staffing such a court".[63]

Of note was Lord Carver's change in position regarding the right to elect court-martial and the need for summary appeal courts. He had earlier proposed that Clauses 11 and 14 to 25 should not stand part of the Bill. At the Report stage he stated:

> During the Christmas Recess I took legal advice, as I hope the Minister did. I took such advice from sources that are far more familiar than I am with the goings-on at the European Court of Human Rights. That advice was very clearly that if the existing arrangements for the Army and Air Force Acts over election for trial by court martial at the end of summary proceedings rather than at the beginning were to remain, we would almost certainly lose the case at the European Court, even if we did not lose it

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61 HL Deb 18 January 2000, c980
62 HL Deb 18 January 2000, c990
63 HL Deb 18 January 2000, c992

> in a court in this country. However, more importantly, in the course of that being considered by the European Court, the danger is that the whole issue of whether summary proceedings were themselves in conformity with the convention on human rights might be brought into question. That would be extremely dangerous; indeed, far more dangerous than just bringing the election of trial by court martial to the beginning instead of the end of summary proceedings.[64]

Clause 18: Right of appeal

Another key issue that arose during the Lords debate was the question of how long a serviceman should have to exercise his right of appeal under Clause 18. The clause inserts a new section into each of the SDAs:

> Subsection (1) inserts a new *section 83ZE* into both the Army and Air Force Acts 1955. This section provides that anyone who is dealt with summarily and found guilty may appeal against the finding, the sentence or both. The section imposes a time limit of 14 days from the date the sentence was awarded to lodge an appeal, although the court may extend this period at its discretion. It can also give leave to appeal at any time after the 14 day period has expired. In the case of an appeal, the section provides that the respondent (that is, the other party to the appeal) will be the prosecuting authority.
>
> Subsection (2) inserts a new section 52K into the Naval Discipline Act 1957. This section is identical in effect to that described in subsection (1) above.[65]

Originally Clause 18 provided for 21 days to launch an appeal. This was revised on Report by a Government amendment, mainly in response to arguments put forward by Earl Attlee, which reduced the period to 14 days. The Minister explained:

> In Committee I explained that we selected 21 days primarily because it seemed sensible to mirror the civilian system and also seemed a reasonable amount of time to allow an accused to secure legal advice, apply for legal aid and lodge an appeal.
>
> I was unable to accept the amendment of the noble Earl as the period of seven days, which he suggested, was likely to be incompatible with the convention as being too short a time in which to appeal. The possibility of large numbers of applicants seeking leave to appeal out of time or, indeed, of accused invariably lodging possibly ill-considered appeals simply to ensure that they were within time, seemed to me to be something we would all wish to avoid.

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64 HL Deb 18 January 2000, c982

65 Explanatory Note para 50.

> However, as I indicated, that 21-day period is not set in stone. I am satisfied that 14 days is a period acceptable to both the accused and the services. That will give an accused two working weeks in which to prepare his or her appeal.[66]

III Other Issues

A. Costs of the Bill

The Ministry of Defence has estimated that the annual average cost of implementing the changes proposed in the Bill will be in the order of £6,500,000. In 2000/01 there will be an additional £1,500,000 in start up costs to cover areas such as administration, accommodation, equipment and the recruitment of additional personnel. [67]

The main bulk of the additional costs associated with this Bill will come from personnel costs. These will involve the need for additional lawyers, investigators and other staff to administer the new procedures. The Government estimates that the Service manpower requirement will be for an additional 55 personnel, with a further 35 additional civilians to be employed by the MOD. The total costs in any one year will be sensitive to the number of appeals to the summary appeals courts. The figure of £6,500,000 is based upon a planning assumption of around 1500 appeals to the summary appeal courts per year.[68]

The question of costs was raised by Lord Chalfont at Second Reading:

> Finally, there is the matter of cost, a point which has been made very forcefully by a number of noble and gallant Lords. The summary appeal courts are to have not only extra officers assigned to them, but a judge advocate also. As noble Lords will see from the Bill, these judge advocates must have had at least five years experience as qualified lawyers. Such animals do not come cheaply; one cannot get qualified lawyers of five years' experience to come into the Armed Forces without paying them, and paying them very highly.
>
> It may not be a matter for the Ministry of Defence to decide, but, in that context, I should like to know what the Ministry of Defence understands about the defraying of the obviously very considerable extra costs which will come about as a result of the Bill. Are these costs to be borne by the defence vote? If so, as noble and gallant Lords have already said, an already overstretched budget, which caters for already overstretched forces, will become further overstretched, to the great detriment of the Armed Forces and the effectiveness of our services.[69]

The Minister responded as follows:

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66 HL Deb 18 January 2000, c1015
67 Explanatory Notes para 61
68 ibid
69 HL Deb 29 November 1999, c689

> The estimated annual cost of implementing the changes proposed in the Bill will be about £6.5 million. As noble Lords have rightly suggested, those costs will arise from the establishment of a summary appeal court and the other new arrangements. The majority of the costs will arise from the need for additional lawyers, investigators and other staff to administer the new procedures. These will also include travel and subsistence costs, fees, witnesses' expenses and so forth. Obviously, the costs will absorb an appreciable part of the Armed Forces' legal aid scheme. The noble Lord, Lord Chalfont, asked specifically how these costs would be met. I am sure that the noble Lord will be sad to hear that the costs will fall to the MoD. However, they will be absorbed across a wide range of budgetary areas, each of which will manage their costs in terms of their overall priorities.[70]

B. The Need for Further Legislation?

It would appear that the process of assessing how far UK Armed Forces discipline regulations conform to provisions of the European Convention on Human Rights will be an on-going one. Baroness Symons indicated during the Lord's debate that the need for further legislation could not be ruled out:

> The noble Lords, Lord Burnham and Lord Wallace of Saltaire, asked whether this would be the end of what we must do in terms of Armed Forces discipline in order to comply with the ECHR. I believe that there is still a question to be answered here. We have identified the main areas for concern, but we are continuing to examine our legislation and procedures. Should we need further legislation, it is hoped that remedial action will be taken in the next five-yearly Armed Forces Bill, due to be introduced in the next Session. However, for the moment we do not believe that any derogations are necessary. [71]

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[70] HL Deb 29 November 1999, c698
[71] HL Deb 29 November 1999, c697

Appendix A: Relevant Articles of the European Convention on Human Rights

1. Article 5: Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

> (a) the lawful detention of a person after conviction by a competent court;
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

2. Article 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

3. Article 15: Derogations in time of war or other public emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.