RESEARCH PAPER 01/03
8 JANUARY 2001

The *Armed Forces Bill*

Bill 4 of 2000-2001

The *Armed Forces Bill* was introduced in the House of Commons on 11 December 2000 and is due to have its Second Reading on 9 January 2001.

An Armed Forces Bill comes before Parliament every five years. It provides for the three Service Discipline Acts (the *Army Act 195*5, the *Air Force Act 1955* and the *Naval Discipline Act 1957*) to continue in force for a maximum of five years, subject to an annual Order in Council.

The other main purpose of the Bill is to amend the Discipline Acts in order to bring military law into line, in as far as is considered possible, with civil law.

This paper will examine the provisions of the *Armed Forces Bill* and discuss certain related issues that may arise during debate and consideration in committee.

Mark Oakes

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ISSN 1368-8456

Summary of main points

An Armed Forces Bill comes before Parliament every five years. It provides for the three Service Discipline Acts (the *Army Act 195*5, the *Air Force Act 1955* and the *Naval Discipline Act 195*7) to continue in force for a maximum of five years, subject to an annual Order in Council. The Armed Forces Minister, John Spellar, described the Bill as follows:

> The new Armed Forces Bill is important in enabling Parliament to check that military law meets the current needs of the Services. This new Bill is no exception. It keeps the fundamentals of the way the armed forces administer discipline, while proposing some adjustments to improve the system and keep it up to date.[1]

The main changes proposed in the Bill are:

- Applying relevant changes in civilian criminal justice to Service procedures through secondary legislation.
- Bringing Service police powers of search and investigation more into line with the Police and Criminal Evidence Act 1984 (PACE).
- Making Warrant Officers eligible to sit on courts-martial.
- Introducing powers to allow testing for alcohol or drugs after accidents in a Service environment.
- Increasing the ability of the Ministry of Defence Police to help other police forces.

Some of the provisions of the Bill relating to the Ministry of Defence Police will come into force as respects Scotland on a date to be appointed jointly by the Scottish Ministers and the Secretary of State.

The Shadow defence spokesman, Iain Duncan Smith, while welcoming the proposals regarding the Ministry of Defence Police, gave notice that:

> … the big issue that we shall want to debate is the move down the politically correct road, which will damage the ethos of our armed forces. The Government have incorporated the European convention on human rights to legislation, but included no caveat to protect our armed forces from what may become intrusive legislation via the courts. We will want to know how they intend to deal with that, because it could be damaging.[2]

This paper will also analyse the issues surrounding equal opportunities and the armed forces.

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1 MOD Press Release 14 December 2000.

2 HC Deb 11 December 2000, c443.

CONTENTS

I Military and Civil 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 19*57 (collectively known as the Service Discipline Acts - 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* also apply 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 1976*) and are similar to stipendiary magistrates' courts. 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 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 should be 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.

A. The System of Discipline in the Armed Forces

The various means by which discipline is administered in the armed forces can be summarised as follows:

> Discipline can be administered either summarily by the commanding officer (or by a more senior officer, usually called an "appropriate superior authority") or by a Service court. There are four Service courts:
>
> - A court-martial exercises an extensive jurisdiction (including jurisdiction equivalent to that of the Crown court). Within the United Kingdom, a court-

3 HC Deb 21 November 1990, c356
4 ibid

martial can only deal with cases involving Service personnel. Overseas, a court-martial can deal with cases involving anyone subject to the SDAs. A court-martial can also hear appeals against the findings or sentences of Standing Civilian Courts.

- A summary appeal court is an appellate court which hears appeals against the findings or sentences of a commanding officer or appropriate superior authority who has dealt with a matter summarily.

- Standing Civilian Courts operate overseas and only deal with civilians who are subject to the SDAs whilst overseas. They exist only under the Army and Air Force Acts, as dependants of Royal Navy personnel do not generally live on bases abroad. These courts are similar to magistrates' courts.

- The Courts-Martial Appeal Court hears appeals against the findings or sentences of courts-martial.[5]

For further details on courts-martial and summary justice, please see Library Research Paper 00/12, The *Armed Forces Discipline Bill* [HL], 4 February 2000.

II Human Rights

In recent years the Armed Forces have become increasingly sensitive to the context of human rights legislation in which Service law operates. For example, the *Armed Forces Act 1996* introduced changes reinforcing the independence of courts-martial and extensions to the right to choose courts-martial in order to reflect the provisions of the European Convention on Human Rights (see section III B below). More recently, the implementation of the *Human Rights Act 1998*, which incorporates the provisions of the European Convention on Human Rights into domestic statute law, has initiated a further review of the SDAs through the *Armed Forces Discipline Act 2000*.

A. The *Human Rights Act*

The *Human Rights Act 1998*, came into force in England and Wales and Northern Ireland on 2 October 2000 (it was already in force in Scotland). It is designed, as its long title states, to "give further effect to rights and freedoms guaranteed under the European Convention on Human Rights". In particular it:

- requires 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;

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5 Armed Forces Bill, Explanatory Notes, 11 December 2000, para 7.

- enables 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;

- enables 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;

- requires 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;

- enables 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.[6]

B. Armed Forces Discipline Act 2000

In light of the *Human Rights Act 1998,* the Ministry of Defence reviewed the Services' discipline system to ensure that it was in compliance with the European Convention on Human Rights. The *Armed Forces Discipline Act 2000* was the result of this review. The key provisions contained in the Act 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.

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[6] Information supplied by Mary Baber, Home Affairs Section.

The Government described the provisions of the Act as technical, and justified the changes on the grounds that failure to amend the Services' discipline system would have rendered it subject to challenge in United Kingdom courts. It maintained that the possibility of frequent and successful challenges to the system would have produced an untenable situation that would seriously undermine military discipline. The Government pointed out that the Act had the full support of the Chief of Defence Staff, Sir Charles Guthrie, and the Chiefs of Staff of all the Services.

The Opposition described the provisions of the *Armed Forces Discipline Bill* as 'unnecessary', 'unfortunate' and 'flawed' and called for its withdrawal for further examination. Concerns were raised regarding the practicalities of implementing the provisions of the Act under active service conditions, its effect upon the authority of commanding officers, and whether there was a need for the establishment of summary appeal courts. The general view of the Opposition was that more was being put into the Act than was strictly necessary for compliance with the *Human Rights Act*.

For further details on the background to the *Armed Forces Discipline Act* please see Library Research Paper 00/12, The *Armed Forces Discipline Bill* [HL], 4 February 2000, and the House of Commons Defence Select Committee Report on the same bill of 15 February 2000.[7]

III The Armed Forces Bill Procedure

For many centuries military law was a matter of Crown prerogative. Given the long-standing presumption against standing armies, military law was something which applied in time of war and in the proximity of the enemy. The so-called Articles of War issued by successive monarchs were generally of great severity and involved either the death penalty or mutilation. Since English, and later British, forces were normally deployed abroad, it was generally held that the Articles of War could only apply abroad and "when an enemy is really near to an army of the King's".[8]

The involvement of Parliament in military law was at first limited to peace-time. The first Mutiny Act was passed in 1689 at which time Parliament was anxious to ensure the loyalty of the army to William and Mary. From this date onwards Parliament passed various Mutiny Acts which were allowed to lapse during periods of prolonged peace, but the prerogative Articles of War continued to apply to active service abroad. The prerogative power of making Articles of War was finally superseded by a statutory power in 1813, but Parliament still had little influence over how this power was to be exercised. Only with the passage of the *Army Act 1881* did Parliament achieve full control of military law.[9]

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7 Defence Committee, *Armed Forces Discipline Bill [Lords]*, 15 February 2000, HC 253 1999-2000.

8 *Manual of Military Law* Part II (10th edition), pp1-31.

9 ibid

The present procedure dates from the 1950s, with some modification in 1971. *The Army Act 1955*, the *Air Force Act 1955* and the *Naval Discipline Act 1957* (the last of these was brought into the system in 1971, having previously been a permanent statute) 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. The first Armed Forces Bill was passed in 1961. Contained within the Bill is a clause (1 in the present Bill) which allows for further annual extensions by Order-in-Council to be approved by affirmative resolution of both Houses of Parliament. These annual extensions can continue for a maximum of five years, after which a new Armed Forces Act is required.

In practice what this means is that the Government and Parliament have the opportunity for a major review of military law every five years with opportunities for brief debates to review the working of the law in each intermediate year. In the past it has been proposed that the system of annual orders should be dropped, but this idea has not found favour with either the Select Committee examining the Bill or the House of Commons and the annual continuation procedure has been maintained.[10]

A. The *ad hoc* Select Committee

The Armed Forces Bill, once presented and given a second reading by the House of Commons, is referred to an *ad hoc* Select Committee. The Select Committee combines the normal role of a select committee in taking evidence, making visits and producing reports with that of a standing committee, which goes through a bill clause by clause, making amendments, and reports back to the House.

The 1985-86 ad hoc Select Committee suggested that consideration be given to the idea that the Bill might in future be referred to the Defence Select Committee rather than to an ad hoc committee. The Defence Committee rejected this suggestion. The ad hoc Select Committee in 1990-91 reaffirmed its belief in the formation of a special Committee to consider the Armed Forces Bill as the most appropriate procedure.[11]

One of the advantages of the use of a Select Committee to examine the Bill is that this committee may not only propose amendments to the Bill before the House, but may also recommend that certain matters should be reviewed before the passage of the next Armed Forces Bill. It is not, of course, the case that the SDAs can only be amended by the five-yearly Armed Forces Bill. They can, in principle, be amended at any time. In its 1991 report the Select Committee, although not persuaded that the armed forces should accept

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10 *Select Committee on the Armed Forces Bill, Special Report*, 24 March 1986, HC 170, 1985-86, minutes of evidence para 2.41

11 *Select Committee on the Armed Forces Bill, Special Report*, 24 April 1991, HC 179, 1990-91, para 46

homosexuals or homosexual activity, recommended that "homosexual activity of a kind which is legal in civilian law should not constitute an offence under Service law".[12]

This recommendation was accepted by the Government in 1992, and it later promised that the necessary amendment to the *Sexual Offences Act 1967* would be made "as soon as the legislative programme allows".[13] The amendment was made by Section 146 of the *Criminal Justice and Public Order Act 1994*.

In another example, the ad hoc Select Committee on the last Armed Forces Bill, asked that the MOD look again at the in-service monitoring of ethnic minorities which it has previously rejected.[14] This suggestion was supported by the Defence Select Committee. Subsequently, the MOD announced that it would conduct a survey of in-Service ethnicity, excluding the Gurkhas, in May 1992.[15]

B. The *Armed Forces Act 1996*

The Select Committee on the *Armed Forces Bill 1996* described many provisions of the Bill as "technical and uncontroversial".[16] However, the Committee did acknowledge that clauses 12 to 16 of the Bill constituted a "major reform of the court-martial system".[17] A summary of the provisions regarding the court-martial system is provided below:

1. Changes to Court-Martial Procedures and Appeals

The changes to the court-martial procedures introduced a greater degree of separation between the chain of command and the prosecuting authorities. Steps were taken to ensure that officers serving on courts would come from well outside the chain of command of the accused. The role of the Judge Advocate was strengthened so that his rulings on points of law were binding rather than just advisory. Changes to the appeal system were also made whereby defendants could appeal to the Courts-Martial Appeal Court against sentence as well as verdict.

One of the catalysts 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

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12 *Select Committee on the Armed Forces Bill, Special Report*, 24 April 1991, HC 179, 1990-91, para 41
13 HC Deb 17 June 1992, c989-990 and HC Deb 1 December 1993, c610w
14 *Select Committee on the Armed Forces Bill, Special Report*, 24 April 1991, HC 179, 1990-91, para 35.
15 Defence Committee, *Statement on the Defence Estimates 1992*, 11 November 1992, HC 218, 1991-92, para 5.15.
16 *Select Committee on the Armed Forces Bill, Special Report*, 30 April 1996, HC 143 1995-96, iv, para 5.
17 ibid.

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 195*5. 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 its 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.[18]

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.[19]

The ECHR expressed particular concern regarding the role of the convening officer. Previously, if a commanding officer felt that a court-martial was necessary, he would inform his commander, who would then become the *convening office*r. It would be his responsibility to decide if the court martial should proceed, and 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 alter 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.

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18 *RUSI International Security Review* 1998

19 ibid

The Select Committee on the *Armed Forces Bill 1996* stated in its report that:

> We fully support the changes to the courts-martial system proposed in the Bill and believe they will contribute to improving still further confidence in the exercise of Service law.[20]

Other changes made in the Act included alterations to the use of internal complaints procedures and access to industrial tribunals, and the introduction of local service engagements. The latter allowed a member of the regular services to restrict their service to a particular area and would not be liable to be posted overseas or elsewhere in the UK, apart from a specified limited period to allow for training or exceptional circumstances. The provision related to proposals to establish a new category of guard personnel on Military Home Service Engagements to undertake certain guarding duties.

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

IV The *Armed Forces Bill 2000-2001*

The present Bill covers four main themes. These include the continuation of the Services Acts, clarification of the powers of entry, search and seizure, changes to the administration of justice in the armed forces, and extensions to the jurisdiction of the Ministry of Defence Police (MDP). The Bill is accompanied by thorough Explanatory Notes, and it is recommended that these should be read for a detailed clause by clause analysis. The background to the broad themes of the Bill is dealt with below:

A. Continuation of Services Acts – Clause 1

The significance of this clause is described in Section III above. Section 1 of the *Armed Forces Act 1996* provided that the SDAs would expire in the following year unless extended by Order in Council for a further 12 months. The Act allowed for similar annual extensions until, but not beyond, the end of 2001. Clause 1 therefore provides for the SDAs to continue in force for a further five years beyond 31 December 2001.

This clause has also in the past given the House the opportunity to examine a broad range of non-operational Service issues. Among the areas regularly addressed are questions relating to equal opportunities, including the position of women, ethnic minorities, homosexuals and the disabled in the armed forces. These issues are discussed in Section VI of this paper.

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[20] *Select Committee on the Armed Forces Bill, Special Report*, 30 April 1996, HC 143 1995-96, iv, para 5.

B. Powers of Entry, Search and Seizure – Clauses 2-16

These clauses attempt to clarify the powers of entry, search and seizure, that may need to be exercised during an investigation of an offence by someone subject to the SDAs. The SDAs do not at present set out these powers which are currently exercised on the authority of the commanding officer under his inherent powers. The aim of the Bill is to replace the inherent powers, to clarify the powers of entry, search and seizure, and to put them on a statutory footing. The Explanatory Notes state:

> … that both those who exercise the powers and those who are subject to them can be clear about the limits of the powers and the safeguards which apply to the exercise of those powers.[21]

Under the Bill the Service police will be granted statutory powers based on those available to the civilian police, although they will be modified to suit the needs of the Services. [22] One of the key provisions relates to searching for evidence of suspected serious offences. Under the Bill the Service police will be able to apply for a warrant to search the living accommodation of persons subject to the SDAs for evidence of such offences. Judicial officers, who are legally qualified persons appointed under the SDAs to deal with a range of matters arising under those Acts, will be granted the necessary powers to grant warrants. According to the Explanatory Notes these changes will:

> … bring the Services broadly into line with the position in civilian life, where the Home Department police have to obtain a warrant to search from a magistrate. It is also intended to provide greater certainty and, by providing that extra certainty and independent legal supervision of applications for permission to search, to avoid the risk of a successful challenge to searches being made under the European Convention on Human Rights.[23]

One area of possible concern relates to the practicality of promptly obtaining a search warrant during operational deployment overseas, when any delay might make a search ineffective. To cover such an eventuality the commanding officer will retain a residual power to authorise searches in exceptional circumstances. However, the exercise of this power will be subject to retrospective review by a judicial officer.

The provisions outlined above aim to bring Service police powers of search and investigation more in to line with the *Police and Criminal Evidence Act 1984* (PACE). PACE constituted a major reform of the police with the bulk of police powers being

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21 *Armed Forces Bill*, Explanatory Notes, 11 December 2000, para 7.

22 Each of the armed forces has a force of Service police. They have many of the functions of civilian police but are members of the armed forces with no constabulary powers. This means that Service police cannot exercise any statutory powers conferred on constables; any powers they require must be specifically applied to them.

23 *Armed Forces Bill*, Explanatory Notes, 11 December 2000, para 7.

either contained or consolidated within it. The main elements of PACE are: powers to stop and search (Pt I); powers of entry, search and seizure (Pt II); arrest (Pt III); detention (Pt IV); questioning and treatment of persons by police (Pt V); Codes of Practice (Pt VI); documentary evidence (Pt VII); evidence in criminal proceedings (Pt VIII); and police complaints and discipline (Pt IX). PACE does allow the Secretary of State to use subordinate legislation to apply a number of civilian powers of investigation to cases under the SDAs with appropriate modifications. According to the MOD, some of the provisions outlined in clauses 2 to 16 fall outside the existing order-making power and, as a result, primary legislation is required to provide "a coherent system of investigation".[24]

C. Trial and Punishment of Offences – Clauses 17 – 30

This section of the Bill contains a number of largely unconnected provisions concerning the administration of justice in the armed forces. The main aim in reviewing the justice system was to check whether there were areas in which it might be changed, either to reflect developments in the civilian system or to meet the Services' own requirements more effectively. The key clauses are summarised as follows:

Clause 17: Summary dealing or trial and functions of the prosecuting authority

Clause 17 introduces Schedule 1. The main change introduced under the Schedule is to summary proceedings against officers. Under this clause, officers in the Royal Navy would now be able to be tried summarily. This would apply to officers up to and including the rank of commander. To ensure a degree of continuity across the Services, the most senior ranks capable of being dealt with summarily in the Army and RAF would now be those Services' equivalents of commander, i.e. lieutenant colonel and wing commander, respectively (previously only officers up to and including major/squadron leader could be dealt with summarily).

Clause 18: Abolition of naval disciplinary courts

The *Naval Discipline Act 1957* allows for naval officers of the rank of lieutenant commander or below to be tried in certain circumstances by disciplinary courts. The purpose of such courts was to administer discipline quickly where only a relatively limited punishment was required – disciplinary courts may not award a punishment greater than dismissal.

A disciplinary court has never been convened under the *Naval Discipline Act 1957* and the proposed introduction of summary trials would replace that function. Clause 18 therefore removes the provision for naval disciplinary courts.

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[24] *Armed Forces Bill* Explanatory Notes, 11 December 2000, para 19.

Clause 19: Membership of courts-martial

Clause 19 introduces Schedule 2. The Schedule extends the eligibility for court-martial membership to include warrant officers. At present only officers may sit as lay members (i.e. members apart from the judge advocate) of courts-martial of members of the armed forces. Warrant officers will be eligible to serve as members of courts-martial in cases where the accused is of subordinate rank.

Clause 20: Eligibility of warrant officers for membership of summary appeal courts

Summary Appeal Courts were established under the *Armed Forces Discipline Act 2000*. The courts consist of a judge advocate and two officers as lay members. While the MOD states that there is "no intention at present to alter the composition of the courts", it believes that there may be a need to enable warrant officers to be eligible.[25] Clause 20 therefore provides powers to extend eligibility for Summary Appeal Court membership to warrant officers by order. This would enable the Secretary of State to make such a change without being required to wait for an opportunity to do so in primary legislation.

The proposal to establish Summary Appeal Courts was criticised during the passage of the *Armed Forces Discipline Bill 2000* as the greatest potential threat to the authority of the commanding officer. During the Second Reading of the Bill in the House of Lords, Lord Carver questioned the necessity of the Summary Appeal Court:

> 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 to 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.[26]

For further background on the subject of the Summary Appeal Court please see Library Research Paper, The *Armed Forces Discipline Bill [HL]*, 00/12, 4 February 2000.

Clause 21: Review of sentences by Courts-Martial Appeal Court

In the civilian criminal system, certain sentences imposed by the Crown Court may be referred by the Attorney General for review by the Court of Appeal on the basis that he considers the sentence to be unduly lenient. There is currently no such corresponding power in relation to the sentences of courts-martial. Clause 21 inserts in each of the SDAs provisions enabling the Attorney General, with the leave of the Courts-Martial Appeal Court, to refer certain cases to that court.

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[25] *Armed Forces Bill* Explanatory Notes, 11 December 2000, para 19.
[26] HL Deb 29 November 1999, c687

Clauses 22 to 30 provide further procedural alterations to Service legal procedures, bringing many of them into line with civilian practice. The areas covered include: excluding most court-martial proceedings from the possibility of judicial review; clarifying Service courts' powers to compel the production of evidence or the attendance of witnesses; and the creation of a power for Service courts to make orders as to costs.

D. The Ministry of Defence Police – Clauses 31 and 32

The provisions of these clauses extend the jurisdiction of the Ministry of Defence Police (MDP) and create powers to allow the aligning of the forces disciplinary procedures with those of Home Department police forces.

The MDP is a civilian police force exercising constabulary powers within its jurisdiction. *The Ministry of Defence Police Act 1987*, which is the principal legislation governing the force, its powers and procedures, gives the MDP jurisdiction in relation to defence land, property and personnel within the UK and its territorial waters. The MDP is also able to operate on land in the vicinity of defence land, where a constable of a local force has asked for assistance. During 1999/2000 the MDP employed an average of 3,841 staff (including police officers) and its net operating costs were £153m.[27]

The Bill extends the jurisdiction of the MDP by amending section 2 of the 1987 Act. According to the MOD, the extension of the MDP's jurisdiction has been proposed in particular due to the changed deployment pattern of the MDP. The force makes increasing use of mobile patrols, involving travel between defence establishments and bringing MDP officers into greater contact with the public than was previously the case.

Under the Bill the existing power in relation to the MDP acting on land in the vicinity of defence land in response to specific requests from a member of a local force is "replaced by a power to act on such land in furtherance of a request, agreed to by the MDP, for policing assistance from a chief officer of a local force".[28] The aim is to allow standing arrangements to be agreed at a high level under which the MDP may take on agreed policing duties in areas close to defence land. This new provision also applies to requests for assistance from the British Transport Police or the United Kingdom Atomic Energy Authority Constabulary, where members of these two forces have constabulary powers.

The proposals would also empower, in specified circumstances, an MDP officer to act *without* a request for assistance from a Home Department or other police officer if "he reasonably believes that waiting for such a request would frustrate or jeopardise the purpose of his action".[29] These specified circumstances are where the MDP officer has:

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27 MOD Performance Report 1999/2000, p102.
28 *Armed Forces Bill* Explanatory Notes para 107.
29 *Armed Forces Bill* Explanatory Notes para 110.

> … reasonable grounds for suspecting that there has been an offence involving the use or threat of violence against a person, or where he reasonably believes that action is necessary to save life or prevent or minimise injury.[30]

These incidents are most likely to include robberies and road traffic accidents. The proposals have reportedly faced criticism from the Police Federation, which has told the government that the MDP do not have the relevant experience or training to deal with the kind of incidents currently handled by the police.[31]

Robert Key, a Conservative defence spokesman, has supported the extension of the MDP's law enforcement role, saying that the party wanted to see "further integration of police activities".[32] However, he also added that the MDP "must never be a substitute for local constabularies".[33]

Clause 32 introduces Schedule 5, which deals with a number of matters relevant to the MDP, mainly by making amendments to the *Ministry of Defence Police Act 1987*. The key changes include new provisions on disciplinary procedures and amendments to firearms legislation. The changes to the firearms legislation will enable potential recruits to the MDP to use firearms without a certificate while they are being trained or assessed under MDP supervision.

E. Miscellaneous and General – Clauses 33 to 41

This part of the Bill contains miscellaneous provisions relating to the armed forces. It also contains general provisions dealing with matters such as the commencement and extent of the Bill. The main clause in this part of the Bill is 'Clause 34: Powers to test for alcohol or drugs after a serious incident'. Although the SDAs include offences of unfitness for duty due to drugs or alcohol, there is no power which allows testing for drugs or alcohol other than the random drug testing provision introduced in the last Armed Forces Act. According to the Explanatory Notes:

> It is now considered that testing may be necessary after a serious incident to show whether the use of drugs or alcohol was a possible contributory factor to the incident. This clause introduces a power to order testing for drugs and alcohol following such an incident, coupled with an offence (in Schedule 6) of failing to provide a sample (normally breath or urine) when requested to do so. This provision will apply to anyone subject to the SDAs working for or in connection with the armed forces, whether military or civilian. The clause also provides for

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30 *Armed Forces Bill* Explanatory Notes para 110.
31 *Financial Times*, Thursday 4 January 2001.
32 ibid
33 *Financial Times*, Thursday 4 January 2001.

> officers to be designated by Defence Council regulations for the purpose of exercising the powers conferred by the clause.[34]

A serious incident is defined as an event which, "in the opinion of a designated officer, results in or creates a risk of death, serious injury or serious property damage".[35] In a straightforward incident involving, for example, members of only one unit, the designated officer is likely to be the unit's commanding officer. In a more complex case involving more than one unit or different Services, the clause allows the Defence Council to make regulations specifying who may be a designated officer, how many samples may be requested, the procedure to be used and the qualifications of the persons taking the samples. The clause also specifies that samples taken may not be used in evidence against anyone in any disciplinary proceedings.

A possible stimulus for the proposals is the apparently steady increase in the number of Service personnel who are testing positive for the use of controlled drugs. According to the MOD the figures for the past six years are as follows:[36]

Year	Royal Navy	Army	RAF
1995	-	129	-
1996	-	296	-
1997	14	519	-
1998	15	441	1
1999	33	485	10
2000 {1}	41	522	14

{1} Jan-Oct 2000. Note: It should be noted that some individuals have tested positive for more than one type of drug.

F. Costs of the Bill

According to the MOD the "largely procedural" changes in the Bill would generally have little impact on expenditure.[37] The implementation of Part II of the Bill (Powers of Entry, Search and Seizure) would require some initial training effort, at a cost of around £75,000, in addition to the acquisition of approximately £120,000 worth of video conferencing equipment for the conduct of search warrant applications. All these costs are set to fall in financial year 2001/02 and will be found from existing resources.

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34 *Armed Forces Bill* Explanatory Notes, 11 December 2000, para 125.
35 ibid para 127.
36 HC Deb 24 November 2000, c337w and HC Deb 14 November 2000, c576-7w.
37 *Armed Forces Bill* Explanatory Notes, 11 December 2000, para 172.

V A Single Tri-Service Discipline Act?

The Strategic Defence Review of July 1998 announced that there would be an "examination of the need for a single tri-Service Discipline Act"[38] as one of the ways to improve personnel management in the Services. There have also been plans to consolidate the SDAs. David Woodhead, Head of the MOD's Armed Forces Bill team, explained to the Defence Select Committee, during its investigations into the *Armed Forces Discipline Bill*, what consolidation meant:

> … updating the existing statute book, in this case in relation to armed forces legislation, without actually changing the significance or the meaning of the law…The end result of consolidation would have been still to have in all likelihood three Single Service Acts but they will have been updated.[39]

There may be disappointment in some quarters that the opportunity to draft a tri-Service Act, or to substantially consolidate the SDA, has not been taken with this year's Armed Forces Bill. There has been considerable pressure for reform of the SDAs for many years. The Select Committee which looked at the last quinquennial Armed Forces Bill in 1996 recommended:

> … that the Government ensures that the necessary resources and Parliamentary time are made available to allow for the consolidation of Service law before the passage of the next Armed Forces Bill.[40]

During the passage of the *Armed Forces Discipline Bill*, the Minister of State for Defence, Baroness Symons of Vernham Dean further acknowledged the desirability of consolidation of the Acts but recognised that such change would take time to achieve:

> 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 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.

She added:

> 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

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38 *Strategic Defence Review*, MOD, July 1998, Cm 3999, para 133.
39 Defence Committee, *Armed Forces Discipline Bill [Lords]*, 15 February, HC 253 1999-2000, para 28.
40 ibid

> we must have a look at consolidating the Acts. Such a consolidation would supersede the current legislation.[41]

The Defence Select Committee was critical of the delay in consolidating the SDAs in its report on the *Armed Forces Discipline Bill*:

> It is important that those affected by the three Service Acts have ready access to the law and this would be facilitated by the availability of a coherent text. 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.[42]

Mr Spellar indicated in a Written Answer that work towards a tri-service act will begin after the passage of the current Armed Forces Bill:

> We recognise the importance of updating the legislation governing discipline in the armed forces. It has been the intention for some time to consolidate the Army and Air Force Acts 1955 and the Naval Discipline Act 1957. We have been taking stock of the consolidation in the light of the changes to the present legislation made by the Armed Forces Discipline Bill and the likelihood of further changes in the quinquennial Armed Forces Bill in the next Session. A further consideration is the Government's intention, indicated in the Strategic Defence Review, to replace the three present Acts with a single tri-Service Act. It is planned that the substantive development of this important project should get under way as soon as the quinquennial Bill is enacted and that, when the work is complete, the resulting legislation should be introduced when the parliamentary timetable allows. As a consequence, legislation consolidating the present Acts would be likely to have an effective life of only a few years.
>
> We have therefore concluded that the most sensible approach would be to subsume consolidation within the development of the tri-Service Act, the purpose of which will be to provide legislation that better meets the requirements of the three Services in an increasingly joint environment.[43]

VI The Armed Forces and Society

The quinquennial debates and Select Committee reports on the Armed Forces Bill have traditionally offered Parliament the opportunity to examine the full range of non-operational Service issues. The post-Cold War period has been one of rapid change for

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41 HL Deb 16 December 1999, c315.

42 Defence Committee, *Armed Forces Discipline Bill [Lords]*, 15 February 2000, HC 253, 1999-2000 para 28.

43 HC Deb 15 May 2000, c14-15w

the armed forces. Not only have there been reductions in the number of personnel but also substantial relocations and changes in the nature of the armed services. It has become increasingly apparent that the armed forces are no longer immune to the wider changes that have taken place in society. As the rights of the individual have been accorded greater importance, equal opportunities issues, dealing with gender, race, sexuality and disability have increased in prominence over the past few years. These changes have important implications for Service personnel policies. According to the MOD's 'Overarching Personnel Strategy', the armed forces need to:

> recruit and retain high calibre personnel, irrespective of race, ethnic origin, religion or gender and without reference to social background or sexual orientation. They also need to promote a culture in which each individual is respected and valued for his or her unique contribution and is given the opportunity to progress without fear of harassment or unlawful discrimination; the ultimate aim being the enhancement of operational effectiveness.[44]

The most concrete evidence of the MOD's commitment to equal opportunities was the establishment on 25 September 1998 of a Tri-Service Equal Opportunities Training Centre at the Royal Military College of Science at Shrivenham. According to the then Armed Forces Minister, Doug Henderson, the centre, the first of its kind in Europe, was established to:

> … deliver equal opportunities training to Service and civilian personnel holding the appointment of Equal Opportunities Advisers and selected military trainers throughout the Service command chain. It also provides, with the assistance of an outside contractor, mandatory awareness seminars for senior Service officers and MOD Senior Civil Servants.[45]

In 1999/2000, 694 Equal Opportunities Advisers and 205 Senior Officers received training at the Centre.[46]

In November 1999 the MOD was awarded the Gold Standard for Best Diversity Practice by a Government Department at the annual Diversity Awards.[47] The second Equal Opportunities Conference was hosted by the Secretary of State in December 1999.

Sir Charles Guthrie, the Chief of Defence Staff, recently highlighted the question of how closely the armed forces should mirror society in an end of year address to the Royal United Services Institute (RUSI). While he acknowledged that the modern armed forces

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44 'Armed Forces Overarching Personnel Strategy', MOD February 2000.
45 HC Deb 7 December 2000, c57-8w.
46 MOD Performance Report 1999/2000, Cm 5000,
47 ibid.

should reflect "all sections of society"[48] he did express concern at the possible impact of some changes on the ethos of the Services:

> Another area where combat effectiveness could be under threat is in the raft of legislation we face today. Health and Safety at Work, Working Time Directives, Human Rights Bill, and Armed Forces Discipline Acts. As things stand, nothing we have done so far has had a detrimental effect on operational capability on its own. Even the acceptance of homosexuals did not turn out to be the major issue that some thought it would be. Personally, I never believed it would be a problem and I'm pleased to see that it has turned out to be a non-issue. However, we do have to be on our guard and keep an eye on the cumulative effect of all these changes, which might begin to erode the ethos of service and sacrifice. I do think the uniqueness of the Services is not always well understood and the modern concern for the rights of the individual sometimes have to be sacrificed in the military for the collective good of the team.[49]

The key equal opportunities issues facing the armed forces are analysed below:

A. Women in the Armed Forces

The MOD and the armed forces are committed to expanding career opportunities for women. During 1998 the number of posts available to women in the Army increased from 47% to 70%. The Royal Navy and RAF have 73% and 96% of posts respectively open to women.[50] However, women are excluded from some front-line combat roles. These include: for the Army, service in all frontline combat roles; for the Navy, service in the Royal Marine Commandos and in submarines; in the RAF, service in the RAF Regiment. Further details on recent developments regarding women in combat roles are provided below at item 1.

On 1 April 2000, 8% of armed forces personnel were women (8.8% of officers and 7.8% of other ranks). This compares favourably with the situation at 1 April 1990 when 5.7% of Armed Forces personnel were women (5.9% of officers and 5.6% of other ranks).[51] The following table shows figures for the recruitment of women over the past four years:

Total Number of Females Recruited				
	1996-97	**1997-98**	**1998-99**	**1999-2000**
Royal Navy	562	634	661	703
Army	1,939	2,005	1,975	1,743
RAF	434	697	795	713
All Services	2,935	3,336	3,431	3,159

Source: Memorandum submitted by the MOD to House of Commons Defence Select Committee, 22 June 2000.

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48 CDS Presentation to RUSI, 19 December 2000, MOD Press Release.
49 CDS Presentation to RUSI, 19 December 2000, MOD Press Release.
50 *MOD Corporate Principles*, MOD web site at http://www.mod.uk
51 *Ministry of Defence Performance Report, 1999/2000*, Cm 5000,

The Defence Select Committee has welcomed the MOD's performance in improving the recruitment levels of women to the Armed Forces' stating that "Its achievements in recruiting women to all areas of the Armed Forces is one of the MOD's success stories and we hope to see evidence of its continued success in future."[52]

As at 1 April 2000, the highest ranks held by women in the armed forces were as follows:

Service	Rank	Number
Royal Navy	Captain	4
Army	Brigadier	1
RAF	Air Commodore	1

Source: Memorandum submitted by the MOD to House of Commons Defence Select Committee, 22 June 2000.

The Equal Opportunities Commission (EOC)[53], in written evidence to the House of Commons Defence Select Committee, expressed concern regarding continued discrimination against women within the armed forces.[54] These problems were said to persist despite successful joint working between the EOC, the MOD and the three Services. The EOC summarised their key concerns as relating to:

> Recruitment and Selection – the need to end the ban on combat exclusion and attract more women, and
>
> Retention – the need to change the culture of the Armed Services so that more women can enjoy a career in the Armed Services.[55]

The EOC wants to see women having access to all jobs in the armed forces on the basis of their ability. The Commission criticised the armed services for not showing the same level of commitment to increasing recruitment levels among women as it has regarding the ethnic minorities.[56] The EOC is keen to see the extension of the gender-free recruitment and selection fitness tests across all the Services. These tests were introduced by the Army on 1 April 1998 and measure fitness and physical ability to undertake the requirements of particular jobs, irrespective of gender. Ms Jenny Watson, the Deputy Chair of the EOC, explained the Commission's approach to the tests:

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52 Defence Committee, *Ministry of Defence Annual Reporting Cycle*, 2 February 2000, HC 158 1999-2000 para 126

53 The EOC was set up by the Sex Discrimination Act 1975 (SDA). Its duties are to work towards the elimination of discrimination between men and women, to promote equality of opportunity between men and women generally and to keep under review the workings of the Sex Discrimination and Equal Pay Acts.

54 Defence Committee, *Armed Forces Personnel Issues*, Minutes of Evidence, HC 689-iii, 25 October 2000, page 72.

55 ibid

56 Defence Committee, *Armed Forces Personnel Issues*, Minutes of Evidence, HC 689-iii, 25 October 2000, page 73.

> If you can pass the tests that are necessary for the job to be done, then you should have a go at doing it. What we are absolutely not saying – and I want to make this very clear because sometimes it is not heard – that women should be able to do it regardless. Women who are able to do it should be allowed to have a go. Clearly we need to be absolutely certain that does not lessen the effectiveness of our Services.[57]

The EOC is keen to have the Royal Navy's current ban on women serving on submarines reviewed. While women now fly combat aircraft and serve on surface warships, their employment aboard submarines is less common. Sweden and Norway were among the first countries to allow Servicewomen to serve on submarines. Australia decided in 1999 to recruit women for submarine service and the US and Canadian navies have undertaken studies into the issue.

1. Women in combat?

The Army is currently studying, on behalf of the three Services, the likely effects on combat effectiveness of opening up posts that are presently closed to women. Details of the 'Combat Effectiveness and Gender Study' were provided by Geoff Hoon in a Written Answer:

> We are currently engaged in a study, announced in the 1998 Strategic Defence Review, to evaluate the impact on combat effectiveness since opening 70 per cent. of posts in the Army to women and of allowing them to serve in specialist billets "attached" to the Royal Marines. The study, which is due to report to Ministers in 2001, will also make an assessment on the armed forces' combat effectiveness of removing the present exclusion of women from the Royal Marines General Service, Royal Armoured Corps (including the Household Cavalry), Infantry and RAF Regiment. As part of this study we have drawn upon other countries' experiences in respect of women in combat roles.[58]

According to press reports one element of the Study has concluded that women could work effectively alongside men in almost all combat situations. *The Observer* reported that mixed-sex platoons completed a series of trials that were designed to:

> … test female soldiers' aptitude – and their effect on their male colleagues – in everything from peacekeeping and public order situations to intensive combat. An all-male 'control' platoon was also deployed as well as all-women crews and infantry units.[59]

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57 Defence Committee, *Armed Forces Personnel Issues*, Minutes of Evidence, HC 689-iii, 25 October 2000, para 165.

58 HC Deb 14 November 2000, c574w.

59 *The Observer*, 24 December 2000.

It continued:

> … in the physical trials stage of the study, which is now complete, the two sexes interacted well in almost all situations, even in close environments such as tanks and bunkers and under heavy fire.[60]

An MOD spokesman reportedly said "We are not prepared to talk about any of these phases in isolation until all the results are known".[61] The other two elements of the study involve a survey of attitudes within the Army, and a study of the experience of the armed forces of countries which have deployed women in front line combat.

According to *The Independent*, The Secretary of State for Defence, Geoff Hoon said:

> Women are already serving in frontline jobs in the armed forces, with artillery units, as fighter pilots and in warships, which means they are just as likely to be in a position to kill people in combat as men are. That would be the same if they had an infantry role.[62]

Sir Charles Guthrie, Chief of the Defence Staff, has said of the policy regarding women in the armed forces:

> We have taken an incremental approach to widening the roles for women in the Services and are currently conducting a study into their suitability for close combat roles. I am not sure that the nation is ready for such a step yet, but from my perspective we must ensure that nothing, I repeat nothing, damages the combat effectiveness of the British Armed Forces. The Chiefs of Staff have a duty to recommend to the government how to produce the best operational capability for the nation. We will have to see what conclusions the study draws, but I stress the Chiefs of Staff are not in the business of designing Armed Forces for the good times. We have to advise what will work when the conditions are tough, dangerous and frightening. When the time comes, if the Chiefs of Staff advice upsets those who seek equality as an end in itself then so be it.[63]

Iain Duncan Smith, the Shadow defence spokesman, has expressed concern at the possibility of women serving in front line roles. He said:

> This is a decision the military should take, not politicians. Military effectiveness must be put first, not political correctness. It does seem that the Government are partially forcing the military into making this politically correct leap.[64]

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60 *The Observer*, 24 December 2000.
61 *Daily Telegraph*, 25 December 2000, at http://www.telegraph.co.uk
62 *The Independent*, 3 October 2000.
63 CDS Presentation to RUSI, 19 December 2000, MOD Press Release.
64 ibid.

Liberal Democrat defence spokesman, Menzies Campbell also has considerable reservations about a future ground combat role for women. He said:

> People should remember that victory in the Falklands in the end depended on British troops clearing trenches on Mount Tumbledown using their bayonets. We have a long way to go before public opinion will be ready to accept the idea that close hand-to-hand combat is something for which women should be deployed.[65]

Six NATO nations – Belgium, Canada, Denmark, the Netherlands, Norway and Spain – have no restrictions on women serving in ground combat roles. However, the number of women serving in these areas tends to be small, generally well under 1%. The main reason for low numbers is a lack of female applicants and more demanding physical standards, which result in a higher failure rate for women during training.

Of particular significance was the opening up of all branches of the German armed services, including combat and special forces, to women on 2 January 2001. This decision came after the European Court of Justice (ECJ) ruled early last year that Germany's constitutional provision restricting the military role of women violated EU rules on sexual discrimination. The case against Germany was brought to the ECJ by Tanja Kreil, an electronics engineer, who applied for a job in electronics weapons maintenance in 1996 but was turned down because of her gender.[66]

Germany's rules on Service women were previously among the most conservative in NATO, and restricted women to the medical or orchestral corps. There were many more opportunities in the armed forces of the UK or France, for example, even though they currently exclude women from some front-line duties. According to press reports the ECJ judgement suggested that these exclusionary practices could continue "where sex constitutes a determining factor to access to certain special combat units".[67]

Drawing lessons from other countries' experiences in deploying women in combat roles could have its dangers. The EOC has acknowledged the need to keep investigations into extending the combat role of UK Service women in a British military context. Jenny Watson, giving evidence to the Defence Select Committee on 25 October 2000, said:

> There are women deployed in combat in other countries, but the interesting thing is that this is obviously in a British military context. I would want to draw a distinction between the role that the British Services perform in certain situations and the role that maybe other countries, such as Denmark and Canada, perform. We seem to have the kind of (for want of a better phrase) the go in and sort it out role. That might mean that you need a different understanding and there are

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65 *Daily Telegraph*, 25 December 2000, at http://www.telegraph.co.uk
66 Tanja Kreil vs Germany, Case C-285/98, Judgement of 11 January 2000.
67 *International Herald Tribune*, 3 January 2000.

> different lessons to learn from other countries that might have perhaps a more peace-keeping role. We do need to look at it in a British military context.[68]

B. Ethnic Minorities in the Armed Forces

The Armed Forces have sought to gain increasing numbers of recruits from amongst the ethnic minorities, which have long been an under-utilised resource. Whereas between one to two per cent of the military is from ethnic minority groups, the latter represent some six per cent of the national workforce as a whole. The Army came under considerable pressure on this point from the Commission for Racial Equality (CRE).[69] Following a CRE investigation into recruitment and transfer into the Household Cavalry, arising from the case of Jacob Malcolm, a black soldier denied a transfer to the regiment allegedly because of his racial origin, the CRE threatened to take enforcement action under the *Race Relations Act.* After extensive liaison between the CRE and MOD a comprehensive equality campaign was launched in October 1997. This included: a new complaints procedure; the formation of an inquiry team outside the chain of command to examine cases of alleged racism; greater racist awareness training both for recruits and officers in command; and a special recruitment cell, made up of personnel from the ethnic minorities.[70] Pilot ethnic minority recruitment initiatives were launched in Newham and in Sandwell. In addition, in December 1997, the Army and RAF launched a confidential support hotline for counselling and advice for ethnic minority Servicemen fearing or experiencing discrimination.[71]

In January 1998 the MOD announced that it would increase its target for recruits in the ethnic minorities from 2 per cent in 1998-99 to 5 per cent in 2001-2002, and further thereafter until it reflected the proportion of ethnic minorities in the UK population.[72] To assist this process, the nationality rules for entry into the armed forces were relaxed in April 1998. In most cases, merely holding British, Commonwealth or Irish nationality will enable a person to apply to join the Armed Forces. Fixed rules governing minimum residence in the UK and the nationality of parents have been abolished.[73] The above initiatives led the CRE to abandon the question of legal action against the Household Cavalry in March 1998 and to sign a five-year Partnership Agreement with the MOD.[74] The main aims of the Agreement are as follows:

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68 Defence Committee, *Armed Forces Personnel Issues,* Minutes of Evidence, HC 689-iii, 25 October 2000, para 172.

69 The CRE was established under the Race Relations Act 1976 with duties to work for the elimination of racial discrimination and to promote equality of opportunity and good race relations. A third duty is to keep the Act under review and, when appropriate, to recommend amendment.

70 HL Deb 16 October 1997 cc547-548

71 HC Deb 1 December 1997 c 13

72 HC Deb 22 January 1998, cc621-622w

73 HC Deb 18 February 1998, c665w

74 HC Deb 31 March 1998, cc43-444w

- achievement of ethnic minority recruitment targets;
- removal of barriers to ethnic minority recruitment;
- retention of Service personnel at all levels;
- continued examination of reasons for premature voluntary release;
- increased numbers of ethnic minority officers at higher ranks;
- removal of barriers to ethnic minority promotion;
- establishment and maintenance of non-racist environment at every level;
- effective action to prevent racist abuse;
- clear lines of accountability for discrimination and racism;
- robust monitoring;
- assessment of equal opportunity performances as part of annual appraisal.[75]

The CRE receives quarterly reports from each of the Services, which include detailed monitoring returns. Since 1996 there have been regular meetings at various levels between the CRE and the Services and MOD officials.

The Armed Forces Minister, John Spellar, provided an update of current recruitment levels among the ethnic minorities in a Written Answer on 30 October 2000:

> **Mr. Woolas:** To ask the Secretary of State for Defence what progress has been made by each of the three armed services in meeting their targets for recruitment among Britain's ethnic minorities.
>
> **Mr. Spellar**: The ethnic minority recruiting goal for 2000-01 is 4 per cent. For the period from 1 April to 1 September this year, 2.2 per cent. of the armed forces intake from the British labour market came from the British ethnic minority communities. Although short of the 4 per cent. goal, the figure represents an improvement on achievement levels for the corresponding period for the last financial year, which stood at about 1.8 per cent. If this improvement continues for the rest of the financial year, it would indicate that ethnic minority recruitment into the armed forces is moving in the right direction. Ethnic minority recruiting levels broken down for each Service for the period are: Naval Service--0.8 per cent. Army--2.8 per cent. RAF--1.9 per cent.[76]

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[75] Defence Committee, *Armed Forces Personnel Issues*, Minutes of Evidence, HC 689-iii, 25 October 2000, p90-91.

[76] HC Deb 30 October 2000, c270w.

As at 1 April 2000 the highest ranks held by ethnic minority personnel in each of the three Services were:

Service	Rank	Number
Royal Navy	Captain	1
Army	Colonel	2
RAF	Group Captain[77]	5

Source: Memorandum submitted by the MOD to House of Commons Defence Select Committee, 22 June 2000.

The MOD's policy on ethnic minorities has received considerable praise. Sir Herman Ouseley, the outgoing Chairman of the CRE, has said:

> The armed forces have recognised that equality and diversity are positive strengths for an organisation, and their work in this area is setting standards that other sections of society should follow.[78]

General Colin Powell, former Chairman of the US Joint Chiefs of Staff and secretary of state-designate, also commented:

> The leadership of the armed forces, working with their civilian leaders and the Commission for Racial Equality, have a firm understanding of the nature and dimension of this challenge and have put in place policies and programmes to get the results that they want and the results that they very badly need.[79]

However, it could be said that progress, particularly in improving recruitment levels among the ethnic minorities, has been disappointing. While it is true that there is usually a considerable time lag between the adoption of policies and their implementation in practice, in 1999 all three Services still failed to meet the 3% target for ethnic minority recruits. During the preceding year only the Army managed to meet the 2% target. The CRE has pointed out that:

> In the four years since comprehensive ethnic monitoring began, the percentage of ethnic minority recruits entering the armed forces has increased from just 1.7% in 1997 to 1.9% in 2000. If progress were to continue at the same rate it would take approximately 30 years to reach the intake target of 5%.[80]

On a wider level, the CRE expressed concern at the level of implementation of the MOD/CRE Partnership Agreement in the conclusion of its written evidence recently submitted to the Defence Select Committee:

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77 One RAF Group Captain has since been promoted to Air Commodore.

78 *MOD Corporate Principles*, MOD web site at http://www.mod.uk

79 ibid

80 Defence Committee, *Armed Forces Personnel Issues*, Minutes of Evidence, HC 689-iii, 25 October 2000, p92.

> The Partnership Agreement between the CRE and the MOD is now half way through. Unless there is a radical improvement in the equal opportunity work by the Services, the commitments undertaken in this agreement will not be achieved. The impact of the Human Rights Act and the Race Relations (Amendment) Act may help to stimulate further and improved action. Ultimately, however, the success or failure of the Services in this area will be determined by the leadership exercised in the Services themselves. There are no short cuts to race equality. The CRE urges this Committee to join in pressing upon the MOD and the Services chiefs the urgency of this message.[81]

C. Homosexuality in the Armed Forces

An area of personnel policy where there has been a radical change over the past year is the issue of homosexuality in the armed forces. The MOD has removed its ban on homosexuals serving in the armed forces and replaced it with a new code of conduct. This major shift in policy was in response to the judgement in September 1999 by the European Court of Human Rights (ECHR) that the ban on homosexuals serving in the UK armed forces was illegal.[82] The background to the changes in policy on homosexuality and the armed forces is provided below:

1. Previous Policy

The decriminalisation of homosexual acts undertaken in private between two consenting males over the age of 21, which was brought about by the *Sexual Offences Act 1967,* did not extend to members of the armed forces. However, section 146 of the *Criminal Justice and Public Order Act 1994* repealed those sections of the *1967 Act* which related to members of the armed services and the merchant navy. Therefore, homosexual acts committed by persons would not in themselves be offences which are not offences under civilian criminal law. Nevertheless, such acts may have constituted grounds for dismissal, and in some circumstances may have constituted an offence under the SDAs.[83] In addition it was Ministry of Defence policy not to accept homosexuality within the armed forces, and Service personnel who were found to have committed a homosexual act or express a homosexual orientation were administratively discharged.

The policy towards homosexuals serving in the Armed Forces has been reviewed as a matter of course in every Parliament. The last Parliament decided to continue the exclusion of homosexuals from the Armed Forces because of the special nature of Service life. Labour Members were given a free vote on the amendment to the *1996 Armed Forces Bill* which sought to introduce a new clause to stop the armed forces from

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81 Defence Committee, *Armed Forces Personnel Issues*, Minutes of Evidence, HC 689-iii, 25 October 2000, p97.

82 *Lustig-Prean and Beckett* v *UK* (application numbers 31417/96 and 32377/96), *Smith and Grady* v *UK* (application numbers 33985/96 and 33986/96) judgements of 27 September 1999. ECHR web site at http://www.dhcour.coe.fr

83 The Army Act 1955, the Air Force Act 1955 or the Navy Discipline Act 1957.

discriminating on the ground of sexual orientation. The amendment failed on division.[84] The Government had stated that it was starting from a position of supporting the policy of excluding homosexuals from the services, but that it would "seek to establish the way forward in consultation with the Chiefs of Staff".[85] The SDR dealt with personnel issues involving women and racial minorities but ignored the question of homosexuality.[86] The policy with regard to homosexuals serving in the UK armed forces was outlined by the then Minister for the Armed Forces, Doug Henderson:

> The current policy is that homosexuals are excluded from the armed forces. As I have already made clear, the issue of homosexuality will be reviewed during this Parliament and there will be a free vote in Parliament on the subject.[87]

2. The European Court of Human Rights Judgement

On 27 September 1999, the European Court of Human Rights (ECHR) declared unanimously that the ban on homosexuals serving in the UK armed forces was illegal under Article 8 of the European Convention on Human Rights, which safeguards an individual's right to privacy.[88] The Court's judgement stated:

> The Court considered the investigations, and in particular the interviews of the applicants, to have been exceptionally intrusive, it noted that the administrative discharges had a profound effect on the applicants' careers and prospects and considered the absolute and general character of the policy, which admitted of no exception, to be striking. It therefore considered that the investigations conducted into the applicants' sexual orientation together with their discharge from the armed forces constituted especially grave interferences with their private lives.[89]

As to whether the Government had demonstrated "particularly convincing and weighty reason" to justify those interferences, the Court noted that:

> the Government's core argument was that the presence of homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government relied, in this respect, on the Report of the Homosexual Policy Assessment Team (HPAT) published in February 1996. The Court found that, insofar as the views of armed forces' personnel outlined in the HPAT Report could be considered representative, those views were founded solely upon the

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84 HC Deb 9 May 1996 cc481-512

85 Dr John Reid, the then Minister of State at the Ministry of Defence, HC Deb 7 July 1997 c359W

86 *The Strategic Defence Review*, Cm 3999, 8 July 1998

87 HC Deb 16 June 1999 c145w

88 A Copy of Article 8 can be found at Appendix I.

89 *Lustig-Prean and Beckett* v *UK* (application numbers 31417/96 and 32377/96), *Smith and Grady* v *UK* (application numbers 33985/96 and 33986/96) judgements of 27 September 1999. ECHR web site at http://www.dhcour.coe.fr

> negative attitudes of heterosexual personnel towards those of homosexual orientation. It was noted that the Ministry of Defence policy was not based on a particular moral standpoint and the physical capability, courage, dependability and skills of homosexual personnel were not in question. Insofar as those negative views represented a predisposed bias on the part of heterosexuals, the Court considered that those negative attitudes could not, of themselves, justify the interferences in question any more than similar negative attitudes towards those of a different race, origin or colour. [90]

The HPAT report surveyed opinion within the Services and concluded there was unanimity across all three branches opposing a change to the ban.

The challenge to the ban on homosexuals had been taken to the ECHR by three ex-servicemen, ex-RAF administrator Graeme Grady, ex- Royal Navy lieutenant-commander Duncan Lustig-Prean and ex-naval rating John Beckett, and a former RAF nurse Jeanette Smith. This followed the earlier rejection of their case by the Appeal Court in London. The four claimed that the investigation into their sexual orientation and their subsequent discharge violated their right to privacy, their right to protection against discrimination and their freedom of expression under Article 8 of the Convention.

The then Defence Secretary, George Robertson, commenting on the judgement, said:

> This Government, like all Governments, has to accept the ruling of the European Court of Human Rights. The details of this complex judgement and its practical implications are being studied carefully. After consulting the Service Chiefs, Ministers will be making their recommendations in a timely manner. In the meantime, cases in the system will be put on hold.[91]

The Defence Secretary had indicated in October 1998 that the ban should "in principle" be lifted and that all people should be treated equally. However, he did add that there were practical difficulties with regard to homosexuality in that there was "an issue of practice, of operational effectiveness, which has also got to be taken into account."[92]

Richard Ottaway then a Shadow defence spokesman, said:

> We believe in our judgement the government should get together with its European partners and consider whether or not the convention could be modified to allow individual countries to have an opt out.[93]

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90 ECHR Judgements in the cases of Lustig-Prean and Beckett v. the United Kingdom and Smith and Grady v. the United Kingdom, ECHR web site at http://www.dhcour.coe.fr

91 MOD Press Release 27 September 1999.

92 *Daily Telegraph*, 6 October 1998.

93 BBC website at http://news.bbc.co.uk

He added: "we back the Service Chiefs who believe that it will affect morale and effectiveness and therefore the ban should remain."[94]

Menzies Campbell, the Liberal Democrat defence spokesman' described the decision as a triumph for civil liberty.

General Sir Anthony Farrar-Hockley, the former allied forces commander, said the decision was "ridiculous" and that, "it is striking at the root of discipline and morale to have a policy whereby you knowingly enlist people who are homosexual."[95]

3. The New Policy

On 12 January 2000, The Secretary of State for Defence, Geoff Hoon, announced to the House the Government's new policy on homosexuals in the armed forces. He stated that the policy to bar homosexuals from the Armed Forces was not legally sustainable and had been replaced with a new policy that recognised sexual orientation as a private matter. He underlined that the new policy had been formulated with the full consultation and support of the three Service Chiefs and was firmly underpinned by a code of social conduct that applied to all, regardless of their sexual orientation. His statement was as follows:

> In the light of the court's decisions, it was clear that the existing policy was not legally sustainable. We accordingly asked the Chief of the Defence Staff to set in hand an urgent review of policy in that area. That review has now been completed, and I am able to announce the outcome today.
>
> Our starting point has been to develop a revised policy that preserves the operational effectiveness of our armed forces, respects the rights of the individual, and takes full account of the court ruling. The chiefs of staff accept the need to change the existing policy and have been fully involved in the process of developing a revised policy. I have discussed the subject with them on a number of occasions. They have endorsed the outcome of the review.
>
> We have drawn on the experience of other countries – in particular, Australia – and have taken account of the last formal study of the subject in the United Kingdom, undertaken in 1995. Moreover, we have reflected the court's conclusion that legally we are obliged to adopt an approach that regards sexual orientation as essentially a private matter for the individual.
>
> There is, of course, no doubt that the armed forces are a unique institution and occupy a unique place in our society. We expect a lot of them. They cannot choose the people they work and live with, often in difficult, cramped conditions and for sustained periods. Operational effectiveness depends on team cohesion and the maintenance of trust and loyalty. As a result, standards of behaviour are

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94 *Daily Telegraph*, 28 September 1999
95 *Daily Telegraph*, 28 September 1999.

imposed on members of the armed forces that can be more demanding than those required by society at large. That is why we need a code of conduct to govern the attitude and approach to the personal relationships of those serving in the armed forces.

This code will apply across the forces, regardless of service, rank, gender or sexual orientation. It will provide a clear framework within which people in the services can live and work, and it will complement existing policies, such as zero tolerance towards harassment, discrimination and bullying. I would emphasise that we are not tightening the rules on heterosexual relationships.

The Code is not an abstract legal document full of rules and regulations. It has been developed by service experts who understand fully the operational needs and day-to-day practicalities of the armed forces. Personal relationships do not ever lend themselves to precise prescription and the code recognises explicitly that

"It is not practicable to list every type of conduct which might constitute social misbehaviour".

Therefore, we have placed at the heart of the code what we call the service test, set out in the following terms:

"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?"

In using the code, commanding officers will have to apply the service test through the exercise of their good judgement, discretion and common sense – the essence of command and the effective management of people. I am arranging for copies of the code to be placed in the Library of the House.

The ECHR ruling makes very clear that the existing policy in relation to homosexuality must change. As all personal behaviour will be regulated by the code of conduct with the object of maintaining the operational effectiveness of the three services, there is no longer a reason to deny homosexuals the opportunity of a career in the armed forces. Accordingly, we have decided that it is right that the existing ban should be lifted. As no primary or secondary legislation is required, with effect from today, homosexuality will no longer be a bar to service in Britain’s armed forces.

A range of briefing material is being issued to commanding officers to explain the code of conduct and to give them detailed guidance on how it should be implemented. This makes it clear that the chiefs of staff commend the principles of the new policy and are committed to ensuring that it works.

I recognise that there may be some concerns within the armed forces and elsewhere over this new policy, but I believe that the changes I have described offer the best way forward in terms of providing an approach that maintains operational effectiveness, is within the law, and recognises the rights of the individual.

> Implementing these changes successfully will be a challenge for leadership at all levels in the armed forces but such challenges are not new, and all three services will be equal to the task. With the commitment which is in place from the very highest levels of the chain of command, I am confident that our armed forces will adapt to this change in the professional manner for which they are rightly held in the very highest regard.
>
> There will be those who would have preferred to continue to exclude homosexuals, but the law is the law. We cannot choose the decisions we implement. The status quo is simply not an option. This code centres on the paramount need to maintain the operational effectiveness of the armed forces. I have no doubt it is the best way forward.[96]

Mr Hoon added that:

> … subject to obvious considerations of fitness, we shall look very sympathetically at applications from service personnel who wish to rejoin the services following discharge for homosexuality.[97]

A full copy of the Code of Social Conduct referred to in Mr Hoon's speech can be found at Appendix II.

Iain Duncan Smith, the Conservative Shadow defence spokesman, expressing regret at the Court's decision, turned his attention principally to the possible practical difficulties in implementing the new policy. He stated:

> The code is all about sexual behaviour, as the Secretary of State made clear. I agree with him that, in this context, the only way to write a code such as this is to make it as broad as possible and not to be specific. However, despite the guidance and advice in the statement, the matter boils down to a two-line service test, which in essence comprises only one sentence. How that test is operated will be critical.[98]

Mr Duncan Smith suggested that a fundamental review of the effects of the policy on military effectiveness should be carried out at the earliest opportunity. At the Conservative Party Conference on 3 October 2000 he stated:

> … Labour believes that the Armed Forces are a social experiment in human rights. But what they don't understand is that being a member of the armed forces isn't about rights. They give up many of their rights to defend ours. They are expected if necessary to kill or be killed ..[99]

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96 HC Deb 12 January 2000, cc287-288
97 HC Deb 12 January 2000 c298
98 HC Deb 12 January 2000, c289
99 Conservative Party web site at http://www.conservative.com

He continued:

> Yet by applying the European Convention on Human Rights to our forces this Government is putting their effectiveness into the hands of campaign junkies, jobbing lawyers and even judges. There is a creeping tide of political correctness threatening to overwhelm our forces' military effectiveness.
>
> So when we return to Government we will take the Armed Forces out of this politically correct morass, safeguard their unique ethos, and uphold the primacy of military effectiveness.[100]

The Liberal Democrat defence spokesman, Paul Keetch, welcomed the Government's announcement but also expressed caution as to how the policy should be implemented:

> The Secretary of State pointed out that the implementation of the new code of conduct will be a challenge for the leadership of our armed forces. He is right. Does he agree that great sensitivity to the concerns of gay and straight personnel will need to be exercised, if a cultural sea change is to be achieved without damaging the morale and efficiency of our armed forces? [101]

a. A derogation from the European Convention on Human Rights?

The question of whether the Government has been overzealous in implementing provisions of the European Convention on Human Rights and its impact on military effectiveness is an important one. However, the latter part of Mr Duncan Smith's conference speech would seem to echo Mr Ottaway's earlier suggestion that the armed forces in some way opt out or derogate from the Convention. This would be problematic. In general states cannot simply opt in and out of obligations with which they find themselves in conflict. The Convention does allow for derogation from certain obligations under Article 15 "in time of war or other public emergency threatening the life of the nation". The British Government cited this article when derogating from the Convention on the grounds of the security situation in Northern Ireland. It is unlikely however, that an issue such as homosexuals serving in the armed forces would fall under the provisions of Article 15. The impact of the Convention on the armed forces has been summarised thus:

> Armed forces personnel continue to enjoy the rights guaranteed under the Convention although the special disciplinary context may allow certain limitations on their exercise which could not be imposed on civilians. Obvious and inevitable restrictions of military service will not raise issues, e.g. rules on uniform and haircuts but joining up does not waive fundamental rights, *inter alia*, to liberty and fair trial.[102]

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[100] Conservative Party web site at http://www.conservative.com
[101] HC Deb 12 January 2000 cc292-293
[102] Karen Reid, *A Practitioner's Guide to the European Convention of Human Rights*, 1998.

4. Impact on Military Effectiveness

Early assessments of the impact of the policy on homosexuals serving in the armed forces would suggest that the new policy has had little or no impact on the armed forces' military effectiveness or recruitment. The first major assessment of the new policy was completed by the MOD in August 2000 when it canvassed opinion in the Army, Navy and RAF. Details of the resulting confidential report were cited in *The Observer*:

> The services reported that the revised policy on homosexuality had no discernible impact, either positive or negative, on recruitment. There is widespread acceptance of the new policy. It has not been an issue of great debate. In fact, there has been a marked lack of reaction. Generally there has been a mature, pragmatic approach which allowed the policy to succeed. The change in policy has been hailed as a solid achievement.[103]

At Rank Outsiders, an organisation representing gay Service personnel, chairman Steve Johnston said, "Most of those who objected strongly to this are old soldiers who were just unenlightened. It's society that is changing quite rapidly".[104]

In September 2000 Rear-Admiral James Burnell-Nugent, who is assistant chief of the Navy staff, stated that admitting homosexuals into the Navy had caused fewer problems than sending the first Wrens to sea. In a press interview he said:

> There are issues to do with sharing accommodation and so on, which we shall deal with using normal management mechanisms. I am not saying everybody is happy with it, but on the whole it has not caused a great upset.[105]

D. The Disabled

Mr Spellar provided an outline of the MOD's policy regarding the disabled in a Written Answer in 27 January 2000:

> Members of the armed forces are exempt from the employment provisions of the Disability Discrimination Act 1995. Disability or a history of disability is not compatible with the need for a combat effective fighting force, able to undertake a full range of military operations anywhere in the world. Service personnel disabled on duty are, depending on circumstances, allowed to continue to serve as long as such service will not undermine overall combat effectiveness. This approach reflects the Services' duty of care to the individual and allows them to

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[103] *The Observer* 19 November 2000.
[104] *The Observer* 19 November 2000.
[105] *Daily Telegraph* 1 September 2000.

> benefit from the individual's experience and ensures a return on their training investment.[106]

In October 2000 the UK secured an opt-out for the armed forces from a clause in Article 13 of the EU's directive on equal employment banning discrimination on ground of disability or age.

The issue of the disabled serving in the armed forces was brought to prominence recently through comments by Sir Charles Guthrie. He described suggestions that the disabled had the right to serve as ill-conceived:

> Our Defence Ministers do understand our position and have been robust in the defence of our case during the recent European debate on ending employment discrimination on grounds of age and disability. I fully understand that those proposing this aspect of employment law were acting with good intentions and for entirely laudable aims. But if left unchecked the impact would have had a detrimental effect on the Forces by insisting that disabled people had a right to serve. We need to guard against such ill-conceived ideas in future but the fact that some thought they should apply to the Forces is a reflection of that lack of awareness of military issues…[107]

Sir Charles' comments generated quite a large amount of public comment. The Royal Association for Disability and Rehabilitation (Radar) called Sir Charles' comments "inappropriate and patronising".[108] *The Independent* remarked:

> It is quite wrong that the armed forces, police and fire service should be exempt from requirements of the Disability Act 1995, and quite right that the Government should seek to end those exemptions. In any case, the Act attempts to balance the needs of employers and the interests of employees: it could not require the forces to deploy anyone with a significant physical disability in a combat role.

It continued:

> Sir Charles should be ashamed to have said what he did, just as the Prime Minister's spokesman was talking nonsense yesterday in saying that there was "no such thing as a non-combatant job" in the armed forces.[109]

The Government has supported Sir Charles. A spokesman for the prime minister told reporters:

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106 HC Deb 27 January 2000, c225w.
107 CDS Presentation to RUSI, 19 December 2000, MOD Press Release.
108 *The Guardian*, 21 December 2000.
109 *The Independent*, 21 December 2000.

> The prime minister's view is that the armed forces cannot be just another employer. There is no such thing as a non-combatant job.[110]

Menzies Campbell also supported Sir Charles' views:

> It's a hard unpalatable, brutal fact that soldiers have got to be able to fight and if necessary kill, and if you have got a disability that stands in the way of that, then you not only put yourself at risk but all those around you.[111]

[110] *The Guardian*, 21 December 2000.
[111] *The Scotsman*, 21 December 2000.

Appendix I: Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Appendix II: The Armed Forces Code of Social Conduct

1. This Code of Social Conduct explains the Armed Forces' revised policy on personal relationships involving Service personnel. It applies to all members of the Armed Forces regardless of their gender, sexual orientation, rank or status. The provisions apply equally to members of the Regular and the Reserve Forces.

2. In the area of personal relationships, the overriding operational imperative to sustain team cohesion and to maintain trust and loyalty between commanders and those they command imposes a need for standards of social behaviour which are more demanding than those required by society at large. Such demands are equally necessary during peacetime and on operations. Examples of behaviour which can undermine such trust and cohesion, and therefore damage the morale or discipline of a unit (and hence its operational effectiveness) include: unwelcome sexual attention in the form of physical or verbal conduct; over-familiarity with the spouses or partners of other Service personnel; displays of affection which might cause offence to others; behaviour which damages or hazards the marriage or personal relationships of Service personnel or civilian colleagues within the wider defence community; and taking sexual advantage of subordinates. It is important to acknowledge in the tightly knit military community a need for mutual respect and a requirement to avoid conduct which offends others. Each case will be judged on its merits.

3. It is not practicable to list every type of conduct that may constitute social misbehaviour. The seriousness with which misconduct will be regarded will depend on the individual circumstances and the potential for adversely affecting operational effectiveness. Nevertheless, misconduct involving abuse of position, trust or rank, or taking advantage of an individual's separation, will be viewed as being particularly serious.

4. Unacceptable social conduct requires prompt and positive action to prevent damage. Timely advice and informal action can often prevent a situation developing to the point where it could impair the effectiveness of a Service unit. However, if the misconduct is particularly serious, it may be appropriate to proceed directly to formal administrative or to disciplinary action. Such action is always to be proportionate to the seriousness of the misconduct. It may constitute a formal warning, official censure, the posting of one or more of the parties involved or disciplinary action. In particularly serious cases, or where an individual persists with, or has a history of acts of social misconduct, formal disciplinary or administrative action may be taken, which might lead to termination of service.

5. **The Service Test**. When considering possible cases of social misconduct, and in determining whether the Service has a duty to intervene in the personal lives of its personnel, Commanding Officers at every level must consider each case against the following 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?"

In assessing whether to take action, Commanding Officers will consider a series of key criteria. This will establish the seriousness of the misconduct and its impact on operational effectiveness and thus the appropriate and proportionate level of sanction.