



RESEARCH PAPER 05/75
11 NOVEMBER 2005

Background to the Forthcoming *Armed Forces Bill*

The *Armed Forces Bill*, which has also been referred to as the *Tri-Service Bill*, is due to be presented in the 2005-06 session. It is expected to modernise Service legislation by consolidating the three existing Service Discipline Acts (SDA) into a single system of Service law.

This paper looks at the main aspects of the current disciplinary system as set out in the SDA and the expected aims of the Bill. It also examines some pre-legislative comments and a number of issues that may take on greater relevance as the Bill progresses.

A paper examining the specific clauses of the Bill will be published in due course.

Claire Taylor

INTERNATIONAL AFFAIRS AND DEFENCE SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

List of 15 most recent RPs

05/59	<i>Employment tribunals (Representation and Assistance in Discrimination Proceedings) Bill</i> [Bill 14 of 2005-06]	26.08.05
05/60	Unemployment by Constituency, August 2005	14.09.05
05/61	Employment & Training programmes for the unemployed Vol. 1: Recent developments and the New Deal programmes	30.09.05
05/62	Employment & Training programmes for the unemployed Vol. 2: Other programmes and pilots	30.09.05
05/63	Social Indicators [includes articles: MRSA Statistics: Frequently Asked Questions; Domestic electricity and heating costs]	11.10.05
05/64	Unemployment by Constituency, September 2005	12.10.05
05/65	The <i>Electoral Administration Bill 2005-06</i> [Bill 50 of 2005-06]	19.10.05
05/66	The <i>Terrorism Bill</i> [Bill 55 of 2005-06]	20.10.05
05/67	The <i>National Insurance Contributions Bill</i> [Bill 53 of 2005-06]	26.10.05
05/68	The Burden of Taxation	26.10.05
05/69	The <i>Rights of Savers Bill</i> [Bill 15 of 2005-06]	26.10.05
05/70	The <i>Terrorism (Northern Ireland) Bill</i> [Bill 52 of 2005-06]	27.10.05
05/71	The <i>EU Accession Bill</i> [Bill 51 of 2005-06]	26.10.05
05/72	Afghanistan – The Culmination of the Bonn Process	26.10.05
05/73	The <i>Council Tax (New Valuation Lists for England) Bill</i> [Bill 57 of 2005-06]	01.11.05

Research Papers are available as PDF files:

- to members of the general public on the Parliamentary web site,
URL: <http://www.parliament.uk>
- within Parliament to users of the Parliamentary Intranet,
URL: <http://hcl1.hclibrary.parliament.uk>

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. Any comments on Research Papers should be sent to the Research Publications Officer, Room 407, 1 Derby Gate, London, SW1A 2DG or e-mailed to PAPERS@parliament.uk

Summary of main points

Statutory authority for the system of military law that currently exists in the UK is provided for in the Service Discipline Acts (SDA): the *Army Act 1955*; the *Air Force Act 1955* and the *Naval Discipline Act 1957*. All Service personnel are subject at all times to military law as set out under the SDA, wherever they are based in the world. Service law is also applicable to civilians in certain circumstances.

At present, the SDA are renewed and amended by primary legislation every five years when an Armed Forces Bill is presented to Parliament. These Bills propose that the SDA continue, with any suggested or necessary amendments, for a further year. After this, further extensions of the SDA are obtained by an annual Order in Council. Orders in Council can continue for a maximum of five years, after which a new Armed Forces Act is required.

The disciplinary system and the processes involved are largely the same across all three Services. However, there are some key distinctions between the Army/RAF and the Royal Navy. Specifically, the jurisdiction of summary powers of a naval Commanding Officer (CO) are greater; the right to elect trial by court martial is not universal in the Royal Navy; while a naval CO is also able to deal summarily with a wider range of Service and civil offences, and to apply more severe punishments. The Royal Navy also only has one type of court martial, in contrast to the RAF and Army; while civilians charged under the *Naval Discipline Act 1957* cannot be tried by a Standing Civilian Court which has jurisdiction only over offences committed under the *Army Act 1955* and the *Air Force Act 1955*.

On conviction, Service personnel and civilians have the right of appeal to either the Summary Appeal Court or the Court Martial Appeal Court depending upon the nature of the original hearing. Convictions are also reviewed by a Reviewing Authority.

The aim of the forthcoming *Armed Forces Bill* is to modernise Service legislation by consolidating the SDA into a single system of Service law. In addition, some of the Bill is intended to reflect civilian criminal justice measures already in force or changes that are being made, in order to bring the system of Service law more closely into line with civil law, where practical.

Specifically, the Bill is expected to set out provisions for the harmonisation of offences and disciplinary powers of COs; the creation of a single Prosecuting Authority; the establishment of a unified court martial system, including the creation of a standing court and for the abolition of the right of the Reviewing Authority to review court martial convictions. In addition the MOD has signalled its intention to use the Bill to propose amendments to other aspects of military law, and in particular in relation to Boards of Inquiry (BOI) procedure and the redress of grievances.

There are several issues related to military discipline and the regulations that govern its procedures which have received significant attention over the last few years, and may take on greater relevance with the passage of this Bill. These include ongoing arguments for the establishment of an independent military ombudsman, and concerns over the role of the Service Prosecuting Authorities following the collapse of a second trial in November 2005 against Service personnel charged with offences committed in Iraq.

CONTENTS

I	Background – The Present System of Military Law	9
	A. The Service Discipline Acts	9
	1. Applicability	9
	2. Renewal of and Amendments to the SDA	10
	B. The Disciplinary System	11
	1. Summary Dealing (Army and RAF)	13
	2. Summary Dealing (Royal Navy)	15
	3. The Summary Appeal Court (SAC)	16
	4. The Service Prosecuting Authorities	17
	5. The Court Martial System	18
	6. The Reviewing Authority	23
	7. Court Martial Appeal Court (CMAC)	25
	8. Provisions Relating to Civilians	26
	C. Boards of Inquiry	30
	1. Procedure	31
II	Aims of the <i>Armed Forces Bill</i>	34
	A. Proposals Relating to the Current Disciplinary System	36
	1. Harmonisation of Summary Discipline	36
	2. A Single Prosecuting Authority.	39
	3. A Unified Court Martial System	39
	4. The Reviewing Authority	41
	B. Other Provisions	42
	1. Harmonisation of Boards of Inquiry Procedure	42
	2. Redress of Grievances	43
III	Pre-Legislative Comments	46
	A. The Defence Select Committee	46
	1. Government Response to the Defence Committee Report	48
	B. Other Comments	49
IV	Issues	54

A.	Prosecutions of Service Personnel in Iraq	54
	1. R v. Kevin Williams	55
	2. 3rd Battalion, the Parachute Regiment	56
B.	An Independent Military Ombudsman	60
	Appendix One – List of Summary Offences (Army and RAF)	63
	Appendix Two – Powers of Summary Punishment (Army and RAF)	67
	Appendix Three – Summary Offences and Powers of Punishment (Royal Navy)	70

I Background – The Present System of Military Law

A system of military law, through which military discipline is preserved, is regarded as essential for maintaining the operational effectiveness (OE) of the Armed Forces both in times of peace and of conflict. The *Manual of Military Law, Part I (12th edition)* states:

The object of military law is twofold. First, it is to provide for the maintenance of good order and discipline among members of the army and in certain circumstances among others who live or work in a military environment. This it does by supplementing the ordinary criminal law of England and the ordinary judicial system with a special code of discipline and a special system for enforcing it. Such special provision is necessary in order to maintain, in time of peace as well as war, and overseas as well as at home, the operational efficiency of an armed force [...]

The second object of military law is to regulate certain aspects of army administration, mainly in those fields which affect individual rights. Thus, there is provision relating to enlistment and discharge, terms of service, forfeitures of and deductions from pay, and billeting. Often in practice, however, the term “military law” is used with regard to its disciplinary provisions rather than its administrative ones.¹

A. The Service Discipline Acts

Statutory authority for the system of military law that currently exists in the UK is provided for in the Service Discipline Acts (SDA): the *Army Act 1955*; the *Air Force Act 1955* and the *Naval Discipline Act 1957*.

1. Applicability

All Service personnel are subject, at all times, to military law as set out under the SDA, wherever they are based in the world. The imposition of a military status does not, however, alter the subjection of Service personnel to the ordinary law of the UK, hereafter referred to as civil law.² Rather, his or her civilian status is modified by the superimposition of a military status. The result is that certain rights and freedoms are restricted in order to preserve military discipline and readiness,³ while Service personnel become subject to both the provisions of military law and civil law, whether in the UK or overseas.

Jurisdiction over offences committed solely against Service law lies with the Service authorities. Concurrent jurisdiction with the civil justice system exists for all other

¹ Ministry of Defence, *Manual of Military Law: Part I*, 12th Edition, Ch1

² It is important to note the two ways in which the term “civil law” is used. Within the UK justice system “civil law” is used as a contrast to “criminal law”. However, within a military context “civil law” is used as an all encompassing term and as a contrast to “military law”.

³ For example, a civilian who fails to attend his/her place of work would not be subject to criminal proceedings. A member of the Armed Forces who does so without leave, however, commits a punishable offence under the SDA.

offences with the exception of certain offences committed in the UK, including treason, murder, manslaughter, treason-felony, rape and war crimes, which lie wholly within the jurisdiction of the civil authorities. For personnel serving overseas these rules on jurisdiction are usually set down in a Status of Forces Agreement (SOFA) with the country in question.⁴

Service law is also applicable to civilians in certain circumstances. These include civilians overseas who either work with or are employed by the Armed Forces, their dependants and the civilian dependants of Service personnel who are stationed abroad and fall under the command of an officer commanding a body of regular Service personnel.

It has long been accepted that, even though they remain civilians, the conduct of these individuals as part of the military community should, in certain circumstances, be governed by the same legal rules that govern the conduct of Service personnel.⁵ Therefore, they can also be tried within the military disciplinary system for offences against English criminal law and a limited number of Service offences.

As far as is practicable, the provisions of Service law reflect the provisions of the civil criminal justice system, particularly in relation to civilians.

2. Renewal of and Amendments to the SDA

The SDA are renewed and amended by primary legislation every five years when an Armed Forces Bill is presented to Parliament. The Bill proposes that the SDA continue, with any suggested or necessary amendments, for a further year. After this, further extensions of the SDA are obtained by an annual Order in Council, to be approved by Affirmative Resolution.⁶ Orders in Council can continue for a maximum of five years, after which a new Armed Forces Act is required.

The last *Armed Forces Act* was passed in 2001. However, prior to this, and following the passage of the *Human Rights Act* (HRA) in 1998 and the incorporation of certain provisions of the European Convention into domestic law, the MOD decided to conduct a further review of Service discipline, in addition to the quinquennial *Armed Forces Act*. In 2000 the *Armed Forces Discipline Act* was passed. It sought to address those areas of the disciplinary system that the MOD considered may not be compliant with the European Convention of Human Rights. Specifically, it introduced the right for Service personnel charged with an offence to elect trial by court martial, and the right to appeal against summary findings and awards to a new Summary Appeal Court.

⁴ The status of Service personnel with respect to the jurisdiction of the military and civil legal systems is set out in detail in Chapter 2 of the *Manual of Military Law, Part II (Tenth Edition)*

⁵ Arrangements for the application of Service law to Service dependants and British employees based with the Armed Forces overseas have existed since 1748 (HC Deb 21 November 1990, c356). The provisions of military law relating to civilians are examined in section I B8.

⁶ The *Naval Discipline Act* was brought into line with the *Army Act 1955* and the *Air Force Act 1955* in 1971.

The SDA have also been amended in recent years, by way of secondary legislation, as a result of cases brought before the European Court of Human Rights (ECHR). Following the ECHR ruling in the case of *Grievs v. the United Kingdom* in December 2003, for example, which found that the Royal Navy court martial system was non-compliant with Article 6 (right to a fair trial), the *Naval Discipline Act 1957 (Remedial) Order 2004* was brought into force.⁷

B. The Disciplinary System

The internal investigative nature of the disciplinary system is based upon Commanding Officers (COs), the Service Prosecuting Authorities (SPA) and those involved in the court martial system being uniquely placed to understand the circumstances of Service life and the significance of misconduct by Service personnel.

At the centre of the disciplinary system is the CO of a unit, on the basis that discipline is inseparable from command.⁸

During a House of Lords debate on 14 July 2005 Admiral Lord Boyce stated:

Command and discipline in the Armed Forces go absolutely hand in hand. A commanding officer, who has total responsibility for the command of his ship or unit, must, in turn, be responsible for—and carry out—its discipline. It is impossible to achieve and maintain the necessary level of discipline unless those under his or her command are in absolutely no doubt that their commanding officer has authority over them.

That is why it is not just right, but essential, that the commanding officer himself should exercise disciplinary powers over those in his command. He is best placed to understand the circumstances of service life and of his particular unit—and the causes and significance of misconduct by those under his command.⁹

Any alleged offence is reported to the CO, in the first instance. He/she is then responsible for ensuring that the matter is investigated by the Service police. The CO has the option of considering whether to dismiss the allegation; deal with the case summarily if it is within his/her jurisdiction; or refer the case further up the chain of command to a higher authority.¹⁰ In the latter instance, the matter is either brought before a court martial or is dealt with summarily if the accused is an officer or warrant officer. Some exceptions exist in the Royal Navy which is examined in Section I B2.¹¹ A CO may

⁷ SI 66 (2004). This is examined in section I B5

⁸ In the Army a Commanding Officer is defined as the officer in command of a unit or detachment; in the RAF a CO is either the officer appointed as Station Commander of an RAF base or in the case of air force personnel not located at an RAF base, the officer in command of that unit; whilst in the Royal Navy a CO is defined as the officer in command of the ship or naval establishment.

⁹ HL Deb 14 July 2005, c1234-5

¹⁰ A Higher Authority is defined as the officer to whom the CO is next responsible in the disciplinary chain of command or any officer superior to him in that chain of command.

¹¹ Officers and Warrant Officers charged with an offence are entitled to be dealt with summarily by an "Appropriate Superior Authority" who must be a senior officer in the chain of command and at least 2

also refer a case to Higher Authority if he/she does not wish to deal with the charge summarily.¹²

Summary hearings alone are not, however, considered to be compliant with Article 6 of the European Convention on Human Rights. This is because of the perceived lack of independence of a CO and the absence of legal representation for the accused.¹³ The overall system of summary dealing is, however, considered to be compliant because the accused has had the right, since 2000, to elect, before a summary hearing begins, a trial by court martial¹⁴ (with the exception of some limited offences in the Royal Navy);¹⁵ and the right after a summary hearing to appeal to the Summary Appeal Court (SAC).

Since 1997 several legal challenges have also been brought before the Appeal Courts, the House of Lords and the European Court of Human Rights (ECHR) questioning the impartiality of the UK military court martial system and its compatibility with the European Convention of Human Rights.¹⁶ Each case consistently argued that the court martial system contravened Article 6 of the Convention. As a result of those ECHR judgments, several changes to the court martial system have been introduced. These are examined in Section I B5.

Personnel on temporary attachment with one of the other Services are subject to the law of both their parent Service and the Service to which they are attached. In theory, therefore, they could be tried for any offence committed during that period by either Service. As a general rule, charges are normally tried under the code of their parent Service.

The disciplinary system and the processes involved are largely the same across all three Services. However, there are some key distinctions between the Army/RAF and the Royal Navy. These are outlined in Sections I B2 and I B5 below.

All three Services also operate a formal system of administrative action, quite separate from the military disciplinary system, in order to deal with personnel who have displayed professional shortcomings or have failed to act in accordance with the values and standards expected of them.¹⁷ Sanctions can be awarded and are dependent upon rank and the type and level of misconduct. Whereas the primary purpose of disciplinary action, as set out in the following chapters is to punish offenders, the main aim of administrative action for misconduct is to safeguard the efficiency and operational

ranks above that of the accused. A list of those considered to be ASA is contained in section 17 of the *Custody and Summary Dealing (Army) Regulations* and Section 82 (2) of the *Air Force Act 1955*

¹² This may be because a CO considers that his/ her powers of punishment are insufficient for the charges concerned or that the case is complex. (*Commander's Guide to Summary Dealing*, para.14)

¹³ The accused is, however, entitled to seek legal advice and the assistance of an Accused's Adviser in preparing his/her case and at the summary hearing itself (*Commander's Guide to Summary Dealing*, para.12). This person must not be a civilian.

¹⁴ On election a court martial is limited to the powers of punishment that would have been available to the Commanding Officer (*Government Response to the House of Commons Defence Committee's Second Report of Session 2004-05 on the Armed Forces Bill*, Cm 6619, Session 2004-05, p.5)

¹⁵ The Royal Navy rules are examined in greater detail in Section I B2. In addition, an accused who elects trial by court martial also has the absolute right to withdraw that election within 48 hours and afterwards no later than 24 hours before the start of the court martial with the approval of his/her CO and Higher Authority.

¹⁶ The European Convention of Human Rights was incorporated into UK law by the *Human Rights Act 1998*

¹⁷ These are set out in *The Standards and Values of the British Army*. A copy of this is available online at: http://www.army.mod.uk/linked_files/ag/servingsoldier/usefulinfo/V_S_soldiers_guide.pdf

effectiveness of the Service.¹⁸ Since January 2005 the Army has distinguished between minor and major administrative action, while the RAF and the Royal Navy have continued to use the existing system.

When a person subject to military law has already been tried for an offence, either summarily or by court martial, a civil court is unable to try him/her for the same offence. This position is also true in reverse. A person subject to military law who has been tried for an offence in a civil court is not liable to be tried for that offence either by court martial or summarily. If a charge against an individual is dismissed then he/she cannot be re-tried for the same offence. This is similar to the double jeopardy provision within the civil justice system.¹⁹

1. Summary Dealing (Army and RAF)

In deciding whether to hear a case summarily, the CO has access to legal advice from the appropriate Service legal advisers. In taking a view on a case both the CO and the legal advisers have to take into account the range of punishments available to the CO and the complexity of the offence. The CO also has the option of delegating to a subordinate commander who is directly responsible to him the power to investigate and deal summarily with charges within the CO's jurisdiction, albeit with a number of caveats. Such delegation does not include the power to deal summarily with charges against certain personnel;²⁰ to refer a charge to Higher Authority; or stay further proceedings on a charge. In any cases where the accused elects trial by court martial, the subordinate commander must refer the case back to the CO who initially delegated responsibility. More specifically, delegation to a subordinate commander also imposes limitations on the punishments that can be awarded. This is examined in greater detail below.²¹

Service personnel must be charged before they can be dealt with summarily. They should only be charged if there is sufficient evidence and if it is in the interests of justice and military discipline to do so. It is possible for a CO to deal with more than one charge against an accused at the same time if it is considered that those charges can be properly dealt with together in law. Similarly a CO may deal with more than one accused at the same hearing if the charges are founded on the same facts or are part of a series of similar offences. The offence of Absence without Leave (AWOL) and escape from custody can be dealt with summarily in conjunction with any other charge.²²

Prior to a summary hearing, the accused is entitled to receive copies of the evidence against him/her in order to assist in preparing a defence.

¹⁸ More information on administrative action, including the offences, investigative procedures and available sanctions is available in the MOD Memorandum to the Defence Select Committee, 15 March 2005. This is available online at:

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/64/64we08.htm>

¹⁹ *Manual of Air Force Law: Volume I*, section 53 (c)

²⁰ Non-commissioned officers in the army above the rank of Corporal.

²¹ Where a case is delegated to a subordinate commander the same procedures for investigation and summary dealing by a CO are followed.

²² *Commander's Guide to Summary Dealing*, paras.7 and 8

At any time during a summary hearing, a CO may refer the charge to a Higher Authority with a view to trial by court martial, if the offence is revealed by the evidence to be more serious, or because of the complexity of the case and the subsequent legal issues that could arise.²³ A CO may also amend or substitute the charge with a new charge at any point during the hearing. However, the accused must then be given the right to elect trial by court martial on the basis of the new or amended charge.²⁴

a. Referring a charge to Higher Authority

Higher Authority (HA) is defined as the officer to whom the CO is next responsible in the disciplinary chain of command or any officer superior to him in that chain of command.

Cases are referred to Higher Authority with a view to proceeding to court martial, or where the accused is an officer or warrant officer, to a summary hearing.

In referring a case to Higher Authority a CO must apply the following considerations:²⁵

- That there is a *prima facie* case against the accused, i.e. there is an unretracted allegation which is not wholly incredible and which if proved would amount to the offence charged.
- There is no Service reason why the case should not be tried by court martial.²⁶

Where a case is referred to Higher Authority either at the outset of or during a hearing, that authority will in turn have various options depending on the offence and the rank of the accused. He/she can:

- a. Refer the case back to the CO with a direction to dismiss or stay the charge.
- b. Refer the case back to the CO for summary dealing.
- c. Refer the case to an Appropriate Superior Authority (ASA)²⁷ for summary dealing where the accused is an officer or warrant officer.²⁸ If the HA is of sufficient rank to be considered an ASA it is possible for him/her to summarily deal with the charge.

Otherwise the HA, on the basis of the considerations set out above, will refer the case to the appropriate Service Prosecuting Authority for proceeding to trial by court martial.²⁹

²³ *Commander's Guide to Summary Dealing*, para.31

²⁴ *ibid*, para.32

²⁵ Set out in J.6.084 of the *Queens Regulations for the Army 1975*; the *Manual of Air Force Law. Volume I*, para.10

²⁶ 'Service reason' is not defined in the regulations and each case must be considered on its own merits. However, it is acknowledged that the reason must be a factor relating to the particular circumstances of Service life, such as military operations.

²⁷ An Appropriate Superior Authority is defined as a senior officer in the chain of command and at least 2 ranks above that of the accused. A list of those considered to be ASA is contained in section 17 of the *Custody and Summary Dealing (Army) Regulations* and Section 82 (2) of the *Air Force Act 1955*.

²⁸ The CO of the officer or warrant officer would still investigate the charge in these cases.

²⁹ The role of the Service Prosecuting Authorities is examined in Section I B4.

Officers above a certain rank may not be dealt with summarily and must be tried by court martial:

- RAF – Group Captain and above.³⁰
- Army – Lt Colonel and above³¹

b. Summary Offences and Powers of Punishment

The Service and civil offences which may be dealt with summarily under the *Army Act 1955* and the *Air Force Act 1955* are listed in Appendix One.

The standard of proof required in a summary hearing is very high and a CO is obliged to dismiss a charge unless he/she is sure that it is proved. If the accused is found guilty the CO has a range of disciplinary options available depending on the nature of the offence, including imposing fines, stoppages of pay, and detention. Mitigating factors and consideration of the character of the accused are taken into account in determining appropriate punishment, as is any period of time previously spent in military custody in relation to the charge.³² When a punishment is awarded, the CO must inform the accused of his/her right of appeal to the Summary Appeal Court (SAC) (this is examined in Section I B3 below). Separate punishments must be awarded for each charge, when several charges are heard together.

On the whole the powers of punishment are considered to be limited, particularly in comparison to the Royal Navy (this is examined below) and depend on the status of the officer conducting the hearing (i.e. ASA, CO, or Subordinate Commander). The differing powers of punishment are outlined in Appendix Two.³³

All awards of detention at summary dealing are suspended for 14 days from the date of the award in order to allow the accused to file an appeal against the finding or punishment with the SAC. However, an accused can exercise the 'detention option' whereby he/she can opt to start the period of detention immediately.³⁴

2. Summary Dealing (Royal Navy)

Although the process of summary dealing in the Royal Navy is largely the same as in the Army and RAF, there are some key differences. Notably:

- **Jurisdiction of summary powers** – Officers of the rank of Commander or below can be tried summarily by the Commanding Officer. The CO must be of at

³⁰ *Manual of Air Force Law*, para.53

³¹ *Manual of Military Law, Part I*, para.38

³² Mitigating factors may include previous history in committing the offence; the effect on discipline within the unit; age, rank and length of service; private circumstances such as financial situation; circumstances of provocation and the effect of punishment on his/her Service career (*Commander's Guide to Sentencing*, para.6).

³³ More detailed guidance on sentencing is set out in the *Commander's Guide to Sentencing* (Army Code No.64183)

³⁴ The accused can change his/ her mind at any point during that 14 day period, or during his/her sentence, whichever is the shorter.

least Commander's rank and there must be at least two ranks between the trying CO and the accused officer. If not, the charge must be tried by a HA or ASA.³⁵ Naval warrant officers can also be tried summarily. However, there are restrictions on the punishments that can be awarded to officers and warrant officers. These are outlined in Appendix Three.

Commanding Officers in command can also be tried summarily by a HA or ASA, but only with the approval of the appropriate Commander-in-Chief.³⁶ A list of those personnel who may act as Higher Authorities or ASA is outlined in Section 66 of the *Naval Summary Discipline Regulations*.

- **Right to elect trial by court martial** – In the case of naval ratings (i.e. personnel other than commissioned officers), the right to elect trial by court martial is limited to those cases where the CO is considering the sentences of detention, dismissal or demotion. In the case of a warrant officer, the right to elect trial by court martial is limited to those cases where the CO is considering a punishment of demotion, a fine or stoppages.³⁷ Officers have the right to trial by court martial in every case.³⁸
- **Offences and Punishments** – In contrast to the summary offences and disciplinary powers of an Army or RAF CO, a Naval CO is able to deal summarily with a wider range of Service and civil offences, and apply more severe punishments. The punishments that can be awarded to an officer or warrant officer that has been tried summarily are, however, restricted. These restrictions, along with a guide to offences and punishments are outlined in Appendix Three.

According to the MOD, the historical basis for these differences lies in the unique operational circumstances of the Royal Navy. They consider that if too many offences were tried by court martial, rather than summarily, this could have an unacceptable impact on the effectiveness of the fleet during long deployments overseas because of the need to remove witnesses, court members and others from their duties at sea.³⁹

3. The Summary Appeal Court (SAC)

The Summary Appeal Court (SAC) was established in 2000 following the passage of the *Armed Forces Discipline Act*. The aim of establishing the SAC was to make the summary dealing process more compliant with the ECHR.

Consequently, Service personnel across all three Services found guilty of an offence at a summary hearing are entitled to appeal to the SAC against the finding, the award, or both. The accused must send a 'Notice of Appeal' to his CO within 14 days of the summary hearing (including the day of the hearing) regardless of who heard the original

³⁵ *Manual of Naval Law: Volume I*, para.0705

³⁶ *Naval Summary Discipline Regulations 2004*, para.34

³⁷ *ibid*, para.0712

³⁸ *ibid*, para.0705

³⁹ MOD Memorandum to the Defence Select Committee inquiry on the *Tri-Service Bill*, October 2004

case.⁴⁰ The CO is obliged to inform both the Court Administration Officer and the relevant Service Prosecuting Authority. The SPA decides whether to contest an appeal or not. If a decision is taken to oppose an appeal the SPA will act on behalf of the Crown.

An accused is entitled to be legally represented at the appeal hearing⁴¹ and legal aid is available to assist with the cost of legal representation. The accused can be represented by a Service or a civilian lawyer. The accused also has the option at any time of abandoning an appeal, or any part of it.

The SAC consists of a Judge Advocate⁴² and two officers.⁴³ In cases where the appeal is against the finding, or against the finding and the punishment, the SAC will re-hear the evidence and all members of the SAC will have an equal say in the appeal decision. Where the appeal is against the punishment alone, and there is no dispute over the facts, the court will hear a statement of facts followed by pleas in mitigation.

On an appeal against a finding, the SAC can uphold, quash or substitute a finding. If the decision on a finding is upheld or substituted the SAC is entitled to alter the related punishment to any which the CO could have given. On an appeal against a punishment the SAC can confirm the punishment or substitute the punishment for another which the CO could have awarded. However, in both instances the SAC cannot increase the punishment originally awarded by the CO.

Service personnel who are dissatisfied with the outcome of their appeal may challenge the SAC's decision by applying to the SAC to have the case stated for the opinion of the High Court.

4. The Service Prosecuting Authorities

Established under the *Armed Forces Act 1996*, the Service Prosecuting Authorities are responsible for bringing prosecutions under military law. They are appointed by The Queen,⁴⁴ are independent of the military chain of command, and are under the general superintendence of the Attorney General, who is also accountable to Parliament for any

⁴⁰ It is possible to extend this initial 14 day period although permission must be sought before the end of the 14 days.

⁴¹ In contrast to the original summary hearing at which no legal representation is allowed.

⁴² Prior to the ECHR judgement in *Grievs v. the United Kingdom* in December 2003 the Judge Advocate serving on a Naval SAC was a serving naval officer. However, the Grievs case ruled that this was non-compliant with Article 6 of the ECHR (right to a fair trial). This is examined in greater detail in Section I B5.

⁴³ To ensure the independence of the court, an officer is ineligible to sit as a member of the court if he/she has been the appellant's CO between the date of the offence and the date of the appeal hearing; has acted as the HA/ASA in relation to any charge or punishment to which the appeal relates; has reviewed the case to which the appeal relates or if he/she has served under the command of any officer who has dealt with the case (*Summary Appeal Court (Navy) (Amendment) Rules 2004*, SI.1949, 2004. SI.1950 and 1951 are the relevant Army and RAF Statutory Instruments).

⁴⁴ In the RAF and Army the appointed Prosecuting Authority must be an officer of HM Armed Forces with a legal qualification of at least 10 years standing (*Army Act 1955* and *Air Force 1955*, Section 83A). In the Royal Navy the Prosecuting Authority must be an officer with a legal qualification of at least 5 years standing (*Naval Discipline Act 1957*, Section 52H). The PA is also the Director of Legal Services within the RAF and Army.

prosecution decisions.⁴⁵ Under the SDA the PA can also delegate any of his functions to suitably qualified officers appointed by him as prosecuting officers.⁴⁶

Before the relevant Prosecuting Authority (PA) can take any action on a case, the matter must have been validly referred through the chain of command, as outlined in sections I B1 and 2 above.

Once a case has been referred to the PA the conduct of a case is entirely a matter for them. They must consider whether legal proceedings should be brought and if so, on what charges. In considering the former, the PA must be guided by whether they are satisfied that there is a realistic prospect of conviction and that it is in the interests of the Service to bring a person to trial.⁴⁷ With respect to the latter, the PA has the power to amend or substitute a charge or charges, or prefer an additional charge or charges. The PA is also not obliged to institute court martial proceedings in all cases referred to them and can discontinue proceedings on any charge.⁴⁸ However, these powers cannot be exercised after the start of a trial unless the court martial gives the PA leave to do so.

In those instances where trial by court martial has been elected, the PA's powers to amend, substitute or prefer a charge are limited unless the accused has given written consent. The PA can also refer a case back to a CO for investigation, outlining what alternative charges are preferred.⁴⁹

With regard to the Army and the RAF, the relevant PA must also decide whether those charges should be heard by a General Court Martial (GCM) which has greater powers of punishment, or a District Court Martial (DCM) which has a maximum sentencing power of two years. Both of these are examined in section I B5 below. Army and RAF officers however, cannot be tried by District Court Martial.⁵⁰

The PA is responsible for conducting the case for the prosecution during a court martial, in a similar role to the Crown Prosecuting Service for cases tried in the civil courts.

The Army Prosecuting Authority and the RAF Prosecuting Authority are also responsible for bringing civilian cases to the Standing Civilian Court. The referral process for doing so is outlined in section I B8.

5. The Court Martial System

Since 1997 several legal challenges have been brought before the Appeal Courts, the House of Lords and the ECHR questioning the impartiality of the UK military court martial system and its compatibility with the European Convention on Human Rights. Each case consistently argued that the court martial system contravened Article 6 of the Convention which provides for the right to a fair trial.

⁴⁵ HL Deb 14 March 2005, c51WS

⁴⁶ *Army Act 1955 and Air Force Act 1955*, Section 83C; *Naval Discipline Act 1957*, Section 52J

⁴⁷ *Manual of Naval Law*, Chapter 16, Annex A

⁴⁸ *Army Act 1955 and Air Force Act 1955*, Section 83B (8); *Naval Discipline Act 1957*, Section 52I (7)

⁴⁹ *Ibid*, Section 83 BB

⁵⁰ *Army Act 1955 and Air Force Act*, Section 83B (5)

In light of those legal challenges several reforms of the court martial system have since been introduced by the Ministry of Defence. In anticipation of a ruling by the ECHR in January 1997,⁵¹ the *Armed Forces Act 1996* introduced a number of amendments to the court martial system in order to reinforce the independence of the system from the military chain of command and so make it compatible with the European Convention. These included the replacement of the convening officers of courts martial, the introduction of a simpler process of review of court martial findings and sentences.⁵² Further changes were introduced in 2000 with the *Armed Forces Discipline Act* and again the following year with the passage of the *Armed Forces Act 2001*.

However in February 2002 the ECHR ruled, in the case of *Morris v. the United Kingdom*,⁵³ that the court martial system was neither impartial nor independent and therefore continued to contravene Article 6 of the Convention. Following that ruling the MOD temporarily suspended all of its Army and RAF courts martial pending an assessment of the future implications of the ruling.

In a Written Answer on 29 April 2002 the Minister of State for the Armed Forces, Adam Ingram, outlined:

Army and Royal Air Force courts-martial scheduled to begin in the period immediately after 26 February were postponed in the light of the judgment on that day of the European Court of Human Rights in the case of *Morris v. the United Kingdom*. This was to enable those services to address the concern expressed in the judgment, about the potential for external influence over certain members of court martial panels. The Army and Royal Air Force have now followed the Royal Navy in including in Queen's Regulations a prohibition on reporting on court martial members for the performance of these duties. All three services have also included in Queen's Regulations a reminder that it is an offence to attempt to influence a member of a court martial. Army and Royal Air Force courts-martial resumed on 3 and 23 April respectively. The backlog of 54 Army and nine Royal Air Force trials that had been postponed should be cleared by the end of June. We regret the inconvenience to the accused and their representatives, and to witnesses, but the postponements have had only a marginal effect on the operation of the discipline system as a whole. Moreover it has been valuable to have clarified the position regarding the very proper independence of court martial members.⁵⁴

However, in December 2003 the ECHR ruled in the case of *Cooper v. the United Kingdom*, that concerns about the independence and impartiality of the RAF/Army court martial system were not justified and that RAF/Army court martial proceedings could not be considered unfair.⁵⁵

⁵¹ *Findlay v. the United Kingdom*, ECHR 221, 1997

⁵² More information on the specific changes is available in HC Deb 18 March 2002, c63-4W

⁵³ A copy of this judgment is available [online](#).

⁵⁴ HC Deb 29 April 2002, c530W

⁵⁵ A copy of this judgment is available online at: <http://www.worldlii.org/eu/cases/ECHR/2003/686.html>

In contrast, concerns over the impartiality of the naval court martial system were upheld by the ECHR in December 2003 in the case of *Grievés v. the United Kingdom*.⁵⁶ The ECHR ruled that although the court martial system as a whole was compliant, the use of a serving naval officer as Judge Advocate did not provide sufficient independence of naval courts martial and thereby violated Article 6 of the Convention. In a Written Ministerial Statement the then Parliamentary Under Secretary of State for Defence, Ivor Caplin, confirmed:

We are reviewing the implications of the details of the judgement as a matter of urgency. On the issue of the appointment of uniformed judge advocates we have already concluded that their use should cease with immediate effect. Following legal advice, we have concluded that the judgement also requires the amendment of existing legislation to change the arrangements for the appointment of judge advocates in naval proceedings, as these appointments are made by a serving naval officer [Chief Naval Judge Advocate].⁵⁷

The *Naval Discipline Act 1957 (Remedial) Order 2004*⁵⁸ subsequently came into force on 16 January 2004. The Order transferred the responsibility for appointing judge advocates and judicial officers from the Chief Naval Judge Advocate to the Judge Advocate of Her Majesty's Fleet, who is a civilian and a circuit judge appointed by HM The Queen on recommendation from the Lord Chancellor.

Although the original ECHR ruling applied only to courts martial, this subsequent legislation applies equally to naval judge advocates appointed to the Summary Appeal Court and to naval judicial officers appointed for naval disciplinary purposes.

a. Court Martial Procedure

The jurisdiction of a court martial and the procedures for referring cases through the chain of command and the relevant SPA for trial by court martial are outlined in sections I B1, B2 and B4 above.

The conduct of a court martial is broadly similar to that of a Crown Court trial. The Judge Advocate, who is a civilian appointed by the Judge Advocate General (Army/RAF) or the Judge Advocate of the Fleet (Royal Navy), performs the functions of a Crown Court Judge, including making directions on matters of law and procedure. The other members of the court martial are appointed at random by the Court Administration Officer and are serving military officers or warrant officers⁵⁹ who are all outside of the accused's chain of command.⁶⁰

⁵⁶ A copy of this judgment is available online at: <http://www.worldlii.org/eu/cases/ECHR/2003/688.html>

⁵⁷ HC Deb 6 January 2004, c6WS

⁵⁸ SI. 2004/66

⁵⁹ A warrant officer can only be appointed if the accused is of a rank lower than that of warrant officer.

⁶⁰ In addition, in the RAF no more than two of those members can be below the rank of Flight Lieutenant and where the accused is a Squadron Leader all of the members of the court martial must be of the rank of Flight Lieutenant or greater. In the Royal Navy the members of a court martial must be the rank of Captain or above in trials where the accused is an officer of flag rank; of the rank of Commander or above in the trial of a Commodore or Captain; and in a trial where the accused is a Commander, there must be at least two members who are of the rank of Commander or above. In the Army at least four members must be of the rank of Captain.

In the Army/RAF there are two main types of court martial:

- A General Court Martial (GCM) which consists of a Judge Advocate and five members, the most senior being nominated as President.⁶¹ Each member must have at least three years commissioned Service. A GCM has no sentencing limits, except those imposed by statute and is intended generally for hearing more serious offences.
- A District Court Martial (DCM) which consists of a Judge Advocate and three members with at least two years commissioned Service. It has a sentencing limit of two years. A DCM cannot try an officer.⁶²

There is also provision for Field General Courts Martial (FGCM) to be convened when on active service when it is not considered possible to convene a regularly constituted court martial without serious detriment to the public good. A FGCM has the powers of a GCM except where the court consists of fewer than three officers. In those cases a sentence cannot exceed two years imprisonment or a custodial order against a young Service offender.⁶³

In contrast, the Royal Navy only has one type of court martial which is similar in composition to a GCM with a Judge Advocate and five members.

The location of a court martial is decided at a Directions Hearing chaired by the Judge Advocate. It is common practice that disciplinary action takes place in the same geographical location as the unit is based. In the Royal Navy, court martial proceedings are usually held at HMS Drake or HMS Nelson.⁶⁴

The accused is entitled to legal representation at court martial by a Service or civilian lawyer and legal aid is available. He/she is also entitled to object to the Judge Advocate and/or any other member of the court martial. Objections to the President or any other member must be approved by the Judge Advocate.⁶⁵ If an objection to the Judge Advocate is successful another Judge Advocate must be appointed by, or on behalf of, the Judge Advocate General.

At the conclusion of a trial the Judge Advocate is responsible for summing up the case, although it is the members of the court that retire to consider a verdict. They are required

⁶¹ In the Royal Navy the President must be at least the rank of Captain (or if the accused is an officer of flag rank, the President must be an officer of flag rank) (*Manual of Naval Law*, Ch.17, para.1703). In the Army the President must be the rank of Field Officer, unless no suitable candidate is available, in which case the president must be at least the rank of Captain. In the RAF the President must be at least a Squadron Leader, and in the absence of a suitable candidate, not below the rank of Flight Lieutenant.

⁶² *Manual of Military Law, Part I*, Ch.3, para.8

⁶³ More detail on Field General Courts Martial is available in the *Manual of Air Force Law*, Chapter V, para.78-81 or the *Manual of Military Law*, Chapter III, Annex B

⁶⁴ These are shore establishments in Plymouth and Portsmouth respectively.

⁶⁵ If the objection is successful, a waiting member may be substituted or the trial may proceed without the member objected to so long as the number of members is not reduced below the legal minimum (*Manual of Military Law: Part I*, Ch.3, para.22)

to return verdicts using the usual criminal standard of proof and their verdicts are by simple majority. If there is an equality of votes the accused must be acquitted.⁶⁶ If the accused is found guilty, the members and the Judge Advocate jointly consider an appropriate sentence.

It is the duty of the Judge Advocate to advise the court on the maximum punishments that can legally be awarded for the offences concerned. The court can award only one sentence in respect of all the offences of which the accused has been found guilty. As with summary punishments, mitigating factors, circumstances of provocation, the consequence of the offence, the age and standing of the offender and prior history of committing the offence are taken into consideration. If there is an equality of votes on the nature of sentencing, then the President has the casting vote.

Under the SDA it is also possible for personnel who have ceased to be subject to military law (i.e. have left HM Services) to be charged and tried by court martial for an offence committed by them prior to that date, as long as the case is brought to trial within six months.⁶⁷ However, that limitation does not apply to civil offences committed overseas, provided that the Attorney General consents to a trial, or for the Service offences of mutiny, failure to suppress mutiny or desertion.⁶⁸

b. Powers of punishment

As outlined above, the powers of punishment of a GCM are far greater than those of a DCM. Generally a GCM has absolute discretion as to sentence. A DCM, in contrast, cannot award the punishment of imprisonment for a period exceeding two years. In considering an appropriate sentence there are certain obligations with respect to offences under section 64 of the *Air Force Act 1955* and the *Army Act 1955* (scandalous conduct by officers). This offence can only be awarded with dismissal from HM Services with or without disgrace. Limitations also apply to offences committed under section 70 (civil offences) which cannot attract a sentence greater than that which could be awarded in a civil court for the same offence. Various provisions also apply to Service personnel under the age of 21 who cannot be sentenced to imprisonment but, if over the age of 17, can be sentenced to detention in a young offender's institution.⁶⁹

Where an accused has opted for trial by court martial, the sentencing powers of the court are also restricted to those that would have been available to the CO, had that offence been dealt with summarily.⁷⁰

⁶⁶ *Manual of Air Force Law*, chapter V, para.57

⁶⁷ *Manual of Air Force Law*, Chapter V, para.15; *Naval Discipline Act 1957*, Section 52 and *Army Act 1955*, s.131

⁶⁸ Several of the prosecutions currently being brought in relation to the conflict in Iraq are against ex-Service personnel. For example, two of seven members of the Parachute Regiment charged with the murder of an Iraqi civilian in February 2005 had left the Army by the time the case came to trial. The case was subsequently dismissed by the Judge Advocate presiding over the court martial in November 2005. This is examined in section IV A2

⁶⁹ *Army Act 1955*, Section 71A

⁷⁰ *Manual of Naval Law*, Section 2503

The general powers of punishment available to a court martial are as follows:⁷¹

- Imprisonment – A sentence of imprisonment also automatically incurs dismissal with or without disgrace from HM Services.⁷²
- Detention by virtue of a custodial order for offenders under the age of 21.
- Detention – for offenders over the age of 21 a sentence of detention is considered more suitable than imprisonment where the offences are exclusively of a Service nature. The maximum sentence of detention is two years.
- Dismissal or Dismissal with disgrace.
- Forfeiture of seniority – applicable to officers only.
- Reduction in rank or reduction to the ranks – warrant officers and non-commissioned officers only.
- Fine
- Severe reprimand or reprimand
- Stoppages of pay
- Minor punishments – not applicable to officers and warrant officers

In the Royal Navy those punishments are also extended to dismissal from HM ship, which is only applicable to officers.

Details of the maximum punishments and combination of punishments available are set out in greater detail in Chapter 25 of the *Manual of Naval Law* and Chapter Three of the *Manual of Military Law*.

6. The Reviewing Authority

Under the SDA, there is a statutory right for the Defence Council, or any other specified authority,⁷³ to review the findings and punishments awarded at a courts martial or summary hearing.⁷⁴

a. Summary Hearings

The Reviewing Authority has the statutory right to review the finding and/or any punishment awarded at a summary hearing. If the finding is considered to be unlawful then the RA may quash the conviction and any related punishment.

With the establishment of the Summary Appeal Court (SAC) an accused can no longer independently ask the Reviewing Authority to examine his/her case. However, the Reviewing Authority can of its own accord apply for leave to refer cases to the SAC. Such an application can be made regardless of whether the accused has already appealed to the SAC. The Reviewing Authority can also seek leave to refer a case back

⁷¹ *Army Act 1955*, Section 71 and the *Manual of Naval Law*, Chapter 25

⁷² All sentences of imprisonment awarded at court martial are served in civilian prisons. Military detention is undertaken at the Military Corrective Training Centre (MCTC) in Colchester.

⁷³ Other authorities include any air force, naval or military officer superior in command to the officer who dealt summarily with the charge; or an officer appointed by the Defence Council to carry out the review.

⁷⁴ *Army Act 1955* and *Air Force Act 1955*, sections 113 -115 , *Naval Discipline Act 1957*, section 71

to the SAC for reconsideration. No case shall be referred unless the Reviewing Authority is satisfied that it is in the interests of justice to do so.

b. Courts Martial

All courts martial that result in a conviction are automatically reviewed by the Reviewing Authority on behalf of the Defence Council.

In addition to this automatic review, the person convicted by court martial has the right to petition the Defence Council against the court's finding, punishment or both, although this is generally considered unnecessary. This must be done within 28 days.⁷⁵ The Reviewing Authority may challenge a conviction where it is felt that it is unsafe and may intervene with regard to a sentence where it is considered unlawful, wrong in principle or manifestly excessive. Specifically, the Reviewing Authority has the power to quash a finding/sentence; quash a finding and authorise a retrial; quash a sentence only, substitute a finding for one which the court could have lawfully made and/or commute a sentence to a lesser punishment or substitute an equal or lesser sentence. In all cases the reviewing authority would receive legal advice on its decisions from the Office of the Judge Advocate (Army/ RAF) and from the Judge Advocate of the Fleet (Royal Navy).⁷⁶

A petition to the reviewing Authority must be made before an application to the Court Martial Appeal Court (CMAC) can be made (see below).

However, in 2002 the role of the Reviewing Authority in relation to courts martial was ruled to be in violation of Article 6 (right to a fair trial) of the European Convention on Human Rights during the case of *Morris v. the United Kingdom*. In its judgment the ECHR stated that the process amounted to non-judicial interference.⁷⁷ In July 2002 the House of Lords subsequently took a different view in the case of *Regina v. Boyd etc* because review cannot increase the sentence imposed and the outcome of it is open to appeal.⁷⁸

In December 2003 the Grand Chamber of the ECHR further considered the role of the reviewing authority in the case of *Cooper V. the United Kingdom*. In its judgement the court concluded that although there was no violation in the case concerned, it was nonetheless uneasy about the role of the Reviewing Authority in the disciplinary process. The judgment stated:

130. The Court further considers, as did Lords Bingham and Rodger in the House of Lords, that the Reviewing Authority is an anomalous feature of the present court-martial system and it would express its concern about a criminal procedure which empowers a non-judicial authority to interfere with judicial findings.

⁷⁵ *Manual of Naval Law*, para.2702

⁷⁶ MOD Memorandum to the Defence Select Committee, February 2005

⁷⁷ A copy of the judgement is available online at: <http://www.worldlii.org/eu/cases/ECHR/2002/162.html>

⁷⁸ A copy of this judgement is available online at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd020718/boyd-1.htm>

131. Nevertheless, the Court notes that the final decision in court-martial proceedings will always lie with a judicial authority, namely the CMAC. This is the case even if a Reviewing Authority quashes a verdict and authorises a re-trial: even if the Prosecuting Authority were to decide to bring a fresh prosecution and even if a court-martial were to refuse to stay those further proceedings as an abuse of process, the final review of any new conviction and sentence would remain with the CMAC.⁷⁹

7. Court Martial Appeal Court (CMAC)

The CMAC is part of the judiciary and therefore independent of the Government and of the Armed Forces. It is constituted of three or more judges drawn from the Court of Appeal (Criminal Division) and ordinarily it conducts hearings in the Royal Courts of Justice, although it may sit elsewhere in the UK or overseas.

An accused convicted at court martial has the right to apply for leave to appeal to the CMAC over a finding, sentence (where it is not fixed by law), or both. However, before a convicted person's right to appeal to the CMAC is exercisable, he/she must have first petitioned the Defence Council as the Reviewing Authority, as outlined above. Regardless of the outcome of the petition, the accused can appeal to the CMAC either upon receipt of rejection by the Defence Council or after 40 days (60 days if overseas). If a petition to the reviewing Authority is still ongoing when a leave to appeal is granted, that review will cease.⁸⁰

The Court will allow an appeal against conviction if it considers the finding of the court martial in all circumstances of the case is unsafe.

An appellant is not entitled to be present at the hearing of an appeal by the CMAC except where the court has given leave for him/her to attend. It is the duty of the Defence Council to defend the appeal.

Upon hearing an appeal the CMAC may dismiss the appeal; allow the appeal and quash the conviction; quash the conviction and authorise a retrial by court martial;⁸¹ allow the appeal in part where there is more than one charge; substitute the finding of the court martial for another finding that the court martial could have lawfully reached and/or substitute a sentence which is not greater in severity.

Following a judgement of the CMAC, either the appellant or the Defence Council may appeal to the House of Lords if leave to do so is granted either by the CMAC or by the House of Lords. Such leave would be granted only if the CMAC considered that a point of law of general public importance is involved and it appears to the CMAC or the House of Lords that that point is one that should be considered by the Law Lords. Any application must be made within 14 days to the CMAC in the first instance. If that leave

⁷⁹ A copy of this judgement is available online at: <http://www.worldlii.org/eu/cases/ECHR/2003/686.html>

⁸⁰ *Manual of Naval Law*, Section 2717

⁸¹ Specific guidelines on those cases where a retrial by court martial may be authorised is contained in the *Courts Martial (Appeals) Act 1968*, Sections 18-20

to appeal is refused, then an application for leave may be made to the House of Lords within a further 14 days.

8. Provisions Relating to Civilians

Civilians in certain circumstances are subject to the provisions of Service law as set down in the SDA. Consequently, offences committed by them are subject to the same disciplinary procedures, although powers of punishment are limited.

In addition to summary dealing and trial by court martial, civilians overseas accused of an offence under the *Army Act 1955* or the *Air Force Act 1955* can also be tried by a Standing Civilian Court, which is examined below. The Royal Navy does not have Standing Civilian Courts as dependants of naval personnel do not accompany them overseas.

As with Service personnel, charges are referred in the first instance to the CO. The CO of a civilian who is charged with an offence under the SDA is appointed by the officer commanding the Service establishment, unit, detachment or other place to which the civilian is attached or is located. In the Army the appointed CO must be of the rank of Lieutenant Colonel or above; in the RAF, not below the rank of Squadron Leader and in the Royal Navy must not be below the rank of Commander.

For offences committed under the *Army Act 1955* or the *Air Force Act 1955* that are within the area of a Standing Civilian Court (SCC),⁸² the CO must, at the outset, determine whether the case should be heard by the SCC. In doing so a CO must apply the following criteria:

- a) Is the charge capable of being tried by an SCC?
- b) Is the charge supported by written witness statements?

If the answer to both of these questions is yes, the CO must form an opinion as to whether the case should be tried by the SCC. In coming to this decision a number of factors are taken into consideration, including whether the offence could be tried summarily by an Appropriate Superior Authority (ASA), and if so, whether it is appropriate to do so; and if a civilian is charged jointly with a soldier who cannot be tried by the SCC, whether it would be expedient to try them jointly; and whether the case should proceed to a court martial where the powers of punishment are greater. If the decision is taken that the case should not be heard by the SCC, the CO is obliged to proceed with investigating the charge. He/she cannot dismiss the charge at this point. If a decision is taken for the SCC to try the case the CO must refer the case to Higher Authority. The HA is then also obliged to consider whether the case should be tried by an SCC. The case can then either be referred to the relevant Service Prosecuting Authority for trial by SCC, or referred to an ASA for summary dealing, or referred back to the CO with a direction either to investigate the charge and proceed accordingly, or dismiss it.

⁸² SCCs are established by Statutory Instrument with the approval of the Lord Chancellor. At present there are two areas in which trials may be directed to be held before an SCC. Area 1 comprises Germany, Belgium and the Netherlands; while area 2 covers the Republic of Cyprus and the Sovereign Base Areas of Akrotiri and Dhekelia (*The Standing Civilian Courts (Areas) (Amendment) Order 1991*, SI.1991/2788)

If the answer to either of the criteria set out above is no, then the CO will proceed to investigate the charge with a view to the offence being dealt with either summarily or by court martial. This is also the case for offences outside the area of an SCC or those offences committed under the *Naval Discipline Act 1957*. As with Service personnel, civilians have the right to elect trial by court martial.⁸³

a. Standing Civilian Courts

The *Armed Forces Act 1976* introduced Standing Civilian Courts (SCC) into the Service legal system. Once established, these courts are permanently available and are for the purpose of hearing trials of civilians overseas charged under the *Army Act 1955* or the *Air Force Act 1955*. The SCCs have the equivalent powers of a Magistrate's Court.

The jurisdiction of SCCs is limited, however, in that it can only try civilians for offences committed outside the UK. With regard to offences, the SCC can try any offence, including Service offences, for which a court martial can try a civilian, with two exceptions:

- An SCC cannot try an offence under Section 57 of the *Army Act 1955* and the *Air Force Act 1955* (contempt of court martial)
- An SCC cannot try an offence under Section 70 (civil offences) which a Magistrate's Court in England and Wales would be unable to try if the offence had been committed in the UK. If a Magistrate's Court has jurisdiction in certain circumstances, then an SCC also has jurisdiction for that offence. The jurisdiction of the SCC is also extended, in line with that of a Magistrate's Court, for offences committed by a juvenile.⁸⁴

The relevant SPA is responsible for SCC proceedings against an accused. At any time prior to, or during the SCC hearing, the SPA may amend or substitute the charge, discontinue proceedings, or prefer an additional charge against the accused. Prior to the hearing the SPA may also determine that the case be heard by court martial rather than the SCC.⁸⁵ The court may also amend the charge during proceedings if it is considered in the interests of justice to do so.⁸⁶ The accused has the right to legal representation.

An SCC is constituted of a Magistrate sitting alone, except in juvenile cases where the Magistrate may sit with up to either two members (who have the right to vote on the finding and sentence) or assessors (who have no vote and are present only in an advisory capacity). Magistrates are members of the judicial staff of the Judge Advocate General who are specially appointed as magistrates of SCCs by the Lord Chancellor. Members and assessors are drawn from a panel made up of civilians who fall within

⁸³ *Standing Civilian Court Order 1997*, section 16

⁸⁴ A magistrates' Court has the power to try offenders under the age of 17 for any offence except murder. A list of offences that can be tried by an SCC is available in the *Manual of military Law: Civilian Supplement*, Amendment No.5, p.23-28

⁸⁵ *Standing Civilian Courts Order 1997*, Section 13 and 44

⁸⁶ *ibid*, section 45

military law, and officers from the three Services. These panels are constituted by Statutory Instrument and the members must be suitably qualified through training and experience.⁸⁷

In terms of power of punishment, an SCC can award a maximum sentence of imprisonment for up to six months and a fine of up to £2,000. The court may award consecutive terms of imprisonment for more than one offence provided that their aggregate does not exceed 12 months. The court may also award absolute or conditional discharge, community supervision orders, custodial orders for offenders under the age of 21,⁸⁸ compensation orders, fines for the parent/guardian of an offender under the age of 17, and orders requiring parents/ guardians to acknowledge responsibility and enter into recognisance.⁸⁹ For a civil offence, the SCC may not pass a sentence greater than that which could be imposed by a Magistrate's Court trying the same offence.⁹⁰

In the event of election by court martial, an SCC would consequently be unable to try that person for the same offence.

b. Summary dealing

Army/RAF

If a case is not dealt with by an SCC, the CO must then investigate the offence. He/she has the right to dismiss the charge but, unlike Service personnel, has no power to deal summarily with the civilian in question. Civilians instead are dealt with in the same manner as officers and warrant officers and therefore any charge must be referred to a HA/ASA⁹¹ for summary dealing or trial by court martial. The HA also has the option of referring the charge back to the CO with a direction to dismiss it.

With the exception of the offence of making a false answer on attestation (i.e. joining the Armed Forces) (section 61 *Army Act 1955*), the ASA can deal summarily with those offences committed by civilians accompanying the Armed Forces overseas on active service, as set out in Appendix One. However, there are limitations on the offences with which a civilian can be charged when accompanying the Armed Forces overseas in peacetime.⁹²

⁸⁷ An accused is entitled to object to the magistrate, any member, assessor or interpreter appointed to hear his/her case (*Standing Civilian Court Order 1997*, section 15)

⁸⁸ Offenders under the age of 17 cannot be sentenced to imprisonment (*Manual of Military Law: Civilian Supplement*, p.66)

⁸⁹ More detail on powers of punishment are contained in Schedule 5A of the *Army Act 1955* and the *Air Force Act 1955*.

⁹⁰ *Manual of Military Law: Civilian Supplement*, Amendment No.5, p.20

⁹¹ As defined by Section 17 of the *Custody and Summary Dealing (Army) Regulations* and Section 82 (2) of the *Air Force Act 1955*

⁹² The offences with which they can be charged are offences in relation to sentries (s.29), obstruction of provost officers (s.35) disobedience to standing orders (s.36), resistance to arrest (s.55), escape from confinement (s.56), disgraceful conduct of a cruel, indecent or unnatural kind (s.56) (not RAF), attempting to commit a military offence as described (s.68), civil offences as set out in Sch2 (s.70) and failure to attend a hearing (s.75J (3))

Whatever the offence, the ASA's power of punishment is also limited to a fine of up to £100. As with Service personnel, civilians appearing before an ASA with a view to being dealt with summarily have the right to elect trial by court martial.⁹³ This right does not extend to trial by Standing Civilian Court.

Royal Navy

In contrast to the RAF and the Army, civilians charged with an offence under the *Naval Discipline Act 1957* may be tried summarily by the appointed CO.

c. Court Martial

In the case of offences under the *Army Act 1955* and the *Air Force Act 1955*, a case against a civilian can be heard by court martial, rather than by SCC where the offence does not fall within the jurisdiction of the SCC; the PA considers that it should be heard by court martial; a civilian to be tried by SCC elects trial by court martial; or an accused convicted by SCC has appealed against either his/her conviction or sentence.

Under the *Naval Discipline Act 1957* a civilian can be tried by court martial either where the PA considers it necessary or where the accused has elected for trial in this manner.

A civilian can be tried by either a GCM or a DCM under the procedures outlined in section I B5 above, although in these instances up to two members of the GCM may be civilians in the service of the Crown and to whom military law is applied.

However, in contrast to Service personnel, the punishments that can be awarded to a civilian at court martial are limited. A court martial can award a sentence of imprisonment or a fine, but comparable with an SCC it also has the power to award absolute or conditional discharge, community supervision orders, custodial orders for offenders under the age of 21,⁹⁴ compensation orders, fines for the parent/guardian of an offender under the age of 17 and orders requiring parents/ guardians to enter into recognisance.

d. Petitions and Appeals against an SCC finding/sentence

The findings and sentences of a Standing Civilian Court are open to review and, with some limitations, to appeal to a court martial. Petitions may be presented to a reviewing authority (usually the HA who referred the case or to an appropriate ASA) within 21 days of the court sentence. The reviewing authority can also, of its own volition, review the finding or sentence of an SCC at any time. The RA is entitled, upon review, to quash or substitute the finding and/or sentence. However a substituted or varied sentence cannot be one which the SCC itself could not have imposed.

A person against whom an SCC has recorded a finding of guilty or passed a sentence involving a custodial order, compensation order or fine also has the right of appeal to

⁹³ In the event of election for trial by court martial neither the charge nor the punishment may increase in gravity.

⁹⁴ Offenders under the age of 17 cannot be sentenced to imprisonment (*Manual of Military Law: Civilian Supplement*, p.66)

court martial, unless he originally pleaded guilty. Notice of appeal to court martial must be lodged to the HA who directed the trial within 40 days. However, if the convicted person only submits a petition to the Reviewing Authority, the opportunity to appeal to court martial will be lost after 40 days regardless of the outcome of the petition. If the appeal is granted, a court martial must be convened to hear the appeal. It must sit in an area for which the SCCs have been established. A court martial in this instance is similar to a civilian court martial trying a case at first instance, although some of the preliminary procedures such as an investigation by the CO, or the referral back of papers to the CO are excluded.⁹⁵ An appellant may abandon his/her appeal at any point prior to the court martial. If the accused is found guilty at court martial the court may only award a sentence which the SCC could have originally awarded. However, the court is not limited by the sentence passed by the SCC and may award a greater sentence provided that the original SCC sentence was not the maximum that could be awarded for the offence in question.

e. *Petition against a Summary Hearing*

Under the SDA the Reviewing Authority has the right to review findings and sentences awarded at a summary hearing.⁹⁶ This power also relates to those cases regarding civilians. As with Service personnel, civilians can appeal to the Summary Appeal Court following the process outlined above.

f. *Petition/ Appeal against a Court Martial*

Along with Service personnel, a civilian also has the right of petition to the Reviewing Authority against a finding and/or a sentence that has been awarded at a court martial and the right of appeal to the CMAAC and House of Lords if necessary.⁹⁷

C. Boards of Inquiry

A Board of Inquiry (BOI) is a form of Service inquiry that is conducted wholly on an internal basis.⁹⁸ Its objective is to ascertain the circumstances surrounding a particular incident and to determine what went wrong and why in order to prevent a recurrence. However, a BOI is not a court of law and its proceedings do not form any part of the disciplinary process as set out above. A BOI cannot award punishments and more specifically, it cannot explicitly attribute blame or negligence to an individual.⁹⁹

However, the conduct of Boards of Inquiry across all three Services is worth examining within the context of the forthcoming *Armed Forces Bill* as one of the Bill's expected aims is to harmonise BOI procedure. This is examined in section II B1 below.

⁹⁵ The Court Martial system is examined in greater detail in section I B5.

⁹⁶ *Army Act 1955*, Section 115

⁹⁷ *Manual of Air Force Law: Civilian supplement*, p.56

⁹⁸ Set up by statute for the Army and RAF and under the Royal Prerogative for the Royal Navy.

⁹⁹ *Queens Regulations for the Army*, Chapter 5, Annex A, para.7

1. Procedure

The rules relating to BOI procedure are similar across all three services, although there are slight procedural differences in the Royal Navy.

Provision to convene Boards of Inquiry is made in the *Army Act 1955* and *Air Force Act 1955*, section 135, while the rules of procedure are set out in the *Board of Inquiry Rules 1956*. Royal Navy BOI are not convened on a statutory basis, but under the Royal Prerogative. Therefore the rules of procedure for naval BOI are set out in the *Queens Regulations for the Royal Navy*, Chapter 57.

Under these regulations an Army or RAF BOI may be convened by order of either of the Service Boards of the Defence Council; an officer (not below the rank of Colonel in the Army, or below the rank of Group Captain in the RAF) who is in command of a body of forces or military establishment; or by the CO of a unit or detachment.¹⁰⁰ A naval BOI may be convened by any Flag Officer¹⁰¹ or by any administrative officer authorised by the Commander-in-Chief Fleet. In addition, when an accident occurs which disables one of HM ships the senior officer present must convene a BOI or ship's investigation¹⁰² immediately in order to determine the cause of the accident or defect. All accidents or defects affecting the readiness of HM ships, and which are considered likely to involve disciplinary action by the Admiralty Board, must be reported to the MOD with an expression of opinion on whether a BOI should be held.

Where a matter to be investigated involves personnel from two or more of the Services, it is open to either of the Service authorities to convene a BOI.¹⁰³

The *Army Act 1955* and *Air Force Act 1955* make specific statutory provision for inquiries to be held into the unauthorised absence of Service personnel, the capture of Service personnel by an enemy or the death of any person in a military establishment outside the UK, and the *Queens Regulations for the Royal Navy* make it an express obligation to convene a BOI in the event of an accident disabling a ship. However, BOI can generally be convened on any matter, at any time and in any place if the convening authority considers it necessary.¹⁰⁴ However, as a matter of policy BOI are usually convened in the following instances (in addition to the aforementioned statutory obligations):¹⁰⁵

- The death of any person subject to military law, other than death caused by enemy action.
- The unnatural death of any civilian abroad not subject to military law if it appears that death may have been the result of negligence by a person subject to military law or was the result of defective MOD equipment or property.

¹⁰⁰ *Queens Regulations for the Army*, Chapter 5, Annex A, and *Queens Regulations for the Royal Air Force*, Chapter 17, para.1258

¹⁰¹ Defined as any officer of the rank of Rear Admiral or above,

¹⁰² This is the equivalent of a regimental/ unit inquiry in the Army/RAF.

¹⁰³ *Queens Regulations for the Royal Navy*, chapter 57, para.5708

¹⁰⁴ The convening authority must consider whether some other form of investigation such as a regimental inquiry or investigation by the Service police would be more appropriate, bearing in mind that evidence at a BOI is given under oath, although it is inadmissible in any related disciplinary proceeding.

¹⁰⁵ *Queens Regulations for the Army*, Chapter 5, Annex A, paras.14-20

- Where no coroner's inquest or other civil inquiry is to be held.
- When a coroner's inquest is to be held but the convening authority considers that, for military reasons, a BOI must be held.
- The escape of a person under sentence from a military establishment.
- The escape of a prisoner of war from a military establishment.
- Loss or damage occasioned by wrongful act or negligence when the financial loss exceeds that which a CO is entitled to write off.
- Loss of documents or equipment bearing a security classification of confidential or higher.
- Accidents involving military aircraft.
- Accidents involving ammunition, other than negligent discharges resulting in no injury or serious damage; or explosives, unless the authority is content that the report of a specialist investigation is sufficient.

Since June 2004 it has been MOD policy that a BOI should convene, where possible, within 24 hours of an incident where it is deemed that an inquiry is either mandatory or necessary. There is no set duration for BOI and the length of time an inquiry takes will be largely determined by the complexity of the case. However, the MOD has indicated its intention to try and conclude inquiries within 14 weeks.¹⁰⁶

A BOI consists of a President¹⁰⁷ and two or more members who must be officers, warrant officers or, in the case of the RAF, non-commissioned officers. Where a civilian may be involved in a case, civilian representation¹⁰⁸ on the Board must be arranged. The President is responsible for setting out the terms of reference of the Board and ensuring that proceedings are conducted with a view to drawing appropriate conclusions from the evidence obtained. In the event of a joint BOI the President of the Board must be from the Service convening the BOI, while representatives from the other Services, where appropriate, must be represented on the Board.

Evidence to a BOI is given under oath or affirmation (except in a Royal Navy BOI)¹⁰⁹ and any evidence presented is not admissible in any subsequent related disciplinary proceedings, except in cases of perjury.¹¹⁰ A BOI may receive any evidence which they consider is relevant to the matter in hand, regardless of whether it would be admissible in a civil court. Witnesses can refuse to answer any questions where the answer may be considered incriminating.¹¹¹ Civilians who are not servants of the Crown also have the right to refuse to appear as witnesses before a BOI.¹¹² Next of kin do not have the

¹⁰⁶ Ministry of Defence Briefing, *Army Boards of Inquiry*. This is available online at: http://www.operations.mod.uk/telic/boi_principles.pdf

¹⁰⁷ An officer not below the rank of Captain in the Army and not below the rank of Flight Lieutenant in the RAF. Where a fatal aircraft accident is being investigated the President must be at least the rank of Wing Commander (*Queens Regulations for the Royal Air Force*, Chapter 17, para.1260) the President and members of a naval BOI must be, as far as practicable, senior to the person whose conduct is under investigation.

¹⁰⁸ These persons must be in the service of the Crown.

¹⁰⁹ *Queens Regulations for the Royal Navy*, chapter 57, para.5704 (2)

¹¹⁰ *Queens Regulations for the Army*, Chapter 5, Annex A, para.8

¹¹¹ *Queens Regulations for the Royal Air Force*, Chapter 17, para.1267

¹¹² *Queens Regulations for the Royal Navy*, Chapter 57, para. 5704

statutory right to attend BOI, although in exceptional circumstances they may be given leave to do so under the authority of the President.

In reaching its findings the Board should endeavour to differentiate between incidents caused by accident, or by other factors. However, as outlined above, in cases where human factors are considered to have contributed to the incident, the BOI must not apportion blame or negligence to any individual.¹¹³ The Board's final report is then forwarded to the convening authority who must review the findings of the Board, in order to ensure that the conclusions in the report are justified on the basis of the evidence presented.

However, neither the official record of a BOI nor any extracts of information relating to the record of proceedings may be disclosed. Copies of a Board's final report may be made available to the Coroner and to the Next of Kin. Members of the public, including Next of Kin, or members of the press have the right to attend a BOI hearing, although any person who may be adversely affected by the findings of the BOI who is subject to military law, or is a civilian in the service of the Crown, is given the opportunity to attend or to be legally represented.¹¹⁴

Prior to February 2004 Army BOI were adjourned if the matter under discussion was subject to a police investigation by either the military or civil police, or subject to disciplinary or criminal proceedings. A BOI could not be reconvened until such disciplinary and criminal proceedings were concluded. However, in February 2004 the Army agreed to bring its policy into line with the Royal Navy and RAF to allow BOI to be conducted in parallel with police investigations if, on legal advice, it is considered that such an inquiry would not affect any police investigation or criminal proceeding.¹¹⁵

¹¹³ *Queens Regulations for the Royal Air Force*, Chapter 17, para.1270. This provision in the Board of Inquiry (RAF) rules was changed in 1997 after the Chinook helicopter crash in 1994 in which the two pilots were found guilty of negligence.

¹¹⁴ *Board of Inquiry Rules 1956*, section 11

¹¹⁵ Ministry of Defence, Directorate of Personnel Services (Army), *PS2 (A) POLICY 1/2004 (Boards of Inquiry)*

II Aims of the *Armed Forces Bill*

The *Strategic Defence Review* (SDR) in 1998 acknowledged that as part of the MOD's personnel policies "examination of the need for a single tri-Service Discipline Act" was necessary.¹¹⁶ Since then calls for a TSA have been made on several occasions, in particular by the Defence Select Committee during the passage of the 2000 *Armed Forces Discipline Bill* and the 2001 *Armed Forces Bill*.¹¹⁷

The aim of the forthcoming *Armed Forces Bill* is to modernise Service legislation by consolidating the SDA into a single system of Service law. In addition, some of the Bill is intended to reflect civilian criminal justice measures already in force or to incorporate changes that are being made, in order to bring the system of Service law more closely into line with civil law, where practical.

In the 2004-05 Session, the Defence Select Committee conducted an inquiry into the expected provisions of the Bill. As part of evidence to that inquiry the MOD submitted a Memorandum setting out both its intentions and a draft outline of the main clauses of the Bill.

In that briefing the MOD set out its reasons for pursuing a tri-service approach:

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

- The general perception, reflected in the SDR, that a single system of Service law would be more appropriate for Services that are increasingly deployed on joint operations and for which they train together [...] In simple terms it is considered that the basic principle should be that, especially within joint commands and units, Service personnel should be subject to the same systems and the same rights and penalties, except where a special rule applying only to the member of one Service is essential.
- The specific concern that because the attachment regulations do not apply to fully joint units, the commanders of such units (i.e. ones where there is no single Service lead such as the Joint Nuclear Biological and Chemical Regt) do not have disciplinary powers over all those under their command [...] The alternative contrived solution that has been adopted in such units is the appointment of separate COs [Commanding Officers] for each service component to deal solely with discipline. This also creates a risk of inconsistency and disparity in treatment of co-accused.
- The additional concern that, in joint units with a single Service lead, there is a reluctance to use existing attachment regulations which, to an extent, enable all personnel to be subject to the lead SDA. A principal difficulty is the difference in COs' powers between the SDA. The effect is that personnel tend to be returned to their own Service for disciplinary action, which similarly

¹¹⁶ Ministry of Defence, *The Strategic Defence Review*, Cm 3999, July 1998, p.34

¹¹⁷ Those comments are outlined in Library Research Paper RP01/03, *The Armed Forces Bill*, 8 January 2001 and in greater detail in Defence Select Committee Special Report, *Armed Forces Bill*, HC154-I, Session 2000-01

runs contrary to the intention that command and discipline should be aligned, and raises a risk of inconsistency, which could compromise the perceived fairness of the system.

- In addition, although many of the disciplinary provisions in the individual SDA are essentially the same, the existence of the separate Acts makes the use, interpretation and amendment of the legislation more complicated and perpetuates different interpretations on a single-Service basis. This makes it more difficult to obtain reasonable consistency in dealing with the same or similar matters [...] We acknowledge, however, that the objective of achieving consistency under a TSA will also require, over time, a degree of willingness to adapt Service cultures [...]

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

Within the disciplinary context, the law and procedures applicable to all the armed forces need also to be sufficiently flexible to operate well in a wide variety of operational circumstances, and without affecting the individual Services' continuing primary responsibilities for the discipline of their personnel.¹¹⁸

In determining the main areas for change, the MOD Memorandum therefore concluded that any new system must be:

- a. fair and command the respect of personnel through being seen to be fair.
- b. align discipline and command because it is essential to operational effectiveness for COs to have disciplinary powers over those whom they command.
- c. consistent, whenever the circumstances of an offence make it appropriate, across single, bi- and tri-Service environments.
- d. expeditious and conducive to the prompt application of justice.
- e. efficient and straightforward to use – so as to avoid over-burdening COs and others involved in the system.
- f. European Convention on Human Rights (ECHR) compliant.¹¹⁹

¹¹⁸ Ministry of Defence Memorandum to the Defence Select Committee inquiry on the *Tri-Service Armed Forces Bill*, HC 64, Session 2004-05. available online at:

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/64/64we06.htm>

¹¹⁹ *ibid*, para.10

Further memoranda were submitted to the Committee by the MOD in January and March 2005.¹²⁰ The following section on the main proposals of the Bill is largely drawn from these three Memoranda.

A. Proposals Relating to the Current Disciplinary System

The main proposals in the Bill, with regard to amending the current disciplinary system, are expected to be as follows:

1. The harmonisation of offences and disciplinary powers of COs.
2. The creation of a single Prosecuting Authority.
3. The establishment of a unified court martial system, including the creation of a standing court.
4. The abolition of the right of the Reviewing Authority to review court martial convictions.

The intention is to implement these new procedures in 2008.¹²¹

1. Harmonisation of Summary Discipline

The stated aim of the Bill is not to affect the fundamental principles of the present disciplinary system but to agree, within that framework, a harmonised level of powers, offences and punishments with respect to summary dealing and in particular in relation to civil offences.

Under the proposals set out in the memorandum the summary jurisdiction and sentencing powers of naval COs will be more limited than they are at present (see section I B2 above), resulting in more cases having to be dealt with by court martial. At the same time the summary powers of COs in the Army and RAF will be expanded, leading to more cases being dealt with summarily. This approach has been regarded as a “compromise in the overriding interests of harmonisation”.¹²²

Specifically, a new system of summary discipline envisages the following changes to the present framework as outlined in sections I B1-3 above:

1. COs will have disciplinary powers to deal with certain officers and warrant officers in addition to non-commissioned personnel. This is the current position in the Royal Navy. However, the option in all three Services of referring more serious cases involving personnel of these ranks further up the chain of command will remain.

¹²⁰ These are available online at:

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/64/64we11.htm>

¹²¹ Ministry of Defence Memorandum to the Defence Select Committee inquiry on the *Tri-Service Armed Forces Bill*, HC 64, Session 2004-05, para.46

¹²² Ministry of Defence Memorandum to the Defence Select Committee inquiry on the *Tri-Service Armed Forces Bill*, HC 64, Session 2004-05, para.25

2. Notwithstanding the availability of legal advice, the power of a CO to dismiss without any form of hearing, a criminal charge he/she would be unable to deal with summarily, will be removed. In the case of the most serious offences triable only by court martial the CO will be required to inform the Service police as soon as reasonably practical, while the police themselves would put any proposed charges to the PA at the same time as informing the chain of command.¹²³
3. The civil offences that can be dealt with summarily will be based on the current Army/RAF list which is set out in Appendix One, plus eight offences which the Royal Navy considers important to retain as summary offences. These are as follows:
 - Carrying an article with a point or blade in a public place
 - Obtaining property by deception
 - Obtaining services by deception
 - Evasion of liability by deception
 - Assault occasioning Actual Bodily Harm
 - Fraudulent use of a telephone (2 alternative offences depending upon the circumstances)
 - Possession of an offensive weapon.¹²⁴

However, in all three Services any of these eight additional civilian offences will be dealt with only with the approval of Higher Authority, and informed by legal advice.

4. The maximum summary punishment available will be 90 days detention on approval by Higher Authority, as is the situation currently in the Royal Navy;¹²⁵ and a reduction in rank/rate for senior non-commissioned officers and below, limited to one rank and on approval by Higher Authority.¹²⁶
5. Accused personnel facing summary proceedings across all three services will have the universal right to elect trial by court martial. This is restricted in the Royal Navy at present (see section I B2). It is considered that extending this right will strengthen European Convention compliance of the summary system as a whole.
6. There will be disclosure of relevant papers to the accused on a common basis across the three Services at least 24 hours before a summary hearing.
7. The accused will have the right to representation by an officer or non-commissioned officer at a summary hearing. At present the accused is allowed an adviser (the 'accused's friend') although there are differences in the extent to

¹²³ This proposal has been considered pertinent in the aftermath of the Trooper Williams case. This is examined in greater detail in sections III B and IV A1.

¹²⁴ Ministry of Defence Memorandum, 5 October 2004, Annex D, Appendix One

¹²⁵ The standard period of detention will remain 28 days.

¹²⁶ This would remove the present power of naval COs to impose reductions in rate of greater than one rank.

which this individual is actively involved in proceedings. However, this proposal stops short of allowing formal legal representation at a summary hearing, which is regarded as defeating the objective of summary dealing.

8. The accused will be able to call, and question, witnesses either directly at a summary hearing or through a representative.
9. Where a charge is proved, the justification of the punishment awarded will be given at the time of the award.
10. There will be a tri-Service sentencing guide for summary disposal, providing that it allows for sufficient flexibility in taking account of local factors.
11. There will continue to be a specific review procedure for summary convictions by a Reviewing Authority. However, the power of the Reviewing Authority will be curtailed, with limitations imposed on their ability to quash convictions. Instead this would be subsumed within their existing power to refer cases of doubt to the SAC. It is expected that this will go some way toward addressing the criticism that the role of the Reviewing Authority represents interference by a non-judicial body.

However, the proposals acknowledge that there must be flexibility in developing a summary discipline system that takes into account the differences between the three Services. At present the MOD considers that this will “largely be a matter for secondary legislation” and “requires further examination”.¹²⁷

In addition, the Bill is expected to include provisions for harmonising Service offences and the maximum punishments available. In its March 2005 Memorandum the MOD stated:

The review of service offences has focused primarily on harmonising and modernising the offences and sentences across the Services, although the existing differences are not significant. It is not generally the intention to provide for Service offences which are equivalent to civilian offences. Most Service offences reflect the particular circumstances of Service life and operations and have no equivalence in the civilian system [...]

In some cases there are Service offences which, although they have analogous civilian offences, are being retained because of the particular implications of the offence for a discipline service. For example the Service offence of damage to Service or public property overlaps with the civilian offence of criminal damage, but a key difference is that the Service offence will cover negligently doing an act which causes or is likely to cause damage while the civilian offence only covers intentional and reckless actions.

An example of modernising offences is in respect of the Service offence of obstructing operations, which is one of a number which requires wilfulness on the part of the accused. This expression has given rise to inconsistencies of interpretation in the civilian criminal courts and is also archaic. This is likely to be

¹²⁷ Ministry of Defence Memorandum, 5 October 2004, Annex D

replaced by reference to the “mens rea” or mental element of the specific offence wherever it occurs.

Finally, the work has involved a review of the maximum sentences of each offence. As part of this we have taken account of the maximum sentence for analogous civilian offences, so that, for example, it will be proposed that the current maximum of life imprisonment for the offence of damage to, and loss of, public or service property should be reduced to ten years, in line with the civilian offence of criminal damage.¹²⁸

The application of Service law to civilians and the arrangements for renewing Armed Forces legislation every five years have also been outlined as areas of potential amendment when the Bill is presented. However, at the time of the Defence Select Committee inquiry these proposals remained under review.

2. A Single Prosecuting Authority.

Provision is intended to be made within the Bill for the establishment of a single Prosecuting Authority, with a staff of lawyers drawn from across the three Services.

The MOD Memorandum of October 2004 states:

This accords with the general principle that a single system of Service law should be supported by unified appointments and institutions and is especially important to ensure consistency of application and advice. This is subject to detailed work to identify the structure of the new organisation to be headed by the prosecuting authority. He or she would remain independent of the chain of command and under the (non statutory) general superintendence of the Attorney General. There are implications for defence arrangements, where we aim in certain circumstances to provide Service lawyers to give defence advice and representation to Service personnel. We will need to consult the professional legal bodies on any potential conflict of interest issues.¹²⁹

3. A Unified Court Martial System

In establishing a tri-service disciplinary system one of the main aims of the forthcoming Bill is to amalgamate the separate courts martial system across the three Services into a single unified process. Consequently, the MOD considers that there is no longer any need to maintain a distinction between the different types of court martial, as outlined above, and between the Services themselves.

Specifically, the Bill is expected to:

1. Establish a joint Court Administration Authority (CAA). The Army and RAF already share a CAA.

¹²⁸ Ministry of Defence Memorandum, March 2005

¹²⁹ Ministry of Defence Memorandum, October 2004, Annex E

2. Establish one type of court martial, comprising a Judge Advocate and a minimum of three lay members, except for certain serious offences when the size of the court should be increased to a minimum of five lay members. The MOD considers that “there is no evidence that the higher number of lay members increases the quality of justice, although it may be justified in the more serious cases, in order to reinforce the gravity of the matter”.¹³⁰ In the RAF and the Army at present it is the PA which decides on the type of court martial to be convened based upon the sentencing powers available. The determination of the number of members of a court martial on the basis of the offence in question will be set out in secondary legislation.

It is presumed that the composition of a court martial will reflect the parent Service of the accused.

3. Create a tri-Service standing court martial rather than continue with the *ad hoc* arrangements which exist at present. It is considered that a standing court will offer the benefits of being able to dispense with the requirement for a convening warrant for each trial; Judge Advocates will not have to be sworn in on each occasion and case management will be simplified.

Precedent for creating standing courts already exists within the present disciplinary arrangements, with the Summary Appeal Court and the Standing Civilian Court.

4. Introduce a number of technical amendments to court martial procedure, including allowing the Judge Advocate to exercise the casting vote on sentence in order to reflect where the primary expertise on sentencing lies; rationalising the arrangements for pre-trial hearings and providing the opportunity to take a plea at a pre-trial directions hearing in order for the full court, when convened, to proceed immediately to sentence.¹³¹ The ability of the accused to object to any member of the court after the beginning of a trial is also being considered.
5. In order to keep Service law in line with civil law, as far as possible, additional sentencing powers at court martial will be introduced.¹³² The Bill will make provision for a court martial to award various custodial arrangements as possible sentences. For Service offenders under the age of 18, a sentence equivalent to a Detention and Training Order, which is the standard custodial sentence in the civil system for this age group, will also be introduced. Specifically this will make provision for a period of supervision after release which is not part of the current custodial order.

¹³⁰ MOD memorandum, January 2005

¹³¹ This proposal would reflect current civilian practice.

¹³² To reflect the changes introduced in the *Criminal Justice Act 2003*. A series of Library Research Paper's on the provisions of the CJA are available online at:
http://www.parliament.uk/parliamentary_publications_and_archives/research_papers/research_papers_2_002.cfm

6. Remove the automatic link between a sentence of imprisonment and dismissal from HM Services. The intention is to give the court martial a wider range of options in sentencing offenders and remove the difficulties arising when the CMAC has, on occasion, felt it necessary to vary the sentence awarded at court martial to one where dismissal does not automatically follow. However, it is acknowledged that a court is likely to be reluctant to retain an offender where it sentences him/ her to imprisonment, and that retention will only occur in the most exceptional circumstances.¹³³
7. Place the Services' legal aid scheme on a statutory footing and administer it on a unified basis. This proposal is intended to bring the Services into line with the civil system. However, the MOD has indicated that this proposal will remain on hold until proposed changes to the civilian system are implemented.¹³⁴
8. Establish the Judge Advocate General as the single appointing authority for Judge Advocates, both in post and in relation to all individual trials. Under this proposal the separate appointment of the Judge Advocate of the Fleet will lapse.
9. Increase the minimum qualification for appointment as a Judge Advocate to a seven year general qualification which reflects the minimum qualification for judicial office in a Magistrate's Court.
10. Regardless of the number of lay members sitting on a court martial, officers will be required to have held a commission for a minimum of three years in order to qualify as a member. This is an increase for the minimum membership of a DCM, although it also reflects the fact that this form of court martial will no longer exist. As at present, a warrant officer will only qualify for membership if the accused is below the rank that the warrant officer holds. However, two additional categories of officer or warrant officer excluded from membership of a court martial will be set down: any officer or warrant officer who is a member of the Service police and any officer who is a member of the Chaplaincy services. Lay members selected for a court martial trial will not all come from the same unit, ship or establishment.

4. The Reviewing Authority

In light of the views of the ECHR in *Cooper v. the United Kingdom* in relation to the role of the Reviewing Authority in court martial proceedings,¹³⁵ the MOD proposes in this Bill to abolish the review procedure for court martial convictions.

¹³³ In comparison, dismissal is not automatic for Service personnel convicted and sentenced to imprisonment by a civil court, but the Defence Council has the right to exercise discretion in this matter (MOD Memorandum, January 2005, para.24)

¹³⁴ These provisions are contained in the *Criminal Defence Service Bill* which is an enabling bill intended to implement two main proposals: the reintroduction of a financial eligibility (means) test and the transfer of the authority to grant the right to publicly funded representation away from the courts and into the scope of the Legal Services Commission. The bill has completed its passage through the House of Lords and has had its First Reading in the House of Commons. On publication of this paper no date had yet been set for Second Reading.

¹³⁵ This case is examined in section I B5

The MOD Memorandum of October 2004 states:

The Grand Chamber of the European Court did not find a violation in the particular circumstances of the Cooper case in its judgement in December 2003, but it is clear that the procedure was considered to be unusual and it attracted some criticism. It is a procedure which dates back to a time when a court martial would not necessarily have any lawyers involved either as judge, prosecutor or defence counsel. In addition there was no appeal to the CMAAC against sentence until 1997. In those circumstances it was important that a post trial procedure took place to ensure fairness to the defendant. However with the significant improvements now in place in the court martial system and the introduction of the same rights of appeal to the Court of Appeal (to CMAAC) as civilians, there is no longer a necessity to retain this non-judicial process which, although it can have advantages for some defendants, follows a determination by an ECHR compliant court.¹³⁶

B. Other Provisions

The MOD has signalled its intention to use the forthcoming Bill to propose amendments to other aspects of military law, and in particular in relation to Boards of Inquiry (BOI) procedure and the redress of grievances.

1. Harmonisation of Boards of Inquiry Procedure

As outlined in section I C above, the provision to convene Boards of Inquiry in the RAF and the Army is set down in statute. Naval BOI are conducted, in contrast, under the Royal Prerogative. BOI procedure across all three Services is largely similar. However, there is also a fundamental distinction in the Royal Navy in that evidence to a BOI is not given under oath.

As the MOD points out in its October 2004 Memorandum “there is no justification for removing the statutory basis for Army and RAF BOI”. The reasoning behind this is set out as follows:

The particular advantage of a statutory system is the ability to provide for additional powers and enforcement as well as greater transparency in serious or sensitive matters. Such provisions are widely regarded as important for inquiries to be effective.¹³⁷

As such, provision is expected to be made in the Bill to establish BOI procedure on a statutory basis across all three Services. This will effectively abolish the main differences between Royal Navy and RAF/Army BOI in that naval BOI will no longer be convened under the Royal Prerogative and evidence to the BOI will be required to be given under oath.¹³⁸

¹³⁶ Ministry of Defence Memorandum, October 2004, Annex E

¹³⁷ Ministry of Defence Memorandum, October 2004, para.40

¹³⁸ Ministry of Defence Memorandum, January 2005, para.7

As with the existing Acts the Bill will set out who may convene a BOI, and who may be a member of such a Board. The convening authorities will, as at present, be primarily based upon the chain of command and authorised by the Defence Council. However, the matters upon which inquiries may be held will be updated by secondary legislation. The January 2005 Memorandum states:

The provisions in the primary legislation are currently permissive, but the secondary legislation makes it mandatory to hold a BOI into, for example, death of those serving military sentences of imprisonment and detention in military prisons overseas, but such establishments no longer exist. We intend to provide for some matters (to be defined in secondary legislation) to be made the subject to a mandatory inquiry. In future we would expect, for example, unnatural death and serious injury to be so defined excluding combat deaths and injuries and in other exceptional circumstances which would have to be recorded.¹³⁹

The MOD has also indicated that, in principle, it would like to introduce a provision in the Bill setting out the power, exercisable by a judicial officer, to subpoena civilian witnesses to give evidence at a BOI. At present they are not obliged to do so. However, it is acknowledged that there will be limitations with regard to inquiries that may take place outside the UK or where the witness is not from the UK. The MOD argues:

This is to meet the circumstance, which has already occurred, where a key witness, who is not subject to Service law (and cannot be compelled to attend and give evidence) refuses to do so. This significant new power reflects the increasing use of civilian contractors in service activity. A subpoena could be used only where the evidence is considered essential to the Inquiry, and the existence of the power might itself be sufficient to compel a witness to attend voluntarily and certainly we would expect these to be issued only in exceptional circumstances.¹⁴⁰

The establishment of a single system of Service Inquiry, incorporating the present arrangements for BOI and regimental/unit inquiries, and extended to cover the Royal Navy, is also envisaged.

However, the MOD has reiterated that next of kin should not have the statutory right to attend Boards of Inquiry, except under exceptional circumstances and on the authority of the President of the Board, as is the case at present.

2. Redress of Grievances

Under current legislation Service personnel are entitled to elevate any complaint relating to his/ her service to the highest internal level, i.e. the Service Boards.¹⁴¹ However, they are unable to take a case to an Employment Tribunal, except in relation to the following:

- *Equal Pay Act 1970*
- *Sex Discrimination Act 1975*

¹³⁹ *ibid*, para.6

¹⁴⁰ *ibid*, para.8

¹⁴¹ *Queens Regulations for the Army*, paras. J.5.204-5.206

- *Race Relations Act 1976*
- *Working Time Regulations 1998*
- *Part time Workers (Prevention of Less Favourable Treatment) Regulations 2000*
- *Employment Equality (Religion or Belief) Regulations 2003*
- *Employment Equality (Sexual Orientation) Regulations 2003.*

After due consideration, the MOD expressed the opinion in its October 2004 memorandum that to bring Service personnel within the scope of ordinary contract and employment law would be undesirable on the basis that:

It would have implications for Service ethos and the chain of command on which operational effectiveness depends. The essence of the military relationship is that it is based on command and discipline. The introduction of civil contractual rights into an organisation which frequently requires immediate obedience to orders on penalty of criminal disciplinary action could therefore cause problems.¹⁴²

Therefore it is considered essential that internal grievance procedures are demonstrably fair and effective. On the basis of current arrangements the MOD has outlined several key areas where it is felt that the system could be improved:

- The statutory right to state a complaint to the Service Boards means that very minor matters can reach that level involving considerable, and sometimes, disproportionate time and effort. The Boards are legally unable to delegate these functions.
- Redress procedures have required a complaint to be considered at a number of levels before reaching the Service Board if it is not resolved to the satisfaction of the complainant earlier.
- In cases where there is a right to go to an Employment Tribunal (ET) the complainant is obliged firstly to use the redress system, and any ET application may be delayed pending its outcome.
- Currently the Service Board's power to award compensation is unclear.
- An officer has the right, after consideration by the relevant Service Board, to petition Her Majesty on any matter.¹⁴³
- There is scope for the perception that the present system results in findings which are overly supportive of the chain of command with a reluctance, sometimes, by higher elements of the chain of command to interfere with the decisions and opinions of their subordinates.

Consequently the following principles and proposals are under consideration as part of the work on the Bill:

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

¹⁴² Ministry of Defence Memorandum, October 2004, para.34

¹⁴³ This is a historical right derived from the fact that an Officer holds the Queen's Commission.

2. The principle that complaints should be resolved at the lowest level possible is paramount. However, when it becomes apparent that the CO (or a Higher Authority) cannot resolve a particular complaint, in order to avoid unnecessary delay, it should be elevated swiftly to the first level that is able to resolve it.
3. The establishment of a Tri-Service Redress of Complaints Panel. Although capable of dealing with a complaint from any of the Services, its membership would be flexible so as to reflect the parent Service of the complainant. Although not regarded as essential, consideration would be given to the desirability of including an independent member in certain cases. Individuals would, however, retain the right to proceed to the Service Boards, albeit only in relation to complaints that relate to decisions that would be made at Service Board level, such as the discharge or censure of an officer.

The creation of such a panel, the MOD suggests, has “the attraction of efficiency, speed and a greater degree of independence than exists at present” while it would also “unburden the Service Board of their current level of redress caseload, whilst not significantly reducing the highest level to which a complaint may be progressed”.¹⁴⁴

4. The establishment of a Tri-Service Secretariat to provide a focus for the complaints system. It is proposed that the Secretariat would ensure consistency of approach and standard formats in the submission of complaints; ensure the timely progress of a complaint through the system; be able to task other agencies with investigating specific issues of a complaint and where necessary raise a complaint direct to the Panel. However, establishing a Secretariat is not considered to require specific provision in the Bill.
5. There is no intention to weaken the constitutional relationship between officers and the Sovereign. However, as the proposed system envisages limiting the right of all complainants to proceed to the Service Boards, with the Panel being the final level of recourse in the majority of cases, it is considered that officers should only have the right of petition to the Sovereign in cases where a right of access to the Service Boards is retained.

¹⁴⁴ Ministry of Defence Memorandum, October 2004, para.36

III Pre-Legislative Comments

A. The Defence Select Committee

During the 2004-05 Session, the Defence Select Committee examined the MOD's proposals for the *Armed Forces Bill*.

In publishing its report the Committee took care to note that:

While we were content to consider the proposals set out in the MOD's Memorandum, the sketchy nature of some of the information, and the lack of any draft clauses, limits the extent to which we have been able to reach substantive and unqualified conclusions [...]

We have not attempted any consideration of more fundamental issues such as the need for a military system of law, or the underlying principles of the existing arrangements. These issues will, however, need to be considered in future procedures relating to the Bill.¹⁴⁵

In summary, the Committee reached the following conclusions:

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

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

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

10. We fully support the proposal in MoD's Memorandum that the right to elect trial by court martial should be universal [...]

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

¹⁴⁵ Defence Select Committee, *Tri-Service Armed Forces Bill*, HC64, Session 2004-05, para.6 and 7

ensure that the planned improvements for more expeditious courts martial are delivered.

14. MoD's Memorandum sets out a number of proposals relating to the courts martial system, these include proposals for a single prosecuting authority and a defence arrangement. It is not entirely clear to us why some of these will be matters for primary legislation and others will not [...]

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

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

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

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

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

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

22. The Memorandum outlines a number of proposals relating to Boards of Inquiry. Radical changes are not envisaged to the existing system, but are aimed at ensuring that there are improvements over the current arrangements. We are disappointed that MoD has taken the view that next of kin would only be allowed to attend Boards of Inquiry in exceptional circumstances. We recognise that there

may be reasons for not allowing next of kin to attend, for example, where the inquiry needs to consider highly classified material or where the operational environment may make attendance impracticable, but we consider that the presumption should be that next of kin should be allowed to attend and only in exceptional circumstances should they not be.

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

As a final consideration the Committee also recommended that in order to achieve effective parliamentary scrutiny of the Bill, a select committee stage should be included in the passage of the Bill. The report stated:

The form of scrutiny will depend to some extent upon progress with the Bill's preparation and the parliamentary timetable over the coming months. However, we recommend that it comprises a select committee stage, during which witnesses from the MOD and the Armed Forces could be examined, and a standing committee stage, at which the bill would be subject to line by line examination in public.¹⁴⁶

The committee report is available online at:

<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmdfence/64/64.pdf>

1. Government Response to the Defence Committee Report

The Ministry of Defence published its response to the Select Committee report in July 2005. The Government welcomed the Committee's initial report as "part of an ongoing process of pre-legislative scrutiny" and made the following comments in response to some of the Committee's conclusions:

9. We do not consider that the proposed changes to summary jurisdiction will increase the risk of a successful challenge to the summary system through the European Court of Human Rights. The increase in jurisdiction is by eight extra offences, all of which are dealt with at present by Royal Navy commanding officers. In addition, commanding officer will not be able to deal with any of these offences without the consent of higher authority [...]

14. The appointment, role and powers of an independent Service prosecuting authority require statutory authority. They are of sufficient importance to require them to be set out in primary legislation. On the other hand, the defence arrangements referred to by the Committee are simply a matter for agreement between the Services to provide a defence function for those personnel who wish to use it [...]

16. The chief objection to Review is one of principle. The Review procedure is based on the idea that a single Service officer acting as the reviewing officer might take a better view of the appropriate finding and sentence than the court

¹⁴⁶ Defence Select Committee, *Tri-Service Armed Forces Bill*, HC64, Session 2004-05, p.3

martial that heard the case originally. Review is arguably not compliant with the European Convention on Human Rights because it represents non-judicial interference in the decisions of an independent and compliant court. Review has the effect of delaying the defendant's right to appeal to a higher court. Furthermore, Review is not carried out in public and the independent prosecuting authority does not have the opportunity to make representations. This is not satisfactory in the wider interests of justice, including those of the victim [...]

Following extensive discussion with the Services, we have concluded that in a modern justice system benefits will be provided more appropriately in future by the safeguards of full rights of appeal against both finding and sentence to the Courts Martial Appeal Court and the availability of bail pending appeal.

22. Boards of inquiry are intended as a wholly internal procedure and are convened for Service purposes. The presence of families might inhibit the openness of witnesses, in addition to being impractical [...] It remains our view that next of kin should not attend boards of inquiry except in exceptional circumstances. We recognise, however, that next of kin will have a close interest in the board's work [...]

28. The Department is still considering the renewal arrangements and will come forward with proposals in due course. There is clearly a need for Service law to be kept up to date. But we are not convinced that a guaranteed place for primary legislation to renew the system of Service law would be needed as frequently as every three years. Indeed, doing so could mean that we would have insufficient evidence about how systems were working; the training need would be considerably increased; and there would be greater scope for confusion among personnel subject to Service law.

Additionally, since 2001 we have had the power to amend Service law by statutory instrument to make equivalent provision to changes in civilian criminal justice legislation. We expect to make similar provision in the Bill.¹⁴⁷

B. Other Comments

On 14 July 2005 the House of Lords held a debate on the legality of the chain of command in the Armed Forces. The debate was largely prompted by the case of Trooper Williams in early 2005 when charges that were dismissed by his CO were referred by the Director Army Legal Services to the Attorney General and subsequently to the Crown Prosecution Service (CPS) for possible trial in the civil courts. The case was subsequently dropped on 7 April 2005 by the CPS after it concluded, on review, that the possibility of a conviction was no longer realistic.

Speaking in that debate the former Chief of the Defence Staff, Lord Boyce, reiterated the importance of the CO in maintaining discipline and the effect that legal challenges to those powers could have on morale:

¹⁴⁷ *The Government's response to the House of Commons Defence Committee's Second Report of Session 2004-05 on the Armed Forces Bill, Cm6619, Session 2004-05*

While there may be purist legal arguments for ensuring that those who decide guilt and punish offenders are independent of the person accused, we interfere with the unique linkage between the commanding officer and his men at our peril.

It is the commanding officer who will know best the importance of enforcing discipline by punishing misconduct expeditiously, with the whole unit being aware that justice has been done, and been seen to be done. The need for prompt action is true of any disciplinary system—but on operations it can be even more vital to deal swiftly with misconduct. The importance of having effective means for the commanding officer to deal with misconduct in deployed ships and submarines—as I know well from my experience—or indeed in any deployed unit, from whatever service, is vital to maintaining morale.

The commanding officer's summary powers enable straightforward dealing with offences—face to face between the member of the unit and the commanding officer—and are based on trust, authority and impartiality. I am absolutely certain that they play a vital part in underpinning our Armed Forces remaining world class, capable of operations across the full spectrum from diplomacy to direct action. Incidentally, I would contend that they are also why our Armed Forces have high morale and relatively low levels of criminality.

Of course there must be safeguards; but we see far too many examples of Ministers being tempted to deal with concerns in an organisation by bolting on some sort of independent oversight or adjudication. If we continue travelling down this road, there will come a point where the close relationship between a commanding officer and his or her people will be lost—and if that is destroyed, the consequences will be serious [...]

The Armed Forces are under legal siege and are being pushed in a direction that will see such an order being deemed as improper or legally unsound. They are being pushed by people schooled not in operations but only in political correctness. They are being pushed to a time when they will fail in an operation because the commanding officer's authority and his command chain has been compromised with tortuous rules not relevant to fighting and where his instinct to be daring and innovative is being buried under the threat of liabilities and hounded out by those who have no concept of what is required to fight and win.¹⁴⁸

Former Chief of the Defence Staff the Rt Hon Field Marshal Lord Inge said:

[The legality of the chain of command] is an enormously important issue, because if the integrity and authority of the Armed Forces' chain of command is undermined it will have serious implications on morale and the fighting effectiveness of our Armed Forces.

A robust and, I stress, trusted chain of command is much more than a system for passing information and orders. Nor is it about discipline and punishment. Very importantly, it is about confidence and trust in the chain of command from the very bottom to the very top. Military command is very personal and very different to civilian life, not least because a military commander may have to lead men and women on operations where their lives may be in great danger.

¹⁴⁸ HL Deb 14 July 2005, c1235

The whole chain of command has a duty for its servicemen and servicewomen and must do its best to ensure that it balances the care with the rights and interests of the civilian population and the law. Troops are assured by their officers that if they act in good faith and obey the rules of engagement they will be supported [...]

It would be disastrous if servicemen lost faith in the chain of command, and there would be a danger that they might hesitate to use lethal force for fear of prosecution and their lives might be needlessly lost.

In addition, it would be disastrous if we undermined the military justice system, which is a free-standing criminal justice system equal to that of a civil jury trial. If people such as Trooper Williams and others are to fight on the nation's behalf in areas as dangerous as Iraq, they are entitled to expect not only that the chain of command will keep its word, but that the Army and therefore the nation will support them provided that they act in good faith.¹⁴⁹

Viscount Slim also questioned the consequences of the Trooper Williams case for overarching military ethos:

My Lords, I believe that the route this Government are taking is towards making a soldier a civilian, instead of making a civilian a soldier.

Heaping enormous extra outside responsibilities on the shoulders of a commanding officer when he is the key person in command in battle is wrong. He has around him people from health and safety, prosecutors, SIB investigators and a tame, and often very courageous, journalist.

The military ethos is being destroyed. It is appalling that the Government today are besotted with political correctness. It does not work in the military. You do not kill or beat the enemy or the terrorist with large doses of that.

As other noble Lords have mentioned, there is mistrust. There is a feeling that those higher in the chain of command are not with the troops, but are all the time are looking at and investigating them with people who have never been on the front line.¹⁵⁰

On the ability of the *Armed Forces Bill* to address these concerns, Lord Tunnicliffe stated:

Let us look forward and consider what is to be done. We must not take away the burden of accountability. It is crucial that our Armed Forces are accountable to a standard that commands the respect of the international community. That is one of the features that cause us to stand out as a nation. We must not do anything to take away that accountability. It is clear that the administration of justice by the agents of justice did not serve Trooper Williams, the Army or the reputation of the Army and our nation well. As individuals and as a government, we must

¹⁴⁹ HL Deb 14 July 2005, c1241-2

¹⁵⁰ *ibid*, c1247

constantly apply pressure for the agents of justice, within the military and without it, to be more efficient and to be more capable of timely and wise administration.

What else can we do? Together, we can work on the new Armed Forces Bill, on the tri-service Act, or whatever it is to be called. That can take account of the many problems faced by the modern military. It can meet the essential elements of being fit for purpose, of securing appropriate accountability and of assuring the men and women of our Armed Forces that it is fair and timely. If we can improve the law and its administration, we can maintain and improve the morale of our excellent Armed Forces.¹⁵¹

Lord Astor of Hever commented:

I understand that the Tri-Service Discipline Bill will be introduced in mid-November. We on these Benches have consistently set out our concerns about the Government's intentions. We shall consider carefully all the Bill's implications before we finalise our attitude to it, but our current view is that it must meet the following tests.

First, the essential authority of the commanding officer must not be undermined by the shadow of civil criminal proceedings or the ICC [International Criminal Court]. Secondly, the chain of command must not be compromised by unwarranted changes in the process of enforcing military law. Thirdly, there must be an understanding that military law and how it is applied must continue to reflect the circumstances under which the Armed Forces operate. Fourthly, the Bill must not compromise the ability or willingness of our Armed Forces to take necessary action in theatres of war [...]

We are witnessing a growing fear of legal vulnerability that will inevitably jeopardise the risk-taking culture that is so essential to the fighting spirit and operational success of the Armed Forces. In this climate of uncertainty troops may hesitate to use lethal force for fear of prosecution. Their lives may be lost as a result. In addressing these issues, we must start with a recognition that the military is different from the society at large. The Government failed to do that during the passage of the Armed Forces (Pensions and Compensation) Bill [...]

I want to make it clear that we on these Benches do not for one second seek to defend any soldier of any nation who abuses his or her uniform and commits atrocities against civilians or helpless prisoners. Servicemen and women are not above the law. But we cannot allow the trend of political correctness to infuse the Armed Forces undermining trust, discipline and command relationships. Above all, we cannot afford to see the mechanisms by which military discipline is maintained—the authority of the service boards, the court martial system and summary jurisdiction by commanding officers—undermined any further. They are already on the verge of having been irreparably damaged.¹⁵²

A copy of the full House of Lords debate is available online at:

http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds05/text/50714-04.htm#50714-04_head3

¹⁵¹ HL Deb 14 July 2005, c1244

¹⁵² HL Deb 14 July 2005, c1258-9

In early July 2005 the Standing Committee on Delegated Legislation also considered the *Draft Army, Air Force and Naval Discipline Act (Continuation) Order 2005*. During that debate reference was made by several members of the committee to the aims of the forthcoming Bill. In his comments Shadow Defence Minister, Andrew Robathan, argued:

What concerns me about the tri-service Act, which the Minister mentioned so fully, is that in trying to make soldiers, sailors and airmen like other men, and women, we might end up undermining the very ethos with which they serve [...]

The direction in which the Government are going is that they are civilianising military discipline. We must take into account the role of the commanding officers, who is, as it says in the Select Committee report on military discipline, pivotal [...]

We need to consider who is responsible for enforcing discipline. Is the role of the commanding officer [...] going to be undermined by the Attorney General, the European Convention on human rights and other matters?

We intend to put down a marker on that point [...] We think that there is a worrying prospect of an ill-considered and inappropriate Bill on service discipline [...] We do not know, but the Bill may fundamentally misunderstand the differing nature, purpose and role of the three services. I fear that, as has been happening for the last several years, the Bill will further undermine the discipline of the armed forces and therefore undermine their ability to do their job.¹⁵³

The full text of the Standing Committee debate is available online at: <http://www.publications.parliament.uk/pa/cm200506/cmstand/deleg6/st050707/50707s01.htm>

¹⁵³ *Sixth Standing Committee on Delegated Legislation*, 7 July 2005, c5-7

IV Issues

There are several issues related to military discipline and the regulations that govern its procedures which have received significant attention over the last few years, and as such may take on greater relevance with the passage of this Bill.

Among the most pertinent are concerns over the role of the Service Prosecuting Authorities following the collapse of a second trial in November 2005 against Service personnel charged with offences committed in Iraq, and the ongoing arguments for establishing an independent military ombudsman in the aftermath of events at the Deepcut army barracks.

A. Prosecutions of Service Personnel in Iraq

As of 1 March 2005 164 investigations into incidents involving Service personnel in Iraq had been launched.¹⁵⁴ Of those, several have been directed for trial by court martial, including a case against four members of the Royal Regiment of Fusiliers on charges relating to the alleged abuse of Iraqi civilians,¹⁵⁵ and a case against seven members of the 3rd Battalion, the Parachute Regiment on a joint charge of murder.¹⁵⁶ A further case, against Trooper Williams, was referred by the Attorney General to the Crown Prosecution Service for possible trial in the civil courts.¹⁵⁷

In April 2005 the case against Trooper Williams was dropped by the CPS due to lack of evidence. In November 2005 a further case against the members of the Parachute Regiment was also dismissed by the court martial judge because of a lack of credible evidence and concerns over the integrity of witnesses. Both of these cases are examined below.

On 19 July 2005 the Attorney General announced that two further cases against British Service personnel have been directed for trial by court martial, including a case against four members of the Scots and Irish Guards accused of manslaughter, and the case against Colonel Jorge Mendonca and six other members of the Queen's Lancashire Regiment and the Intelligence Corps.¹⁵⁸ The latter case has attracted particular comment as it represents the first case brought against British Service personnel under the provisions of the *International Criminal Court Act 2001* and the first case against an officer for "negligently performing a duty", resulting from operations in Iraq.¹⁵⁹ Although

¹⁵⁴ HC Deb 3 March 2005, c1341W

¹⁵⁵ HL Deb 14 June 2004, c22-24WS

¹⁵⁶ HL Deb 3 February 2005, c17WS

¹⁵⁷ The civil courts have concurrent jurisdiction in certain cases, including murder. A series of statements on the Trooper Williams case were made by the Attorney General: HL Deb 14 June 2004, c22-24WS; HL Deb 7 September 2004, c70-WS and HL Deb 7 April 2005, c92WS

¹⁵⁸ HL Deb 19 July 2005, c80WS

¹⁵⁹ Library Research Paper RP01/39 *The International Criminal Court Bill* examines the ICC in more detail. A copy of the formal charge sheet is available online at:

<http://www.publications.parliament.uk/pa/ld200506/ldlwa/50719ws1.pdf>

charged under the ICC Act, the case will be heard by a military court martial and not by the ICC in The Hague.¹⁶⁰

1. R v. Kevin Williams

The case of Trooper Williams, and some of the reactions to it, is examined briefly in section III B above. One of the main criticisms in this case was the ability of the Director Army Legal Services to refer the case to the Attorney General for possible trial in the civil courts, despite the fact that Trooper Williams' CO, on the advice of the ALS, had dismissed the charges against him.

In a statement on 7 April 2005 the Attorney General stated:

This matter was referred to me by the Director Army Legal Services on behalf of the Adjutant General, following discussions with the Chief of General Staff and the Commander in Chief (Land) in March 2004 after the commanding officers had "dismissed" the charges against Trooper Williams. The matter could not, because of the action of the commanding officer, be dealt with by way of court martial. It was referred to me to consider further action.¹⁶¹

Following a decision by the CPS to prosecute, the trial then collapsed in April 2005 after the Director of Public Prosecutions decided, on review, that there was no longer sufficient evidence to gain a realistic prospect of conviction. Trooper Williams was subsequently acquitted of all charges. In a CPS statement, the First Senior Treasury Counsel, Richard Horwell, outlined the judgement of the court:

Your ruling highlighted the fact that in this very difficult case, experienced and well intentioned lawyers not only could but had come to quite contrary decisions as to whether Trooper Williams should be prosecuted for the killing of Mr Said.

There is, of course, a duty upon the CPS constantly to review every decision to charge. The original decision by the CPS to prosecute Trooper Williams was taken after the most careful consideration but, having been taken, it has been subject to that process of review, particularly as new evidence has emerged.

During the dismissal application, the defence called evidence from very senior Army officers as to the unique dangers which British forces faced in Iraq in 2003. You described those dangers in this way:

'The troops worked in dreadful physical conditions, never knowing when, in a moment, an apparently benign situation would turn into a lethal attack'.

Some, but not the full extent, of that evidence was prefaced in prosecution statements taken from other members of Trooper Williams' squadron.

Subsequent to the applications of February 2005, and noting your Ladyship's observations, the CPS again reviewed the case at the highest level and

¹⁶⁰ This case was the subject of an adjournment debate in the House of Commons on 14 June 2005 (HC Deb 14 June 2005, c227-242)

¹⁶¹ HL Deb 7 April 2005, c92WS

considered the importance of the factual disputes between Trooper Williams and Corporal Blair following, in particular, the evidence which had been called and other evidence which by then was available. The evidential test was further reviewed. In the light of the further evidence, and having revisited the original decision to prosecute, the Crown now takes the view that the factual disputes between Trooper Williams and Corporal Blair no longer have the same degree of importance once placed upon them. The appropriate test in law has always been Trooper Williams's actual perception of danger and he has consistently said that in a moment of crisis he believed that Corporal Blair's life, and that of his own, were at risk.

It is now accepted that there is no longer a realistic prospect of conviction. That is not, of course, the test which this Court had to apply during the recent application to dismiss the evidence. It is a higher test. It is a test which inevitably requires an element of subjectivity. But that test having been applied with that conclusion, Trooper Williams must have the benefit of it, hence the offering of no evidence this morning and the not guilty verdict which was returned.¹⁶²

Commenting on the collapse of the trial, an article in *The Guardian* suggested:

The decision by the Crown Prosecution Service to indict Trooper Kevin Williams - the first British soldier deployed in Iraq to be charged with murder - was deeply resented by army commanders who argued that it was unjust, took no account of the dangers British troops had faced, and seriously undermined morale in the armed forces.¹⁶³

2. 3rd Battalion, the Parachute Regiment

On 3 November 2005 Judge Advocate General Jeff Blackett, presiding over the court martial trial of the seven members and ex-members of the Parachute Regiment charged with the murder of an Iraqi civilian, dismissed the case and directed that verdicts of 'not guilty' be directed against all of the accused. In taking this decision, concerns were raised by the Judge over the adequacy of the evidence presented and the integrity of the Iraqi witnesses.

In a statement to the House on 7 November 2005 the Minister for the Armed Forces, Adam Ingram, defended the decision of the Army Prosecuting Authority to prosecute in this case. He stated:

The trial of the seven members and former members of the 3rd Battalion the Parachute Regiment concluded on 3 November in Colchester, after the Judge Advocate General directed the board to find all seven defendants not guilty. The trial related to an incident in Iraq which occurred at the roadside in Maysan province in southern Iraq on 11 May 2003, following which Mr. Nadhem Abdullah, an Iraqi citizen, died. The seven individuals were jointly charged with murder and violent disorder.

¹⁶² Crown Prosecution Service Press Release, 7 April 2005:
http://www.cps.gov.uk/news/pressreleases/120_05.html

¹⁶³ "Troops murder charge is dropped". *The Guardian*, 8 April 2005

I am limited as to what I can say about the Judge Advocate General's decision, as this is a matter for my noble and learned Friend the Attorney-General. However, it may be helpful if I place the trial in its operational context. The end of the trial has raised the question of why the soldiers faced those serious charges. Soldiers understand that they are required to operate within the law and their rules of engagement and can be held to account for their actions. All soldiers in Iraq and elsewhere receive a briefing on that. They also receive training in the law of armed conflict as part of their annual training. Soldiers are not above the law [...]

In this case, the Royal Military Police was operating in a hostile and volatile environment, which clearly impacted on some aspects of its investigation, both in terms of its scope and its timing. The decision to prosecute was taken by the Army prosecuting authority based upon the evidence gathered by the RMP [...]

Everyone is presumed innocent unless and until they are found guilty. The four servicemen and three ex-servicemen were provided with every assistance to enable them to put their case: a unit defending officer was provided for each of them and acted as their link with their defence team; they were each defended by a QC, funded by the Army criminal legal aid authority; and they were all afforded full welfare provision throughout the period up to and including the trial—and this continues.

The Judge Advocate General made it clear that he had no criticism of the Army prosecuting authority in bringing the case to trial. This court martial demonstrates the Army's commitment to transparency and accountability. It was held in open court, where it was open to full public scrutiny, and to the same standards of justice and independence that are present in the civilian justice system. All the parties and authorities involved, military and civilian, acted properly and in good faith.

The British Army is not complacent. Following all operational commitments, a process of continuous and determined professional review is undertaken. The comments of the Judge Advocate General are being considered and a comprehensive review of the 3 Para trial is under way. In addition, the Army announced a review following the trial earlier this year of members of 1 Royal Regiment of Fusiliers. The review is being conducted on behalf of the Chief of the General Staff by a senior experienced officer and is looking at issues arising from concluded courts martial relating to deliberate acts of abuse. It will seek to learn lessons and look at wider issues emerging from trials and other reports, in order to safeguard and improve the Army's operational effectiveness. Any findings can be published only after all the courts martial have concluded, so publication is therefore likely to be some time in the future.

This case has shown our determination to ensure that justice is done irrespective of the difficulties.¹⁶⁴

¹⁶⁴ HC Deb 7 November 2005, c21-22

However, in responding to the Government's statement the Shadow Secretary of State for Defence, Michael Ancram, commented:

the prosecution of those seven soldiers had a serious effect on morale, and the collapse of the prosecutions has created even greater uncertainty and doubts in the mind of our armed forces.

Of course, where a crime has been committed and the evidence substantiates it, it must be prosecuted, but that was clearly not the case here. In his decision to stop the cases, the Judge Advocate General described the investigation of the case as "inadequate" and much of the evidence as "inherently weak or vague". He referred to witnesses having

"colluded to exaggerate and lie",

and he referred to witnesses seeking "blood money". The bringing of this case therefore raises some serious questions. Who decided that these prosecutions should proceed? Was the Attorney-General involved in that decision? Was a political overview sought and was one given? Who was paying for the witnesses and who decided what they should be paid and for what?

We need urgent answers to those questions. They also form part of a wider concern about the serious damage to morale arising from doubtless well-intentioned but ultimately unsubstantiated prosecutions such as these and that against Trooper Williams, which also collapsed earlier this year. We must never forget that our forces are operating in a highly dangerous and hostile environment where confidence is essential and where nearly 100 of our soldiers have lost their lives. They cannot operate effectively with the spectre of the lawyer metaphorically looking over their shoulder.¹⁶⁵

The Liberal Democrat Defence Spokesman, Michael Moore, argued:

Serious military justice issues arise from the case. I hope that we will consider them in the Armed Forces Bill in due course. It is surely a fundamental principle in our country that, as the Minister said, our armed forces must never be above the law. However, is not the quid pro quo that any prosecution should be brought only on evidence gathered from proper forensics, timely witness statements and, in a murder case, some basic evidence that would allow a post mortem? The Judge Advocate General was scathing in his opinion of the investigation that the Royal Military Police conducted. Surely the lack of resources available to the investigation team was the basic problem. For that, Ministers should be held fully accountable.¹⁶⁶

An editorial in *The Daily Telegraph* commented:

The judge said he had no criticism of the prosecution or the Army Prosecuting Authority (APA). However, given the unreliability of the witnesses and the shortcomings of the investigators, it is pertinent to ask why this case was ever brought. The suspicion remains that the APA was influenced by political as well

¹⁶⁵ HC Deb 7 November 2005, c22-23

¹⁶⁶ *ibid*, c25

as judicial considerations in bringing the case to trial on the evidence produced by the RMP. In other words, it thought it better, given the volatile conditions in which British forces operate in Iraq and opposition to the war at home, to air the case in court rather than to decide not to proceed. Such a course of action is understandable, but it is very hard on the defendants, and costly to the taxpayer.

Whatever the APA's thinking, the collapse of the trial underlines the need for it and the RMP to co-operate earlier in investigations, as would happen in a civilian case. With the seven, the authority was not brought in until 13 months after the alleged murder. The case also calls into question the competence of the RMP's Special Investigations Branch.

It is right that the Army, one of our finest institutions, should be held to the highest standards of professional conduct. But that in turn demands that legal proceedings against it should be conducted more stringently than in the case of the acquitted seven.¹⁶⁷

In an article in *The Daily Express*, Major Charles Heyman of Jane's Defence Consultancy is also reported as suggesting that "the prosecuting authorities have got to get their act together before they destroy the morale of fine upstanding soldiers. No soldier should get away with gratuitous murder but talking to soldiers now, they feel totally exposed".¹⁶⁸

Commenting on the impact of these cases for the passage of the forthcoming *Armed Forces Bill*, Humphrey Crum Ewing, writing in *RUSI Newsbrief* in August 2005, suggested:

Implications for the Tri-Service Discipline Bill

It would certainly seem that what the Government has been doing, and the thrust of the advice that it is being given by its various sets of lawyers, will result in a far more difficult Parliamentary passage for the promised Tri-Service Discipline Bill than originally anticipated. At the heart of this difficulty is the conflict between two different views of the proper nature of the law applicable to the British Armed Forces. One (idealist) view takes the position that 'the Law' should be exactly the same for the Armed Forces as it is for everyone else, and that it should be exactly the same in all circumstances. The other (realistic) view is that the law – and the lawyers who operate it – must recognize the difference between the imperatives of 'active service' or 'operational conditions' on the one hand, and procedures that can be applied in the abstract and without the driving imperatives on the other. Both these views have their supporters in Parliament and – apart from a few extremists on either side – all participants in the debate go some way to recognizing something of the validity of both views. But the realists are deeply anxious about the apparent current supremacy of the idealists, both in terms of legislation and in terms of executive action by 'the Authorities'.¹⁶⁹

¹⁶⁷ "Army trials need more care and co-operation", *The Daily Telegraph*, 4 November 2005

¹⁶⁸ "Why were our hero soldiers ever charged?", *The Daily Express*, 4 November 2005

¹⁶⁹ "Around and about Westminster: a period of wait and see", *RUSI Newsbrief*, August 2005

B. An Independent Military Ombudsman

In March 2004 Surrey Police published its final report into the death of four Army recruits at the Deepcut army barracks between 1995 and 2002. Among its conclusions, Surrey Police contended that:

At the highest level, the system of accountability would benefit from external oversight. This view echoes [the] contention that there is a need for a military ombudsman to safeguard the interests of soldiers when and if internal accounting procedures fail to deliver.¹⁷⁰

In response to the recommendations of Surrey police, the MOD announced in May 2004 its intention to introduce independent inspection of the training, care and welfare provided by the Armed Forces. The Adult Learning Inspectorate (ALI), established under the *Learning and Skills Act 2000*, was subsequently given responsibility for routinely inspecting training establishments across all three Services, including initial training establishments such as Deepcut.

However, a number of commentators have argued that these measures do not go far enough and calls have continued for an independent military ombudsman to be established in order to safeguard the welfare of recruits and provide an impartial avenue of complaint for Service personnel outside the chain of command.

In its *Duty of Care* report in March 2005 the Defence Select Committee supported the establishment of an independent military complaints commission. It concluded:

420. Although we recognise that the chain of command is central to the culture and ethos of the Services, we do not believe that a Military Ombudsman or an external complaints mechanism would constitute an obstacle for the chain of command [...]

421. As we noted earlier in this report, society is changing. One aspect of that change is the increased expectation among the general population that public bodies will be subject to some form of independent scrutiny of their actions. The Independent Police Complaints Commission (IPCC) was established to provide that independent scrutiny for the police. The IPCC was established at a time when public confidence in law enforcement was low. There were concerns that the IPCC would lead to the politicisation of the police force or would be such an intolerable additional burden that police effectiveness would be reduced. In the event, both the public and the police have benefited from the existence of the IPCC.

422. We have sought to identify a model for the Armed Forces that would provide similar benefits of independent scrutiny as the IPCC does for the police without undermining the operational effectiveness of the Services, the maintenance of which this report acknowledges to be of fundamental importance.

¹⁷⁰ Surrey Police, Deepcut Investigation Final Report, March 2004, p.9. A copy of the report is available online at: http://www.surrey.police.uk/news_item.asp?area=12&itemID=4102&division=

423. We therefore recommend that an independent military complaints commission be established. It would have the authority and capability to make recommendations which would be binding on the Armed Forces. It would also have a research capacity that would enable it examine trends that it had identified.

424. It would be for the commission itself to decide whether to undertake an investigation, but we would expect it to take into account the seriousness of the allegation. The commission should have the authority to consider past cases. In deciding whether to pursue a past case, the commission might consider any investigations or inquiries that had already been conducted as is the case for the Police Ombudsman for Northern Ireland which has retrospective powers.

425. The primary goal of the commission would be to resolve complaints made to it. If the commission decided to pursue a complaint, it would have the right of access to all documentation, and to Service personnel, in order to enable it to establish whether the correct procedures had been followed and whether there were matters that required criminal investigation. We do not envisage that, for matters unrelated to duty of care, the commission would replace existing grievance mechanisms.

426. The commission should be required to make an annual report to Parliament.

427. We recommend that the commission be established in such a way as to assure both complainants and the public of its independence from the Armed Forces. We believe that the commission would help MoD identify lessons that need to be learned. We also believe that a truly independent scrutiny mechanism would contribute to bolstering public confidence in the Services.¹⁷¹

In its response to the Committee's report the MOD stated:

The system for making and dealing with complaints, on all matters of concern to an individual, is comprehensive. It is intended to ensure that a complaint, if it cannot be disposed of at the lowest working level – and this is always a prime responsibility of a Commanding Officer - can be considered at successively higher levels. Welfare staffs are also available at units to give face-to-face advice to those who are troubled. The Department acknowledges, however, that the process is slow and may not always be perceived as accessible and fair.

Accordingly, changes were introduced to the system from 1 April 2005 to harmonise procedures concerning harassment complaints across the three Services and the MOD Civil Service, and to make the process more transparent and quicker. The Armed Forces Bill, which we plan to introduce later this year, will propose further changes to the resolution of complaints, as outlined in the Department's memorandum to the Defence Committee and we will consider the case for an independent element as part of those changes: there are different

¹⁷¹ Defence Select Committee, *Third Report: Duty of Care*, HC 63-I, Session 2004-05, paras.420-427

models for this, in this country and abroad, and their implications need detailed examination.¹⁷²

As outlined in section II B2 above, the forthcoming *Armed Forces Bill* intends to make provision for the establishment of a Tri-Service Redress of Complaints Panel. As part of that panel, the MOD proposes to include, in certain circumstances, an independent member. It does not intend, however, for the panel to be outside the military chain of command. Consequently, questions over whether this proposal goes far enough may arise as the Bill progresses.

¹⁷² *The Government's response to The House of Commons Defence Committee's third report of session 2004-05 on Duty of Care*, Cm6620, July 2005

Appendix One – List of Summary Offences (Army and RAF)

Service Offences

Army¹⁷³

s.29	Offences concerning sentries
s.29 A	Failure to attend for duty, neglect of duty etc
*s.30 (c)	Taking stores etc, abandoned by the enemy
s.33 (1) (a)	Using/ offering violence to a superior officer
(b)	Threatening/insubordinate language
s.34	Disobeying lawful commands
*s.34A	Failure to provide a sample for drug testing
s.35	Obstructing provost officers
s.36	Disobedience to Standing Orders
s.38	AWOL
s.39	Failure to report or apprehend deserters or absentees
*s.42 (1) (a)	Malingering (falsely pretending to be sick or disabled)
s.43	Drunkenness
s.43A (a)	Fighting
(b)	Threatening etc words/ behaviour
s.44	Damage to/loss of public/service property
*s.44A (1) (c, d &e)	Unlawful disposal of, damage to aircraft etc
*s.44B (2)	Conduct likely to impair the efficiency or effectiveness of signal equipment or to interfere with or modify a message or signal
s.45	Misapplication or waste of public/service property

¹⁷³ *Commander's Guide to Summary Dealing, Annex A*

- s.46 Losing or making away with clothes, arms, ammunition or equipment issued
- s.47 (c) Damaging billets etc
- s.50 Inaccurate certification of ships or aircraft
- s.54 (2) Improperly releasing or allowing persons to escape etc (not wilfully)
- s.55 Resisting arrest
- s.56 Escaping from confinement
- *s.60 Unauthorised disclosure of information
- *s.61 making false answer on attestation
- *s.62 (1) (a, b & c) Making false official documents or tampering with official documents
- *s.65 Ill-treating subordinates
- *s.66 Disgraceful conduct of a cruel, indecent or unnatural kind
- *s.68 Attempting to commit a military offence (only if that offence itself could be dealt with summarily)
- s.69 Conduct to the prejudice of good order and military discipline
- *s.70 Committing a civil offence (only those offences in CSD (A) R 00 Sch2)¹⁷⁴
- *s.75 J (3) Failure to attend a hearing

* COs should normally consult Higher Authority, any relevant policy guidance in the Queens Regulations or Army General Administrative Instructions and/or Army Legal Services (ALS) before dealing summarily with such charges and also with any charge of dishonesty, indecency, drug abuse, drink/driving and tampering or interfering with vehicles.

¹⁷⁴ *Custody and Summary Dealing (Army) Regulations 2000*

RAF¹⁷⁵

Service offences which can be dealt with summarily by an RAF CO are largely identical to those in the Army. However, the *Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000* outline the following exclusions:

- | | |
|----------|------------------------------------------------------------|
| s.47 (c) | Damaging billets etc |
| s.65 | Ill-treating subordinates |
| s.66 | Disgraceful conduct of a cruel, indecent or unnatural kind |

Civil Offences**Army¹⁷⁶**

1. Common assault or battery, contrary to section 39 of the Criminal Justice Act 1988.
2. Driving without due care and attention or driving without reasonable consideration contrary to section 3 of the Road Traffic Act 1988.
3. Dangerous riding of a cycle, contrary to section 28 of the Road Traffic Act 1988.
4. Riding a cycle without due care and attention or riding a cycle without reasonable consideration for other persons using the road contrary to section 29 of the Road Traffic Act 1988.
5. Taking a conveyance without having the consent of the owner or other lawful authority or, knowing that a conveyance has so been taken, driving it or allowing himself to be carried in it or on it contrary to section 12 (1) of the Theft Act 1968.
6. Taking a pedal cycle without having the consent of the owner or other lawful authority or riding a pedal cycle knowing it to have been so taken contrary to section 12 (5) of the Theft Act 1968.
7. Destroying or damaging property contrary to section 1 (1) of the Criminal Damage Act 1971 where the amount of damage does not exceed £2000.
8. Getting on to or tampering with a motor vehicle contrary to section 25 of the Road Traffic Act 1988 where the vehicle is on a road.

¹⁷⁵ *Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000*

¹⁷⁶ *Custody and Summary Dealing (Army) Regulations 2000, Schedule 2*

9. Unlawful possession of a controlled drug contrary to section 5 (2) of the Misuse of Drugs Act 1971.
10. Theft contrary to section 1 (1) of the Theft Act 1968.
11. Interfering with a vehicle contrary to section 9 of the Criminal Attempts Act 1981.
12. Driving a motor vehicle with excess alcohol contrary to section 5 (1) (a) of the Road Traffic Act 1988.
13. Being in charge of a motor vehicle with excess alcohol contrary to section 5 (1) (b) of the Road Traffic Act 1988.
14. Making off without payment contrary to section 3 (1) of the theft Act 1978 where the payment required or expected does not exceed £100.

RAF¹⁷⁷

Civil offences are the same as the Army, except with reference to Offence 7 where the *Pre-Charge Custody and Summary Dealing (RAF) Regulations 2000* set the maximum as £1000, and with reference to offence 14 where the maximum is £50.

¹⁷⁷ *Pre-Charge Custody and Summary Dealing (Royal Air Force) Regulations 2000*, Schedule 1

Appendix Two – Powers of Summary Punishment (Army and RAF)

Army¹⁷⁸

Appropriate Superior Authority:

- Forfeiture of seniority (officers only)
- Fine of up to 28 days' gross pay (if the charge is a civil offence then any fine must not exceed the maximum permitted by civil law).
- Severe reprimand or reprimand
- Stoppages of pay

Commanding Officer:

- Detention up to 28 days (this can be extended to 60 days with approval from Higher Authority) (Awarded to the rank of Private in the Army only) A punishment of detention cannot be awarded for civil offences 2, 3, 4, 6 or 8 listed above.
- Fine of up to 28 days' gross pay (if the charge is a civil offence then any fine must not exceed the maximum permitted by civil law).
- Stoppages of pay (stoppages exceeding 14 days' pay must be approved by Higher Authority)
- Severe reprimand or reprimand (non-commissioned officers only)
- Reduction to the ranks (Awarded to Lance Corporals and equivalent in the Army only)
- Deprivation of acting rank
- Minor punishments (these may not be awarded in addition to detention for the same charge):
 - Admonition
 - Extra guard duties up to 3 days (may only be awarded for an offence related to guard duties)
 - Restriction of privileges up to 14 days

Subordinate Commander:

- Fine of up to 7 days' gross pay (if the charge is a civil offence then any fine must not exceed the maximum permitted by civil law).
- Stoppages of pay (up to 7 days' pay)
- Reprimands (NCO's only)
- Minor punishments:
 - Admonition

¹⁷⁸ *Commander's Guide to Summary Dealing, Annexes B, C and D*

Restriction of privileges up to 7 days

Extra guard duties up to 3 days (may only be awarded for an offence related to guard duties)

A Subordinate Commander is restricted from dealing with an NCO above the rank of Corporal.

A Subordinate Commander below the rank of Captain may not award either a fine or stoppages of pay.

RAF¹⁷⁹

Appropriate Superior Authority:

- Forfeiture of seniority (except Warrant officers)
- Fine of up to 28 days' gross pay (if the charge is a civil offence then any fine must not exceed the maximum permitted by civil law).
- Severe reprimand or reprimand
- Stoppages of pay

Commanding Officer:

- Detention up to 28 days (awarded only to airmen below the rank of Corporal in the RAF) (this can be extended to 60 days with approval from Higher Authority).
- Fine of up to 28 days' gross pay (if the charge is a civil offence then any fine must not exceed the maximum permitted by civil law).
- Severe reprimand or reprimand (NCOs only)
- Deprivation of acting rank (acting warrant officer or NCO)
- Stoppages of pay

- Minor punishments:
Admonition (NCO's, acting warrant officers and airmen below the rank of Corporal)
Restriction of privileges up to 14 days (airmen below the rank of Corporal)
Extra guard duties up to 3 days (may only be awarded for an offence related to guard duties) (airmen below the rank of Corporal)

Subordinate Commanders:

1) If of the rank of Squadron Leader or above:

a) to an NCO, other than an acting warrant officer:

¹⁷⁹ *Manual of Air Force Law*, Volume I, para.60-61 and *Pre-Charge Custody and Summary Dealing Regulations 2000*, para.8

- Severe reprimand or reprimand
- Stoppages of pay (up to 7 days' pay)
- Admonition

b) to an aircraftman or woman:

- Fine up to 7 days' pay
- Stoppages of pay (up to 7 days' pay)
- Restriction of privileges up to 14 days
- Extra guard duties up to 3 days (may only be awarded for an offence related to guard duties)
- Admonition

2) If of the rank of flight lieutenant or below:

a) To an NCO of the rank of Corporal:

- Reprimand
- Admonition

b) To an aircraftman or woman:

- Fine of up to 3 days' pay
- Stoppages of pay (up to 3 days' pay)
- Restriction of privileges up to 7 days
- Extra guard duties up to 3 days (may only be awarded for an offence related to guard duties)
- Admonition

Appendix Three – Summary Offences and Powers of Punishment (Royal Navy)

Offences

Under Section 52B (7) of the *Naval Discipline Act 1957* all offences against military law (both Service and civil) which are triable by court martial are capable of being tried summarily, with the following exceptions:

- Offences which, before the passing of the *Human Rights Act 1998*, were punishable by sentence of death, including:
 - s.2 (1) (2) (a) Misconduct in action (with intent to assist the enemy)
 - s.3 (1) (a,b,c,d & f) Assisting the enemy
 - s.4 Obstructing operations, giving false air signals etc (with intent to assist the enemy)
 - s.9 Offences of mutiny (where the object or one of its objects is the refusal or avoidance of any duty or service against or in connection with operations against the enemy, or the impeding of the performance of any such duty or service)
 - s.10 Failure to suppress mutiny (with intent to assist the enemy)
 - s.42 Where the civil offence is treason
- An offence under section 42 where the civil offence is one for which the sentence is fixed by law as life imprisonment (i.e. murder).

However, as pointed out in the *Manual of Naval Law*:

In practice the limits imposed by the *Naval Discipline Act* (NDA s.52D (8)), restricting the Commanding Officer's powers of summary punishment to a maximum of three month's detention, impose a limit on his competence to deal adequately and appropriately with the more serious offences.¹⁸⁰

It also suggests that a number of offences should normally be tried by court martial, regardless of the summary jurisdiction of a CO. Paragraph 0821 states:

Whether or not to apply for a particular case to be tried by court martial is a matter for the judgement of Commanding Officers. As a guide, however, Commanding Officers should bear in mind that the following types of offences should normally be tried by court martial:

¹⁸⁰ *Manual of Naval Law, Volume I*, para.0104

Using or offering violence to a commissioned officer
 Woundings and aggravated assaults
 Sexual offences
 Serious drug offences
 Arson and serious cases of wilful damage
 Forgery
 Serious dishonesty
 Offences likely to merit stoppages over 28 days pay.

This list is not exhaustive and there may be less serious cases where trial by court martial is desirable. Often a Commanding Officer may conclude or be advised that a particular charge, or series of charges, (if proved) may well merit a punishment in excess of his summary powers. In other cases the legal complexity of the charges, the number of external witnesses, or the conflicting nature of the evidence, may provide a good reason for a Commanding Officer to apply for court martial [...] The age, rating and status of the offender may be relevant considerations in deciding whether or not to apply for trial by court martial.¹⁸¹

All cases in which the accused is an officer must be dealt with by the Commanding Officer and not delegated to a subordinate.¹⁸²

Punishments

In contrast to the Army and RAF, Royal Navy summary powers of punishment are also more severe extending to dismissal; 90 days detention and, for substantive senior rates and leading hands, reduction in rate, all of which may, in exceptional circumstances, be combined. However, approval of summary punishments must be given by a higher Authority/ ASA.¹⁸³

Powers of a Commanding Officer:

Under Section 43 of the NDA the following punishments may be awarded summarily by the Commanding Officer:

- Dismissal from Her Majesty's Service
- Detention for a period of up to 90 days
- Demotion
- Fine
- Severe reprimand or reprimand
- Stoppages of pay
- Minor punishments:
 - Reduction to the second class for conduct
 - Deprivation of Good Conduct Badges and the Long Service and Good Conduct Medal
 - Extra work and drill for up to 14 days

¹⁸¹ *Manual of Naval Law, Volume I*, para.0821

¹⁸² *ibid*, para.0806

¹⁸³ Further detail is available in the *Manual of Naval Law, Volume I*, ch.9

Stoppages of leave for up to 30 days
Forfeiture of pay for improper absence
Extra work or drill for no more than 2 hours a day up to 7 days
Admonition

Powers of Subordinate Officers:

1) Executive Officers (XO):¹⁸⁴

a) If the XO is a Commander:

- A fine up to 10 days' pay
- Stoppages of pay (up to 10 day's)
- Extra work and drill for up to 14 days
- Stoppages of leave for up to 24 days
- Forfeiture of pay for improper absence up to 2 days' pay
- Extra work or drill for up to 7 days
- Admonition

If the XO is a Lieutenant Commander or Lieutenant:

- A fine up to 7 days' pay
- Stoppages of pay (up to 7 days)
- Extra work and drill for up to 7 days
- Stoppages of leave for up to 14 days (excluding Chief Petty Officers or Petty Officers)
- Forfeiture of pay for improper absence up to 1 days' pay
- Extra work or drill for up to 7 days
- Admonition.

b) Others:

The powers of punishment of an Executive Officer may also be applicable to various Subordinate Commanders including, among others, the CO of an air squadron; Royal Marines Officers subject to Section 112 of the NDA¹⁸⁵; Army or RAF officers in command of a unit embarked on HM ships other than for passage. These powers and the full list of summary jurisdiction are outlined in the *Naval Summary Discipline Regulations 2004*, paragraphs 24-33.

¹⁸⁴ The Executive Officer is defined as the officer carrying out the executive duties of the ship.

¹⁸⁵ Aboard any of HM ships, or at any of HM naval establishments.

Exceptions

Officers and warrant officers

There are a number of exceptions with regard to powers of summary punishment in relation to officers and warrant officers.

An officer who is tried summarily may only be awarded one of the following punishments, following approval from a HA or ASA:

- Fine up to 14 days' pay
- Severe reprimand or reprimand
- Stoppages of pay up to 14 days

A warrant officer who is tried summarily may only be awarded one of the following punishments, following approval by an officer of flag rank:¹⁸⁶

- Disrating to Chief Petty Officer
- Fine up to 14 days' pay
- Severe reprimand or reprimand
- Stoppages of pay

As outlined above a warrant officer can elect trial by court martial in cases where demotion, a fine or stoppages would be awarded.

¹⁸⁶ An Officer of Flag rank is defined as an officer of Rear-Admiral rank or above.