



House of Commons
Constitutional Affairs
Committee

**The Office of the Judge
Advocate General**

Second Report of Session 2005–06

*Report, together with formal minutes, oral and
written evidence*

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The Constitutional Affairs Committee

The Constitutional Affairs Committee (previously the Committee on the Lord Chancellor's Department) is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Constitutional Affairs and associated public bodies.

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House.

All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/conaffcom

Committee staff

The current staff of the Committee are Roger Phillips (Clerk), Dr John Gearson (Second Clerk), Richard Poureshagh (Committee Assistant), Alexander Horne (Legal Specialist), Julie Storey (Secretary), Tes Stranger (Senior Office Clerk) and Jessica Bridges-Palmer (Committee Media Officer).

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Contents

Report	<i>Page</i>
1 Introduction	3
2 Comments of the Judge Advocate General	4
3 Further issues relevant to the Bill	6
Double Jeopardy	6
Appointment of Judge Advocates	6
Extension of military law to the UK for the trial of service personnel for certain serious non-military offences	6
Witness	8
List of written evidence	9
Formal minutes	10

1 Introduction

1. The Constitutional Affairs Committee decided to conduct a short inquiry into the work of the Office of the Judge Advocate General, the body responsible for the conduct of proceedings at Courts Martial for the Army and Royal Air Force, appointing civilian judge advocates and monitoring the military criminal justice system.
2. The Office of the Judge Advocate General falls under the responsibility of the Department for Constitutional Affairs. The appointment of the Judge Advocate General is made by the Sovereign by Letters Patent. The Judge Advocate General appoints judge advocates to conduct proceedings at Service Courts and to hear custody applications and applications for search warrants. The Judge Advocate General does not operate courtrooms, provide staff for hearings, summon witnesses or guard defendants—this is carried out by bodies under the Ministry of Defence.
3. The Committee focused on the operations and future role of the Office of the Judge Advocate General and its relationship with the Department for Constitutional Affairs. In the course of its inquiry the Committee received written evidence from: the Judge Advocate General, His Honour Judge Jeff Blackett; the Department for Constitutional Affairs; and the Ministry of Defence. It also took oral evidence from Judge Blackett on 29 November.
4. The Government has now published its Armed Forces Bill, which makes significant changes in the court martial system and deals with a number of issues raised in the written and oral evidence the Committee received during its inquiry.¹ **The Committee considers that it would be helpful to Members, if, as well as publishing the evidence in time for the debates on the Bill, it presented this short report drawing attention to some of the issues which were raised, particularly those which are unresolved.**

¹ Background on the system of military justice and the Armed Forces Bill can be found in: *Background to the Forthcoming Armed Forces Bill*, Library Research Paper 05/75, 11 November 2005

2 Comments of the Judge Advocate General

5. In evidence to us, Judge Blackett commented on the Armed Forces Bill as follows:

The main themes of the Bill and the amalgamation of the law across the three Armed Services and the modernisation of Courts Martial are welcome and I strongly support them. There are, however, some areas in the Bill which I believe could be improved further.²

6. Judge Blackett raised the following main points:

- The Military Justice System calls for ‘improvement and reform’ of the current situation, but the military justice system overall is a good system;³
- The Military Court Service, currently run by the Ministry of Defence, should be brought under and resourced as part of the Department for Constitutional Affairs;⁴
- The prosecution should no longer be allowed to choose what type of court martial (District or General—roughly analogous to magistrates or crown court) a defendant should face—it should be in the hands of Judge Advocates;⁵
- The delay from charge to end of trials remains too long;⁶
- Judge Advocates should as far as possible be seen as fully on a par with their civilian counterparts and should be similarly qualified;⁷
- Judge Advocates should automatically be appointed recorders;⁸
- The panels of officers and warrant officers who are the closest analogy to a jury in a Court Martial should be increased from their current number of 3 or 5 members to at least 5 or 7;⁹
- Where service panels of only 3 are used they should not hear cases of greater severity than summary offences (or magistrate level);¹⁰
- The service panels should not be involved in the sentencing of those found guilty as is currently the case;¹¹

2 Q 4

3 Q 4

4 Q 4–6 and Ev 13, section 7

5 Q 69

6 Qq 4 and 91

7 Q 34

8 Q 36

9 Qq 69–74 and Ev 13, section 8

10 Q 71

- The abolition of the automatic Review Process (under which the Reviewing Authority of the service itself reviews all guilty verdicts) following a European Court of Human Rights judgement needs to be replaced with the 'slip rule' which exists in Crown Courts for the correction of mistakes.¹²

11 Q 39

12 Q 99

3 Further issues relevant to the Bill

7. The Committee also identified certain further issues that it feels could be usefully explored during debate on the Bill.

Double Jeopardy

8. At present, 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.

9. However, the rules relating to ‘double jeopardy’ were revised under the Criminal Justice Act 2003. The Act made provision for a defendant to be retried for an offence, even where he had been acquitted, in certain limited circumstances. Judge Blackett explained that the military justice system could be consistent with this change if the Secretary of State made a rule to this effect if required.¹³ However, it has not been done and so the system is not in line with Crown Courts. The House may wish to establish when, if at all, the Secretary of State intends to make such an order.

Appointment of Judge Advocates

10. The role of the Judicial Appointments Commission in the appointment of Judge Advocates should be raised for further clarification, particularly in the light of the serious lack of diversity in the current list of Judge Advocates.¹⁴

Extension of military law to the UK for the trial of service personnel for certain serious non-military offences

11. The Armed Forces Bill extends the scope of Courts Martial to the United Kingdom for the trial of military personnel, but not civilian employees or dependants, accused of the most serious offences (namely Treason, Murder, Manslaughter, Treason-felony, Rape, or Genocide), which currently are not dealt with by military courts. Under the Armed Forces Bill, Courts Martial in the UK will have jurisdiction concurrent with the civilian jurisdiction for all offences in respect of military personnel.

12. This change is significant because it means that a member of HM Forces charged with murder or manslaughter could be tried by a military court consisting of a military panel (of five members) capable of a majority verdict of three to two. In a civilian court the accused would face a jury of 12 and a simple majority verdict would never be accepted by a judge, who in most cases would require a unanimous or a very substantial majority verdict. The Bill exacerbates this position by not specifying that larger five member panels must try any offence that is punishable by imprisonment of 14 years or more, leaving it to later specification by Rules (negative resolution). Judge Blackett observed that:

13 Q 86

14 Qq 40–49

in the civilian system Parliament would be unlikely to leave it to the Home Office to determine in Rules what size Crown Court juries should be; no more should MOD do so in the military system.¹⁵

13. There is no right at present for the Criminal Cases Review Body to consider Court Martial judgements and, as noted above, the Reviewing Authority which currently has the power to quash convictions or reduce sentences is to be abolished under the Bill.

Witness

Tuesday 29 November 2005

His Honour Judge Jeff Blackett, Judge Advocate General

Ev 1

List of written evidence

Judge Advocate General	Ev 12
Department for Constitutional Affairs	Ev 15
Ministry of Defence	Ev 17

Formal minutes

Tuesday 6 December 2005

Members present:

Mr Alan Beith, in the Chair

Barbara Keeley
Mr Piara S Khabra
Jessica Morden
Julie Morgan

Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Draft Report [The Office of the Judge Advocate General], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 13 read and agreed to.

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

Ordered, That the Chairman do make the Report to the House.

Several papers were ordered to be appended to the Minutes of Evidence.

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

[Adjourned till Tuesday 13 December at 3.45pm]

Reports from the Constitutional Affairs Committee

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation <i>Government response</i>	HC 79 <i>Cm 6470</i>
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [<i>Lords</i>]: the Government's proposals <i>Government response</i>	HC 275 <i>Cm 6488</i>
Fourth Report	Family Justice: the operation of the family courts <i>Government response</i>	HC 116 <i>Cm 6507</i>
Fifth Report	Legal aid: asylum appeals <i>Government response</i>	HC 276 <i>Cm 6597</i>
Sixth Report	Electoral Registration (Joint Report with ODPM: Housing, Planning, Local Government and the Regions Committee) <i>Government response</i>	HC 243 <i>Cm 6647</i>
Seventh Report	The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates <i>Government response</i>	HC 323 <i>Cm 6596</i>

Session 2005–06

First Report	The courts: small claims	HC 519
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Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 29 November 2005

Members present:

Mr Alan Beith, in the Chair

David Howarth
Barbara Keeley
Mr Piara S Khabra
Jessica Morden

Mr Andrew Tyrie
Keith Vaz
Dr Alan Whitehead
Jeremy Wright

Witness: **His Honour Judge Jeff Blackett**, Judge Advocate General, gave evidence.

Chairman: Judge Blackett, welcome. We are glad to have you here. There are a couple of things we need to do first of all, one is for committee members to declare any relevant interests they may have.

Q1 Jeremy Wright: I am a non-practising criminal barrister and my former pupil master is one of the serving judge advocates.

Judge Blackett: Thank you. Which one?

Jeremy Wright: Michael Elsom.

Keith Vaz: I am also a barrister and my wife holds a part-time judicial appointment.

Q2 Chairman: The second thing I want to say is that as usual, and this is particularly pertinent to this committee, matters which are *sub judice* are not discussed by the Committee in Parliamentary proceedings; and we all understand also that there may be matters on which you might have to sit or rule on which you will not be able to answer questions. If we stray in our questioning, please feel free to indicate if that is the case and we will fully understand.

Judge Blackett: Of course.

Q3 Chairman: Is there anything you wanted to say by way of opening, or shall we proceed?

Judge Blackett: Yes, I would like to make an opening statement, although you have asked me to give evidence rather than me asking you if I can give evidence.

Q4 Chairman: Yes, and we are grateful, by the way, for your very clear written submission of evidence.

Judge Blackett: Thank you very much for inviting me to come along today. The first point I would want to say is that the Military Justice System as it operates in the United Kingdom and abroad today is a good system. There have been some criticisms of the system; indeed individual cases have highlighted some deficiencies. However, those individual cases should not, in my view, be cited as evidence against the whole system. By and large the Military Justice System supports the operational effectiveness of the Armed Forces, it ensures that discipline is maintained, it extends the reach of British justice to every part of the world where the

Armed Forces operate and train and in uncertain times secures the confidence of sailors, soldiers and airmen that they will be treated fairly by people who understand their unique position. The purely civilian courts in this country are not well served or placed to do the same for this special user group, in my view. However, there is not any cause for complacency. The Military Justice System calls for improvement and reform in a number of areas, and I am grateful for the opportunity today to be able to give my views on the programme of improvements which are in progress. In my view, it is essential that the Courts Martial provide and are seen to provide a standard of justice which is in no way inferior to civilian equivalents. The standing and status of the judges, the infrastructure of the courtrooms, the efficiency of the investigative and prosecutorial processes are all under scrutiny at the moment. The service panels, which are the Court Martial equivalent of the jury, have a special and indispensable role which can best be maintained by ensuring they are focused on their proper function. As you said, Chairman, I am an independent judge, which means independent of the Executive, of the Government and of all parties to trials that I conduct, and the same goes for my team of judge advocates, but I am keen for the independence of the judicial process as a whole to be demonstrated more obviously perhaps than before, particularly by establishing that the administrative staff who support trials and list cases for hearing do so under the supervision of judges and not under the supervision of the Ministry of Defence. In recent years, as we all know, there have been several challenges to the Military Justice System in terms of the European Convention on Human Rights. Some challenges have succeeded and have resulted in improvements to the system, but I believe now that the system is compliant, but compliance is dynamic not static. The best way to maintain compliance is conscious scrutiny of the system, continuous improvement and programmed reforms to ensure that it remains defensible from challenge. The new Armed Forces Bill is to be introduced into Parliament, I think, tomorrow. I am, of course, not responsible for its content, though I have been consulted at various times

through policy discussions. The main themes of the Bill and the amalgamation of the law across the three Armed Services and the modernisation of Courts Martial are welcome and I strongly support them. There are, however, some areas in the Bill which I believe could be improved further. My main concerns since I took over as Judge Advocate General a year ago was delay. In this jurisdiction, as in many others, the end to end time taken to dispose of cases remains a serious concern for me, both in major and in minor matters. I hope that perhaps in giving evidence today I can give my views on measures for driving down delay which I have already taken and which I propose for the future, because I do think there is scope for improvement. That is all I need to say by way of introduction.

Q5 Chairman: Thank you very much indeed. At present you are involved with two government departments, the Department for Constitutional Affairs support you in the running of your own office, but, as you say, the support arrangements for trials themselves are in the hands of the Ministry of Defence, and you indicated that you would prefer a system in which the whole thing was brought under your jurisdiction, and, therefore, I suppose, part of your relationship DCA. Is that right?

Judge Blackett: Yes, that is correct.

Q6 Chairman: Is that a matter of perception primarily, or do you think there are positive advantages beyond mere perception that it is important that we go through that?

Judge Blackett: I think there are positive advantages. The Court Martial system has developed often because of challenges, as we have discussed and as in my evidence, and part of the system which has only developed a little bit and needs to go further is the control of the courts and the listing of trials. I think while this is the hands of the Executive, which effectively it is, then there is a risk of challenge. Listing, as I have said in my evidence, is a judicial function, and I believe in the Court Martial system it should be a judicial function.

Q7 Chairman: Each Court Martial is a separate undertaking, is it not?

Judge Blackett: Yes, each Court Martial is an ad hoc trial, so it has to be convened and dissolved, which raises a lot of concerns and is going to be solved by making the Court Martial system a standing court like the Crown Court under the Bill.

Q8 Chairman: What would your relationship be with the Lord Chief Justice both now and when further changes are made?

Judge Blackett: I am one of his judges. Personally I am also a circuit judge and so I have my normal link to him through that route. My relationship is not in the statute, but I have a working relationship with him and I call on him from time to time to ask him for advice.

Q9 Chairman: If there were issues that affected say the independence of the judiciary as it arose in the Courts Martial system, you would regard the Lord Chief Justice as somebody to refer to, would you?

Judge Blackett: Indeed, yes.

Q10 Keith Vaz: Judge Blackett, do you think it is essential or desirable that a judge advocate should have a background in the military service?

Judge Blackett: I think desirable but not essential, because much of what he does can be learnt, as a judge in any other jurisdiction can learn it, but having a background in the service certainly helps from day one.

Q11 Keith Vaz: You have been in the service, of course?

Judge Blackett: I have.

Q12 Keith Vaz: Does that, do you think, help you deal with the perception of judicial independence or do you think people think that, because you have been in the service, you know what is going on in the military and therefore that is able to assist you in your independence?

Judge Blackett: I am not quite sure I understand the question.

Q13 Keith Vaz: Do you feel you are more independent because have had a background?

Judge Blackett: I know I am independent. I am not sure what other people think, because I have served in the Royal Navy for 30 years but I believe that having gone through the selection process, like all other judges, and therefore I am like any other judge, I can demonstrate independence and my knowledge of the service gives me an added dimension.

Q14 Keith Vaz: It gives you an insight into life in the service?

Judge Blackett: Indeed.

Q15 Keith Vaz: Perhaps rituals that go on there?

Judge Blackett: Yes, I probably understand them perhaps better than somebody who had not been in the service, but I am not sure it is an issue of independence; it is an issue of knowledge.

Q16 Keith Vaz: For example, though there was no case on what I am going to ask you about now, there is a lot of information in the papers about the rituals that young soldiers get involved in. I assume that does not apply to the judge advocates. There is no initiation ceremony?

Judge Blackett: Certainly not. None that I have been involved in, no. I have never experienced first-hand in my service career any rituals, but obviously I am aware that such matters have gone on and probably continue to go on, and, if those rituals lead to criminal offences, they will come to our courts and we will deal with them appropriately.

Q17 Keith Vaz: That is the time you would deal with something?

Judge Blackett: Indeed.

Q18 Keith Vaz: Looking at appointments and the criteria of appointments for judge advocates, I have had a look at a list which has been provided?

Judge Blackett: Yes.

Q19 Keith Vaz: You all seem to be white, male and 50?

Judge Blackett: Apart from one, I think.

Q20 Keith Vaz: One is just under 50. Having just had my forty-ninth birthday I know how it feels! Why is it that there are no women here? What is wrong with the women? They are not qualified?

Judge Blackett: I am only responsible for those I have just taken on.

Q21 Keith Vaz: They are all men, are they not?

Judge Blackett: Indeed, but I have only just recruited. I have been Judge Advocate General for one year.

Q22 Keith Vaz: How many have you recruited?

Judge Blackett: I have recruited two.

Q23 Keith Vaz: How many have been women?

Judge Blackett: None.

Q24 Keith Vaz: How many have been black or Asian?

Judge Blackett: None, but I sat on the sift at the DCA and on the interview process. I do not know how many were from ethnic minorities from the sift because it would not have shown on the paperwork, but certainly there were none who were interviewed. I think we interviewed one woman and she did not compare as favourably as the two people we selected.

Q25 Keith Vaz: Is it because she did not have a background in the service?

Judge Blackett: No, not at all. We have selected two new judge advocates, one of whom came from the Royal Air Force and one of whom came from private practice, and we have also appointed two new deputies, who are part-timers, one of whom had previous service in the Royal Navy and one of whom had no service at all, a young man of 35 who was in private practice in the north country.

Q26 Keith Vaz: The Lord Chancellor has made a number of statements about diversity, has he not?

Judge Blackett: Indeed.

Q27 Keith Vaz: And it certainly has affected other parts of the judicial appointments process?

Judge Blackett: Yes.

Q28 Keith Vaz: But it does not seem to have penetrated your part?

Judge Blackett: We can only select from those who apply, but I agree with you, diversity is something we adopt. I think part of the problem in recruiting new judge advocates is that it is maybe perceived as an area of law where fewer people will apply than others in the mainstream. We sought to recruit a Vice Judge Advocate General for me, and we had five applications. We sought to appoint two new judge advocates and we had, I think, about 13 applications.

Q29 Keith Vaz: Maybe you should widen the call?

Judge Blackett: I would be happy to do that, but, of course, we have no vacancies at the moment.

Q30 Chairman: Do you think that appointments should be notified much more widely than they have been up to now?

Judge Blackett: They are notified in exactly the same way as recorders or deputy district judges.

Keith Vaz: Thank you.

Q31 Jeremy Wright: Can I ask you about the role of judge advocates within the Court Martial process?

Judge Blackett: Yes.

Q32 Jeremy Wright: You would accept, I am sure, that the role is different post 1997—particularly the case of *Findlay*—than it was pre 1997?

Judge Blackett: Yes.

Q33 Jeremy Wright: On that subject, I suppose the first question is that the assumption that we would draw from the change is that judge advocates were assumed to be analogous to Magistrates Court clerks, or something of the like, pre 1997 and they are now assumed to be analogous to Crown Court judges. That is quite a shift?

Judge Blackett: Yes.

Q34 Jeremy Wright: Do you think that analysis is correct, and, if it is, is that a worthwhile change of role?

Judge Blackett: It is not quite correct in that pre 1996, pre the *Findlay* reforms, they were entirely analogous to a clerk, they were a mixture, because they summed up the law in open court, which, of course, a Magistrates Court clerk does not do, and they advised on sentence but, quite correctly, did not vote on it in closed session. The European jurisprudence has stressed that the independence and impartiality of the Court Martial system is based on the civilian judge advocate, and so he has assumed the role, which used to be assumed by the president in a Court Martial, that is he is in charge of the court as opposed to the president being in charge of the court. In all cases he sums up like a Crown Court judge, even though they are what might be perceived as summary offences where there would be no summing-up in a Magistrates Court. So, even though many of the cases he deals with are commensurate with a summary offence in civilian life, he is still dealing with them as though he were in the Crown Court but he is not quite

analogous, as you know, to the circuit judge or the Crown Court judge because when it comes to sentencing he is part of the sentencing process, not the sole sentencer. My view is that the Court Martial system should reflect civilian practice wherever possible, except where operational imperatives require there to be differences. Thus my view is he should be treated as analogous to a circuit judge, or at least a recorder in the Crown Court, depending on the level of work he is doing, and it is in that area that I would like to make further developments in the future.

Q35 Jeremy Wright: On that subject, is it your view that the role of judge advocate as the presiding legal authority in the tribunal is widely accepted throughout the service structure?

Judge Blackett: Yes, it is. It has taken a bit of time, and latterly, in the Royal Navy, it took a bit more time, but I think the services now are happy with the position as it is.

Q36 Jeremy Wright: In terms of the read-across and comparison to civilian criminal courts, as I say, my old pupil master sits, or did sit, for a couple of weeks in the Crown Court as a recorder anyway, so there was a deal of transfer of knowledge and understanding experienced in the civilian system. Is that something that you think is worthwhile? Is that something you encourage?

Judge Blackett: Indeed it is. In fact I have sought to persuade the DCA that anybody who is appointed as a judge advocate should automatically be appointed as a recorder. We are in the process of having that debate at the moment, although I have not had a particularly warm reception to the idea.

Q37 Chairman: It would be a problem if it blocked off the route to being a recorder to others?

Judge Blackett: Indeed, and that is their view. I have seven assistant judge advocates and one vice judge advocate. Four of those eight do sit as recorders in the Crown Court in their own right in any event. I have asked or encouraged the other four to apply. I think it is almost imperative that we have that cross-pollination.

Q38 Chairman: You mentioned the sentencing process. Can you describe a little more the role of the judge advocate with the panel in the sentencing process. Does he lead that discussion? How does it work?

Judge Blackett: Once the court, or the panel, has found the accused guilty, or he has pleaded guilty, the panel and the judge advocate together become the judge, if you like, so they hear all submissions, mitigation, read all the reports—so they function as though they were the judge—and then they retire and the judge advocate explains the sentencing process to the lay members. Often they have never been involved in sentencing before. He will describe the guideline cases, if there are any, he will tell them what the maximum punishments are and then he will give them a bracket in which he suggests they

should put their sentence. They have a discussion, if necessary a vote, and then at the end of that they come to a decision on what the relevant sentence is.

Q39 Chairman: Is there a good reason relevant to military operations why the judge should not do the sentencing entirely himself, why the panel should be involved? If you take the analogy with the jury, the jury does not become involved in the sentencing process. Is it a military reason that the panel is involved, because we are talking about a panel consisting entirely of officers?

Judge Blackett: Military officers or a warrant officer, yes. The military reason, or the Ministry of Defence military reason, is that there is a service input into sentencing which is crucial and therefore should be taken account of. My personal view is that a judge advocate should sentence alone, but I do not think the services are yet ready for us to move to that position. It is something that I will be negotiating with the services over the next few years.

Q40 Ms Keeley: We have some more questions on the issue of diversity which you have also touched on, the difference aspects of that. The Armed Forces Bill is expected to include provision for the judge advocate general to become the single appointing authority for judge advocates. I think it begs the question, given the discussion you have already had about diversity, about how you are going to progress that really, and will there be a role for the Judicial Appointments Commission once that is established, that widening of diversity in that appointment system? Could they be helped with that given the singular similar nature of the people you have already got?

Judge Blackett: I think there has been a misunderstanding of what my future role is going to be. It is not going to be for me to appoint judge advocates in the sense of recruiting them. My role is to appoint them (ie specify, I think is the word which is going to be used in the Bill) to individual trials, but the appointment of judge advocates is going to be undertaken by the DCA in exactly the same way as the appointment of any other judicial post. An assistant judge advocate is appointed by the Lord Chancellor having been through the same judicial recruiting process; so clearly the diversity issues are the same as they would be in any other judicial appointment.

Q41 Ms Keeley: One further question on diversity and also the level of experience. If the Armed Forces Bill increases the minimum qualification for appointment as a judge advocate to seven years that would seem to be going in the opposite way to the way that the Department for Constitutional Affairs is going trying to widen diversity. I do not know if it is appropriate for you to comment on that?

Judge Blackett: Yes, again, I think there has been some misunderstanding because the Armed Forces Bill is not increasing the current requirement for a seven-year call, and that is in the Courts and Legal

Services Act 1990. My view is that the judge advocate should have the same qualification as a recorder in the Crown Court. At the moment a recorder in the Crown Court has to have 10 years call, and therefore my view is a judge advocate, who is in my view the equivalent to a recorder, should have the same length of call. However, if the DCA policy is to reduce the qualification period in an attempt to increase the pool, increase diversity, then clearly that would be something that we should do as well. I am not fussed really about how many years it is; I am simply fussed that it is the same.

Q42 Chairman: I do not think you have given us a very clear picture of what role, if any, the Judicial Appointments Commission is going to have in all of this. Is it the case that whatever level of appointment is at any given stage transferred to the Judicial Appointments Commission from the Lord Chancellor the equivalent role in the Court Martial and judge advocate structure will go the same way or not?

Judge Blackett: Yes.

Q43 Chairman: It is?

Judge Blackett: That is my understanding. I will not be responsible for recruiting though. Judge advocates will be recruited, in the same way as any other judge, by the DCA, by the Judicial Appointments Commission.

Q44 Chairman: When you said the Department for Constitutional Affairs, it was them or the Judicial Appointments Commission?

Judge Blackett: Yes, I think I was talking about now rather than the future.

Q45 Jeremy Wright: Before we leave the question of recruitment, can I just ask you to clarify. Presumably when we look at recruitment and therefore diversity of applicants for the job of judge advocate, it would be right for us to take into account the particular demands of the job of judge advocate which do not apply to a recorder or a circuit judge, in the sense that it is right, I assume, that you are liable to be moved around the country and, indeed, abroad to sit in other foreign jurisdictions?

Judge Blackett: Yes.

Q46 Jeremy Wright: That presumably is a factor that you would argue is relevant when you look at the people available for selection who put themselves forward?

Judge Blackett: Thank you for raising that point, because one of the differences, clearly, is that a judge advocates job is peripatetic, and judge advocates spend a lot of time living out of suitcases and hotels because they travel far and wide to sit in courts martial. Clearly anybody appointed to judge advocate would have to be able to undertake the rigours of that sort of lifestyle.

Q47 Mr Tyrie: If you can make do with a suitcase in a hotel room, do you think it is time that High Court judges also made an effort to do the same?

Judge Blackett: I am not sure I should answer that question.

Q48 Chairman: It is interesting, because I have a slightly different question, which is: do you in fact stay in hotels if you are in Germany or Cyprus, or do you stay in messes?

Judge Blackett: In hotels. There is no staying in messes.

Mr Tyrie: Have a go at answering the question.

Q49 Chairman: Do not feel obliged.

Judge Blackett: I would not really want to be quoted criticising High Court judges.

Q50 David Howarth: You mentioned listing. I was just wondering whether the administrative nature of that includes the allocation of particular cases to particular judge advocates.

Judge Blackett: No, at the moment listing is a function of when and where, and that is done by the Military Court Service who currently are part of the Ministry of Defence, but the judge advocate, once a trial has been convened, can of course make directions as to when and where, so technically he can change it if he wishes to. Not that that happens particularly, but the appointment of judges to individual trials is my role, and so the MCS (Military Court Service) would indicate that there will be trials at a particular place, at a particular time and then ask me to appoint judge advocates to those trials, which I will do by signing a warrant.

Q51 David Howarth: Do you follow any criteria in allocating a case to a particular judge?

Judge Blackett: Yes, I have a ticketing system in which more senior and more capable judge advocates have been ticketed to sit in particular types of crime in exactly the same way as in civilian life, and so one my judge advocates who is not a recorder would not get to sit in more serious cases but those recorders are ticketed variously to deal with murder, manslaughter, serious sex offences.

Q52 David Howarth: What sort of cases do you yourself take on?

Judge Blackett: Very serious cases. I have sat three times since I have been Judge Advocate General in a Court Martial, that is, in a rape case, a manslaughter case which turned out to be a negligence case and a murder trial.

Q53 David Howarth: Has there been any particular change in recent years about how a case is allocated either between the other judges or to you as the JAG?

Judge Blackett: There was no ticketing system in place until I arrived, and any judge could sit in any trial, but I felt uncomfortable with a judge advocate who had not at least become a recorder sitting in very serious crime: hence I introduced the ticketing system.

Q54 David Howarth: The rules that you cover, are they written down so they can be passed on to your successor or are they informal rules that you yourself follow?

Judge Blackett: Each individual judge advocate received a letter from me which explained my reasons for the decision; so I suppose the rules are written down in those letters, but there is no document that I have created, no,

Q55 David Howarth: So it is case law?

Judge Blackett: Yes.

Q56 David Howarth: Moving to a slightly different question about what happens, what sort of cases are coming before Courts Martial? Is there any trend in the number of cases going through the system or the types of cases going through the system?

Judge Blackett: Do you want me to answer that in relation purely to Courts Martial and not in the summary system? There is a whole raft of stuff underneath the Courts Martial system.

Q57 David Howarth: If you could start at the top and comment on other cases.

Judge Blackett: There are getting towards a thousand trials across the three services in a year, perhaps slightly less than that. I think the figures might be on my evidence or certainly in some of the documentation. Certainly there are going to be 600 plus Army Courts Martial this year. In very broad handfults I have suggested elsewhere in evidence that about 25% of those cases would be indictable in the civilian system, probably 25% would be either way offences and probably the rest would be summary offences. In the Army there is a significant problem with absence, which, of course, is a much more serious offence in the military context than it is in civilian life; there are a steady stream of drug offences, dishonesty offences, an increasing number but with a very low baseline of child abuse type cases—downloading pornographic material—I am sorry, I have not got these figures in front of me, but quite a lot of minor violence up and to including ABH and probably GBH as well. I am not sure that helps really. It is a bit of a rambling answer, but we have a whole range of crime.

Q58 Chairman: If there are figures that are convenient for tabulating you would like to let us have later, I am sure that would be helpful.

Judge Blackett: I am sure I can do that.

Q59 David Howarth: To clarify, you are saying that the number of violence cases rises, or is that just a major category all round?

Judge Blackett: I review every single Court Martial in the Army and the Air Force and I see most of the Navy Courts Martial. I am giving you an answer which is based on my feeling of what I have seen. I cannot be more certain than that. There is

certainly a steady stream of violence offences, yes, mainly involving alcohol, so it is drunken violence late at night?

Chairman: Ms Keeley, do you want to come in on that?

Q60 Ms Keeley: Yes. I think in particular, given the reference we had earlier to bullying and the sort of initiation ceremonies that have been publicised in the last few days, there has also been some coverage given to female staff who feel they have suffered sexual harassment throughout their military career. Perhaps you could either say or let us know: what are the cases you are seeing like that. It may be that these are only just emerging?

Judge Blackett: There have been a number of cases involving sexual harassment of female staff over the years, and certainly I dealt with them when I was in the Royal Navy as well. Few get to Court Martial because most seem to be dealt with within the service administratively and outside the service in employment tribunals. Few actually get to Court Martial where there is a charge of ill-treatment or assault or that sort of thing.

Q61 Mr Tyrie: In your introductory remarks you said that you thought the system had be improved by the human rights challenges that have been made and that you were now more confident and, as a consequence, you were compliant and also you thought, as I say, that the system was better. You then said compliance is dynamic, which seems to suggest that you are open to, indeed almost welcoming, further challenges to see where else things may be improved. Am I right in that?

Judge Blackett: No, I am not welcoming challenges at all, but we must be alert to the fact that there may well be challenges.

Q62 Mr Tyrie: Do you see a time when crime that falls under the purview of the International Criminal Court Act will be removed from the Military Justice System altogether and transferred to a civilian jurisdiction?

Judge Blackett: No, if the Court Martial is an equivalent court to the Crown Court and it is compliant and there is confidence in it, then it should be able to deal with any offence.

Q63 Mr Tyrie: In your evidence you have said, “The military system should equate to the civilian system in all respects except where the requirements of the operational effectiveness make the differences indispensable”?

Judge Blackett: Yes.

Q64 Mr Tyrie: You seem to be saying now we have got it exactly right?

Judge Blackett: No, I do not think I have said it is exactly right, and I think there are improvements which could be made, and I have already intimated one, which is that the judge should sentence without the officer of the court, for example; that

the Military Court Service should transfer from the Ministry of Defence to the DCA, for example; so there are areas where I would seek improvements.

Q65 Mr Khabra: In the past few years a variety of judgments have made significant changes to the Military Justice System?

Judge Blackett: Yes.

Q66 Mr Khabra: Also there has been a succession of European Court of Human Rights based challenges to the Military Justice System in recent years leading to significant improvements. One of the most essential safeguards to the fairness of the Military Justice System is the participation of an independent civilian judge advocate along with the right of appeal right to a higher court?

Judge Blackett: Yes.

Q67 Mr Khabra: The question is what has been the effect on human right legislation, in your opinion, on the co-operation of military justice. Has it improved your system of justice and, secondly, given the recent human right challenges to the Military Justice System, how confident are you that the system as it stands is ECHR compliant?

Judge Blackett: If I can start with the second question: how confident am I that the system is ECHR compliant? I am confident, but that does not mean that there will not be future challenges which may lead to further changes. Five years ago I was confident that in naval Courts Martial uniformed judge advocates were compliant because of the safeguards. The Court of Appeal ruled that that was the case but then the European Court ruled it was not, so perhaps that is what I mean by the dynamism of the jurisprudence. The system is going to change when the Armed Forces Bill becomes law and the Secretary of State will have to certify that it is compliant; so if he so certifies then perhaps. The first question was: have the challenges improved the system of justice? That is a more difficult question, because the services would say that, although their system did not appear objectively to be fair, they were subjectively fair and therefore the changes have been those that have been subsumed for compliance sake if not necessarily for fairness sake. My view is that justice has to be fair but has to be seen to be fair, and if objectively it is seen not to be fair, then improvements have to be made; so in that respect, yes, the system has been improved.

Q68 Mr Khabra: Given the current situation as you are aware of it that British soldiers are involved in operations in many parts of the world, have been and are involved currently, and there have been allegations, would you consider that the changes which are taking place currently will provide a fair system of justice for the defendant?

Judge Blackett: Yes, I think so. It is a short answer to a long question, but, yes.

Chairman: Yes will often do as an answer.

Q69 Keith Vaz: Yes it is quite underrated as an answer. I prefer yes to no! In your evidence you have suggested that the size of the military panels should be increased. Why do you think that is important?

Judge Blackett: This is one of the areas where I am concerned that the Bill has not gone far enough in that currently in the Army and the Air Force there are two types of Courts Martial, there is District Courts Martial and General Courts Martial. The District Courts Martial has a president plus two (ie a panel of three people) and has powers of punishment up to two years' imprisonment or detention. The decision on whether it is a District Courts Martial or a General Courts Martial is made by the prosecution. That is clearly wrong, in my view, and under the new Bill there will be a more objective criteria when there is a panel of three or a panel of five. The criteria is not on the face of the Bill, it will be in the rules, but my understanding is that it will be a panel of three.¹

Q70 Keith Vaz: So the judge advocate plus three?

Judge Blackett: Yes. We are talking about the jury, in effect, the panel.

Q71 Keith Vaz: Yes

Judge Blackett: My understanding of the rules is that the three-man court will be able to deal with matters up to 14 years' imprisonment on a simple majority of two to one. I find that objectionable, particularly in view of my aim to replicate the civil system if at all possible. I think if there is going to be a panel of three they should be limited probably to summary only offences or powers of punishment, rather like magistrates, and that all others should be before a bigger court numerically.²

Q72 Keith Vaz: You seem to say to this Committee that there is a lot wrong with the current system. That does not give us confidence about the decisions that have already been made?

Judge Blackett: No, I do not think I am saying it is wrong, I am saying it could be improved.

Q73 Keith Vaz: Is it effective? Is it flawed?

Judge Blackett: I suppose if I am saying it must be improved it means that I am saying there are defects in it.

Q74 Keith Vaz: That is what I would have thought?

Judge Blackett: Yes, I think you must be right, but that is not to say it is not compliant, because the system is compliant.

Q75 Keith Vaz: But are we worried about miscarriages of justice because the system is flawed, as you say?

Judge Blackett: I am not worried about miscarriages of justice. Much of my view is based on perception, I suppose, the increased numbers of the court. By and large military officers and

¹ Ev 14-15

² Ev 14-15

warrant officers who sit on Courts Martial take their duty very seriously. If you tell them that they must be sure beyond reasonable doubt, they take that very seriously and are sure beyond reasonable doubt. I would say, and this is based on my overview of having written having read every Court Martial transcript over the last year, that there are very few that might be classified as being miscarriages.

Q76 Keith Vaz: You told the Committee earlier on that you felt that only the judge advocate should be performing the sentencing function?

Judge Blackett: Yes.

Q77 Keith Vaz: Therefore the lay members, as far as you are concerned, should have nothing to do with sentencing?

Judge Blackett: My view is that the lay members should effectively be the jury.

Q78 Keith Vaz: Does that strengthen the need to have a judge advocate with a background in the military service?

Judge Blackett: Yes. Certainly one of the service's concerns would be if the judge advocate was sentencing alone he may not take into consideration the peculiar background of the service. There are a number of ways that you can do that, one of which is that he can be addressed on the peculiar problems relating to the service by the prosecutor, but clearly if he or she had a service background then that would help.

Q79 Keith Vaz: This is the problem I think we have, because in answer to Ms Keeley you did say that you accept that the pool is too small, diversity is not there. By removing the lay members from the sentencing process, are you not making the pool even smaller. It has become a pond, has it not?

Judge Blackett: I thought the pool was the place from which you select judge advocates, not the totality of the court.

Q80 Keith Vaz: But do not we need these lay members? Are they not helpful to us?

Judge Blackett: The service would say so, yes.

Q81 Keith Vaz: But not at the sentencing stage?

Judge Blackett: My experience is both sitting as a uniformed judge advocate and as a civilian judge advocate.

Q82 Keith Vaz: Are they too lenient? Do they water down the possible sentences or are they tougher? What is your experience?

Judge Blackett: In my experience they can be both, depending on the sentence. My experience is that lay members do not like sending people to prison for very long periods, but on minor offences they do not mind sending them to detention for long periods. They are lenient in some respects and not in others.

Q83 Keith Vaz: So the judge advocate is tougher.
Judge Blackett: Yes.

Q84 Dr Whitehead: In the Criminal Justice Act 2003 the rules relating to double jeopardy were revised?

Judge Blackett: Yes.

Q85 Dr Whitehead: I understand that the rule on double jeopardy hitherto has been maintained between military courts and civilian courts, that is, if you are acquitted under the regime of a military court you cannot be retried in a civilian court?

Judge Blackett: Yes.

Q86 Dr Whitehead: The distinction, I think, is unclear, however, in terms of the revision of the rules in double jeopardy. Is the distinction on double jeopardy between the courts likely now to follow the revisions to the situation under the Criminal Justice Act?

Judge Blackett: This is a very technical question you are asking me, Mr Whitehead, but Part 10 of the Criminal Justice Act 2003 provides an exception, as you know, to the double jeopardy rule, and you are quite right that Courts Martial are not included, but section 94 of the Criminal Justice Act does deal with the point, and it enables the Secretary of State to make rules under section 31 of the Armed Forces Act 2001, and my understanding is that that has to be done but once it is done it will bring Courts Martial into line with the Crown Court, as it should do.

Q87 Dr Whitehead: So it will be entirely—

Judge Blackett: It will be entirely consistent.

Q88 Dr Whitehead: I understand in the Armed Forces Bill that a further what one might call aligning is proposed to take place in as much as all of those who are subject to military law will be tried by Courts Martial for all serious offences some of which are presently tried by criminal courts?

Judge Blackett: Yes.

Q89 Dr Whitehead: What do you think of this proposed change?

Judge Blackett: Under current law offences of murder, manslaughter and rape committed in the UK are dealt with by the civilian court and the Court Martial does not have jurisdiction, but those same offences committed overseas can be dealt with by the Court Martial, and that is totally inconsistent. If a Court Martial is a satisfactory enough court to deal with murder, manslaughter and rape overseas it certainly should be able to deal with it within this jurisdiction; so I think that change which is proposed in the Armed Forces Bill is consistent and correct.

Q90 Dr Whitehead: You have said in your evidence to this Committee that the end to end time from offence to Courts Martial trial both in major and

in minor matters is too long and it is important for it to be reduced?

Judge Blackett: Yes.

Q91 Dr Whitehead: Why is it so long in your view and what can be done about reducing the time?

Judge Blackett: There are areas in the system which do not exist in the civilian system which inevitably cause delays, such as the geographical scatter of work, if I can put it that way. Perhaps if an offence were committed in a training establishment on the day before the service personnel pass out and the next day one is in Iraq, one is in Portsmouth and one is elsewhere, clearly any investigation is going to take longer for that reason. Often investigations can be delayed because units are on operations clearly. What that means is that there are inherent delays sometimes. Having said that, there are delays which can be driven out. There have been complaints, certainly from the prosecution authority, that when they get papers from investigators they are not in a fit state to proceed and they have to ask for further evidence. That could be addressed by putting a prosecutor in with the police to help them when they are gathering the evidence. I have taken some non-statutory measures already to drive down the delay; one is I have instituted automatic directions hearings. When I took over, all trials were listed as though they were going to be not guilty pleas and yet 70% of them turned out to be guilty pleas. Clearly, preparing a not guilty trial takes a lot of time and effort to get witnesses and all the rest of it. Under the new system which we have recently implemented all trials are listed as guilty pleas. The papers are issued, there is automatic direction four weeks later and three weeks after that there is a date for trial and at that directions hearing, if a plea of not guilty is indicated, because, of course, a judge advocate at the moment cannot take a plea, if a plea of not guilty is indicated, then the date three weeks hence is vacated and a date set for trial at an appropriate time and all relevant directions are given; so there is much more judicial involvement in managing the court process, so that is certainly driving down delay. As I said, early pleas, at the moment a judge advocate cannot take a plea; he has to wait until the court is convened. Under the Armed Forces Bill the judge advocate will be able to take a plea, so that will expedite matters. Certain minor offences, such as absence, currently the Army policy has been to investigate and produce prosecution papers for a minor offence like that as if it were any other offence; and I have suggested to the Army ways in which they can expedite those matters and not put so many papers together. We have also increased the use of technology. We have video conferencing facilities, and so those are available now. All of those matters can help to speed up the trial system.

Q92 Chairman: When you say video conferencing, you mean that there are processes which either at present or after the new Act can be conducted through video conference?

Judge Blackett: Yes.

Q93 Chairman: Like a plea hearing, for example?

Judge Blackett: At the moment directions hearings, and plea and directions hearings can be carried out by video conference.

Q94 Chairman: This could be somebody in another part of the world?

Judge Blackett: Indeed. We routinely have video conferences with a screen with four people in it, one in Iraq, one in Catterick, me in my office in London and somebody elsewhere. All the judge advocates have video conferencing facilities in their home and each judge advocate takes it in turn to be duty judge so that they can authorise military custody 24 hours a day worldwide.

Q95 Dr Whitehead: Could I clarify the point about the change that you have made in the listing of trials. You mentioned an automatic guilty plea is listed in the first instance.

Judge Blackett: No. Administratively the Military Court Service has to programme a trial, and if every trial is listed as a plea of not guilty that means that you have to set aside, say, two or three days, two or three days and two or three days, whereas a plea of guilty is only half a day. When the Military Court Service take charge of the case they will list a day for directions hearing and then three weeks after that they will list it for a half day hearing. Clearly, if it is going to be a not guilty plea, that half day will have to be vacated because the judge advocate will have to decide how long the trial is going to take, how long the parties are going to take to prepare and then suggest a three-day trial in two months' time or whatever.

Q96 Dr Whitehead: There is no danger that if you failed to do anything about your trial you will be found guilty?

Judge Blackett: No, there is no power to do that either. I am sorry; perhaps I did not explain that very carefully when I explained it.

Q97 Chairman: One other issue, where there is an alignment to questioning, that is the review process.

Judge Blackett: Yes.

Q98 Chairman: Another committee of this House said that it thought the review process should stay even though it has no real counterpart in the civilian justice system. Would you like to comment on that?

Judge Blackett: Can I assume that you know about the review, or would you like a couple of sentences?

Q99 Chairman: A couple of sentences might help everybody.

Judge Blackett: Every Court Martial is reviewed by a reviewing authority, which is an executive function of the Army Board, Navy Board or Air Force Board, but they only undertake that function on legal advice. In the Army and the Air Force I give that advice as the Judge Advocate General and

that advice is published, or given to the prosecution and defence so they know what the advice is, and the reviewing authority, on legal advice, can quash a conviction and it can reduce a sentence or substitute a sentence which is less than the sentence that is passed by the Court Martial. The European Court of Human rights have indicated that they do not like that system because they see it as a non-judicial interference with the judicial process, and Judge Da Costa, and I cannot remember the case immediately, made adverse comments about it, although the House of Lords themselves have supported the review on the basis that it can only, they say, be to the benefit of the accused. The Bill does get rid of review, abolish review. My concern there is that it simply goes without any replacement. My view is that the Bill should include a slip-rule, rather like the Crown Court have, which is a power under section 155 of the 2000 PCCSA, which enables a judge within 28 days of passing sentence to revisit that sentence and increase or reduce the sentence, but certainly some post trial review, and I think, particularly where a court has made a technical error, on the face of the Bill at the moment all those technical errors will have to be rectified by the Court of Appeal, the Court Martial Appeal Court. It would be much better were there a slip rule to deal with that.

Q100 Chairman: If a court imposed a lesser sentence because it did not know, it was wrongly advised, it could have imposed a greater sentence.

Judge Blackett: Alternatively, I recently reviewed a case where a Judge Advocate advised the court, and the court accepted and both counsel in the case agreed, that the minimum sentence under the Firearms Act should be five years. It was a technical sentencing matter but the 2003 Act had amended the Firearms Act and they had said in sentencing, "We have to give you five years because that is the minimum we can give you, but were we not constrained we would have given you much less". When I read the review, clearly they had misinterpreted the law, so under the review process we could substitute a sentence of two years, which was what I advised and what the Reviewing Authority did. That could have been done under a slip-rule, and that is why I think it is important that the slip-rule is included in the Bill.

Q101 Chairman: You are hoping that will be included in the legislation, or are you suggesting that it might be?

Judge Blackett: It is not in there. I have suggested it should be to the Services and they have rejected those submissions, so I shall be telling you and anybody else I can that I think it should be back in there.

Q102 Mr Tyrie: Who writes the review at present? Is somebody sitting in the court listening to what is going on and then writing a report and sending it to you to read? How does it work?

Judge Blackett: A transcript is made of the trial. My office receives the transcript, which does not have all of the evidence transcribed unless we want it to be, but it has all the legal submissions, the judge's summing up, the reason for sentence, the prosecution's opening and all of those matters. One of my Judge Advocates then reads the transcript and provides me with his assessment of the case and whether he believes there are any irregularities and normally provides me with a draft as well. I confirm the advice or make changes that I think are necessary and then send that advice to the Reviewing Authority.

Q103 Mr Tyrie: Presumably the retention of some system like that is an essential check on the quality of decisions being taken and on the quality of people? Perfectly balanced people fall ill and start to do unusual things, and that includes judges.

Judge Blackett: Occasionally, I suppose.

Q104 Mr Tyrie: We must have some sort of check left in place.

Judge Blackett: Yes.

Q105 Mr Tyrie: That goes further than merely looking at whether you can reduce sentencing in a particular case, some kind of general check or mechanism.

Judge Blackett: The Army in particular want to maintain an overview of the system, and I am in negotiation with them at the moment, whereby there will be a certain number of cases, or type of case, which they will send to me for my advice. I think the Bill will retain the ability of the Secretary of State to refer a matter to the Court of Appeal. Clearly if I advise the reviewing board, or whatever they are called, the Reviewing Authority, whatever the new authority is called, that they should refer this matter or the Secretary of State should refer the matter to the Court of Appeal, there will be a mechanism to give that overview. Certainly I will continue to read some transcripts so I can keep an overview of the performance of my judges.

Q106 Mr Tyrie: Are you going to keep the same staff in place that you had before?

Judge Blackett: Yes, indeed.

Q107 Mr Tyrie: Even though they will not have the power under the proposed legislation to do what you would have formerly been able to do?

Judge Blackett: Yes.

Q108 Chairman: Were the changes to be made, and I am not at all certain that they would be, would that significantly increase the level of appeals?

Judge Blackett: I doubt it actually.

Q109 Chairman: Or would people appeal anyway?

Judge Blackett: At the moment an accused can petition the Reviewing Authority, and it is easy. A lawyer can draft up a petition in no time at all.

29 November 2005 His Honour Judge Jeff Blackett

Q110 Chairman: So it is easier than mounting an appeal?

Judge Blackett: Much easier.

Q111 Chairman: At the end of the process—I should know the answer to this—does the Criminal Cases Review Body have—

Judge Blackett: No, the Criminal Cases Review Body does not cover courts martial, although I think they are in negotiation with the MoD because they think they should.

Q112 Chairman: Is there still a review of the appeal level court martial?

Judge Blackett: Yes, because the Court of Appeal also sits as the Court Martial Appeal Court and an accused can appeal to the Court Martial Appeal Court, so petition and review is just an additional safeguard. Its removal will not put this soldier, sailor or airman in any worse position than his civilian counterpart.

Q113 Chairman: Except that at the end of the day, after he has been locked up, sitting in prison for a while, the Criminal Cases Review Process could ask for the case to be reopened.

Judge Blackett: That is true.

Q114 Chairman: That opportunity is not open to them now.

Judge Blackett: Not at the moment. I know that the Criminal Cases Review Commission have made submissions to the Ministry of Defence Bill team.

Q115 Jeremy Wright: Just very quickly, for clarity on the review process: do you sit as a Judge Advocate on some cases?

Judge Blackett: I do.

Q116 Jeremy Wright: Presumably if it were to be one of your cases subject to review, someone else would have to sign off on the legal advice?

Judge Blackett: They would, yes. In fact, I have an arrangement with the Judge Advocate of the Fleet, Judge Sessions, who provides the legal advice in reviewing my cases.

Q117 Chairman: He will not exist if the changes in the Bill go ahead.

Judge Blackett: Indeed he will not, but nor will the reviews.

Chairman: Thank you very much indeed, Judge Blackett. I think we have found this evidence session very informative and it will be particularly helpful to the rest of the House when they come to consider the legislation. We will make sure that it is in front of them when they do. Thank you very much indeed.

Written evidence

Evidence submitted by the Judge Advocate General

I set out below my written evidence to the Constitutional Affairs Select Committee, in advance of the oral evidence session appointed for 29 November 2005.

There are three preliminary points I wish to mention. First, I cannot comment on pending Court-Martial cases which are *sub judice*. Second, in due course the committee on the forthcoming Armed Forces Bill may invite me to give evidence, and as I would wish to accept I feel that it would be inappropriate to discuss the Bill in any detail now. And third, I must be cautious about commenting on legal issues on which I may subsequently have to give judicial rulings.

1. JUDICIAL INDEPENDENCE

As the Judge Advocate General and as a Circuit Judge I am a holder of judicial office, and as such independent of the executive and not accountable to Government. The same goes for my team of Judge Advocates, who sit as the trial judge in Courts-Martial. In addition, my Royal Letters Patent give me general power to “examine hear or determine” matters concerning the affairs of the Forces and to require the obedience of the Forces in carrying out my duties.

The “Office of the Judge Advocate General” is an administrative office, staffed by civil servants. As part of the Department for Constitutional Affairs it is answerable to ministers.

2. SEPARATE MILITARY SYSTEM

There are several cogent reasons for maintaining a unique system of military justice, separate and distinct from the civilian system. These are to:

- support operational effectiveness and morale;
- maintain discipline which is an essential element of command;
- reflect the special and unique nature of the Armed Forces, in which sailors, soldiers and airmen are required to use lethal force to support Government policy, to risk their personal safety, and to be prepared to lay down their lives for their country; and
- extend the law of England and Wales to personnel serving overseas and outside the jurisdiction of the civilian courts.

The limited powers of Commanding Officers to deal summarily and immediately with minor offences are subject to the unfettered right of the defendant to elect trial by Court-Martial or to appeal to the Summary Appeal Court for a *de novo* hearing after the Commanding Officer’s hearing. The two tiers together (Courts-Martial and summary dealings) amount to a system which is proportionate, effective, economical, ECHR compliant, and meets the unique requirements of the Armed Forces.

3. STATUS OF MILITARY JUSTICE SYSTEM

It is important for those subject to the military jurisdiction, for the judges who conduct them, and for the standing, quality, reputation and resourcing of Courts-Martial that they are, and are seen to be, fully on a par with the civilian system. There may be an unfortunate and damaging perception that a person accused of a serious criminal offence in a civilian court may be tried in a court or by a judge of apparently higher status or quality than a person being tried for the same offence, and in jeopardy of the same punishment, in a military court. That perception, if it exists, must be reversed. It is my aim as JAG, with the support of senior judiciary, to establish a position in which the military criminal justice system and its judges bear comparison with the civilian equivalents, the Crown Court and its Circuit Judges and Recorders. The suggestion that Courts-Martial equate to Magistrates Courts is misconceived; the full range of indictable offences, including murder, arise in Courts-Martial which have the same powers of punishment as a Crown Court including life imprisonment. The military system should equate to the civilian system in all respects except where the requirements of operational effectiveness make the differences indispensable.

4. LISTING TRIALS FOR HEARING

Under the current law every Court-Martial has to be convened separately by the Court Administration Officer (appointed by the Secretary of State for Defence) who has primary responsibility for appointing the time and date of a Court-Martial hearing. The trial judge can then give binding directions on law and procedure which may include changing the date and location. In the civilian system listing is solely a judicial function, with any day-to-day administration undertaken by listing officers working by delegation from judges. In my view the military justice system ought to reflect the same practice and I intend to seek changes following the forthcoming Armed Forces Bill.

The location of the majority of trials is in the UK (including Northern Ireland) but about 25% of the work arises in Germany and trials have recently been held in Cyprus, Belize, Brunei, and Canada. They could potentially be held at any location where British Armed Forces operate or train.

5. COURTROOM INFRASTRUCTURE

The current construction of three new purpose-built two-court Military Court Centres means that within a year there will be eight modern courtrooms in UK to support the military justice system, a sufficient number. The Military Court Service is to be congratulated on the achievement. The position is however less favourable in Germany, where existing courtrooms are unsatisfactory but planned replacements are in doubt.

6. HUMAN RIGHTS ISSUES

There has been a succession of ECHR-based challenges to the military justice system in recent years, leading to significant improvements. Functions which used to reside with the Convening Authority have been separated and, apart from the Review process, executive involvement with the post-trial process has been removed. One of the most essential safeguards to the fairness of the military justice system is the participation of an independent civilian judge advocate, along with the right of appeal to the Higher Courts. It is understandable and perfectly proper that defence legal representatives should seek to challenge aspects of the process in their particular case, or the system generally, in pursuit of their clients' interests and the trial process is well able to deal with those challenges. However, it is not unknown for some civilian lawyers or pressure groups to use human rights points to attack the military justice system or the Armed Forces generally. The system is ECHR compliant and such attacks can be rebutted so long as it remains so, and provided any problems which come to light are promptly dealt with.

7. DCA/MoD SPLIT

The military justice system naturally lies at the interface between MoD and DCA. MoD properly and necessarily supports the investigative process, the prosecuting authorities, and legal aid for defendants. Currently DCA is responsible for the appointments, salaries, and immediate administrative support of judges, while MoD provides courtrooms, staffs hearings, arranges panels (juries), summons witnesses, guards defendants, and lists cases for hearing. In Germany, MoD also provides quarters, transport and offices for OJAG judiciary and staff.

In my view the place where the dividing line falls at present, whilst in no way improper, is slightly uncomfortable. The independence of the judicial process would be more clearly demonstrated if the Military Court Service were resourced and administered as part of DCA, like Her Majesty's Courts Service in the civilian system.

8. MEMBERS OF PANELS

The military panels (the Court-Martial equivalent of a jury) are essential in representing the Service interest and in importing practical understanding of Service conditions when assessing the evidence. The members usually comprise for General Courts-Martial five officers or Warrant Officers or, for District Courts-Martial, three. Panels are the same as Crown Court juries during the trial and may reach a verdict of Guilty or Not Guilty by a simple majority. In my view any risk of unfairness would be better avoided if the panels were larger, with five as the minimum for any indictable offence or any either way offence which would have been tried in a Crown Court, and if unanimity or a high majority threshold was a requirement. Unlike in the Crown Court, the panel assists the judge in sentencing ensuring that the unique nature of service life is taken into account.

Membership of a Court-Martial panel ought to count as jury service; no individual should be obliged to serve on both a Court-Martial panel and a Crown Court jury in the same year.

9. ARMED FORCES BILL

The forthcoming Bill is most welcome. It moves the modernisation of the military criminal justice system forward to the next stage, and accordingly has my strong support. I would not wish to comment on its provisions in detail at this point. The desirability of introducing a single system of Service law, and aligning of three Services together by creating joint authorities for prosecution, for court administration, and judiciary is self-evident. There are three matters which may be of interest to the committee:

9.1. *The abolition of the review process*

After conviction and sentence by a Court-Martial, but before any appeal to the Court-Martial Appeal Court, the Reviewing Authority has power to quash the conviction, or reduce (but not increase) the sentence. Although this power is exercised only on my legal advice and in fact exists as an additional safeguard for the defendant, this is an executive function interpolated into the judicial process, which has been commented upon adversely by the European Court of Human Rights. The forthcoming Bill proposes its abolition, which I support.

However I am concerned at the apparent absence of a “slip rule” like that available to the Crown Court. It seems the only mechanism for correcting even technical errors will be via the Court-Martial Appeal Court (in effect the Court of Appeal).

9.2. *Standing Court-Martial*

The creation of a standing Court Martial (instead of convening and dissolving each Court-Martial *ad hoc*) by the forthcoming Bill is a welcome replacement of a cumbersome system with a simpler one. It will aid the process of preparing cases for hearing under judicial direction, and organising sittings.

9.3. *Judge Advocate General and Judge Advocate of the Fleet posts*

The historic post of Judge Advocate of Her Majesty’s Fleet, which has existed for over 300 years, is still filled with distinction by His Honour Judge Sessions to whose great skill I wish to pay tribute. Judge Sessions has delegated most of the JAF functions to me to enable me to appoint civilian judges to Royal Navy Courts-Martial on a similar basis to those for Army and RAF trials. The Bill will enable JAF functions to be absorbed into the JAG post and the Judge Advocate of the Fleet will cease to exist as a separate post.

10. DELAY

The end-to-end time from offence to Court-Martial trial, both in major and in minor matters, is too long and it is important for it to be reduced. Delays undermine operational efficiency and are detrimental to the purposes of the process and to all the participants.

I am uniquely well-placed to have an oversight of every stage of the process, but only retrospectively at the end of each case; I can have no knowledge or control of cases whilst they are in the early stages of preparation. I have been able to provide advice to MoD, and in particular to those preparing the forthcoming Bill, about the causes of the problem and mechanisms for driving down delay.

The process of preparing cases and bringing them to trial has several stages, all of which call out for improvements. Measures have been taken and are being taken to tackle this issue, and further measures are planned.

His Honour Judge Jeff Blackett
Judge Advocate General

November 2005

Supplementary evidence submitted by the Office of the Judge Advocate General

COURT MARTIAL PANELS AND THEIR ROLE

1. The current legal position is that the choice of a District Court-martial or General Court-martial (ie at least three or at least five [panel members]—but in practice just three or five except in homicide cases where traditionally seven are used) lies with the prosecution. Arrangements to summon the panel are made by the Court Administration Officer. A simple majority suffices for conviction, with no provision about striving for unanimity. A District Court Martial may not try an officer or pass a sentence of more than two years’ imprisonment.

2. In the Armed Forces Bill, the size of the panels and the dividing line between small-panel cases and large-panel cases are left to be specified in Rules (negative resolution). The proposals are that three and five person panels should remain and there are no proposals to alter the summoning arrangements, or the majority verdicts.

3. However, MoD has indicated what the Rules will provide, as in earlier drafts of the Bill the size of the panels and the level of the dividing line were on the face of the Bill. This specified that the larger panel (at least five lay members) must try any offence which is punishable with imprisonment for 14 years or more. These matters were removed into Rules in the later draft not because of a change of policy, we understand, but as a matter of Parliamentary Draftsmanship.

4. JAG's position is that he believes that three-person panels should deal only with matters equivalent to those which a panel of three civilian Magistrates would deal with (ie summary and the less serious either way offences). The more serious matters (indictable and either way offences which would be tried in the Crown Court) should be tried by a panel of at least five persons and perhaps more, depending on gravity, with the trial judge determining the constitution of the panel. He observes that in the civilian system Parliament would be unlikely to leave it to the Home Office to determine in Rules what size Crown Court juries should be; no more should MoD do so in the military system.

5. JAG also takes the view that unanimity of verdicts is most desirable, and that judges should be required, or at least empowered, to ask panels to strive for unanimity and to refuse to take a verdict which is not unanimous until after a certain time (to reflect Crown Court practice). If a majority verdict is to be acceptable it ought to be a majority of a substantial proportion (like the 10–2 in Crown Courts). It is not satisfactory for a bare majority verdict (such as 3–2) to result in conviction in a serious case. The point he was making was that it is objectionable for a three-person panel to convict on a 2–1 majority in a case where the defendant was at risk of a long prison sentence. It would be less objectionable were the three-person's powers to equate to a civilian Magistrates Court.

The Office of the Judge Advocate General

His Honour Judge Jeff Blackett
Judge Advocate General

December 2005

Evidence submitted by the Department for Constitutional Affairs

A. JUDICIARY

The Letters Patent sealed by HM The Queen appoint a "Advocate General or Judge Martial of all Our regular auxiliary and reserve Land and Air Forces", or Judge Advocate General, under the Courts-Martial (Appeals) Act 1951. The current office-holder is His Honour Judge Jeff Blackett. He is supported by one Vice-Judge Advocate General, and seven Assistant Judge Advocates General, and following three recent appointments the judiciary are fully up to strength. All the permanent judges are appointed by the Lord Chancellor. The Judge Advocate General has also appointed 12 fee-paid part-time Deputy Judge Advocates.

The main roles of the Judge Advocate General, apart from being the trial judge in some cases, are to allocate judge advocates to conduct proceedings at military trials, to give the Army and Royal Air Force reviewing authorities post-trial advice on courts-martial, and to keep records of court-martial proceedings. In addition, he has a broad duty to monitor the Army and Royal Air Force criminal justice systems to ensure that they work fairly, properly and efficiently. By delegation from the Judge Advocate of the Fleet, he has a similar role as regards the Royal Navy.

B. ADMINISTRATIVE OFFICE

The Office of the Judge Advocate General is administratively part of Her Majesty's Courts Service, which is an agency of the Department for Constitutional Affairs. The staff of nine (seven in London, two in Germany) support the judiciary by preparing files, handling papers, making booking arrangements, and providing advice. The office does not generally manage courtrooms, staff hearings, summon witnesses, guard defendants, or list cases for hearing: those roles are carried out by the Military Court Service, which is part of the Ministry of Defence, or by the Forces themselves.

C. CATEGORIES OF WORK

Apart from the main work of court-martial trials in the Navy, Army and Air Force, the judges have additional jurisdictions including:

- considering custody applications and search warrant applications at short notice
- giving directions or holding preliminary hearings in advance of trials
- hearing Summary Appeal Court cases (appeals from summary dealing by a Commanding Officer)
- hearing Standing Civilian Court cases (prosecutions against members of the civilian component of British Forces in Germany)
- preparing review advices for the Reviewing Authorities post-trial

D. NATURE OF HEARINGS

A Court-Martial trial is in many respects equivalent to a trial in a civilian Crown Court. Many of the offences are the same as those in the civilian jurisdiction, but in addition there are specifically military offences (such as going absent without leave or desertion, disobeying a lawful order, unauthorised discharge of a firearm, or navigation/flying offences). The jury consists of a panel of three, five or seven Officers or Warrant Officers from the service concerned, the most senior of whom is known as the President. The judge conducts the proceedings and gives directions and rulings on all matters of law, and the members of the jury reach a verdict of Guilty or Not Guilty, which may be by a majority. The sentencing procedure is significantly different from the Crown Court, in that the President and members participate along with the judge in deciding the sentence.

E. LOCATION OF HEARINGS

A Court-Martial hearing can take place anywhere in the world. Trials are listed by the Military Court Service, subject to the directions of the judge. The majority are held in the United Kingdom but about 25% of the work arises in Germany and there are occasional trials in Cyprus, Belize, Brunei, Canada and potentially any location where British Armed Forces operate or train. All Royal Navy and Royal Air Force trials in recent times have been held in UK. New purpose-built Military Court Centres are under construction in Colchester, Bulford and Catterick.

F. WORKLOAD

After allowing for time spent sitting in the civilian Crown Courts, travelling, training, and on leave, the number of judges' sitting days has been as follows:

2003	1,004 days
2004	1,028 days
2005 (<i>January–July only</i>)	717 days

The number of individuals tried at Army Court-Martial has been as follows (some defendants are tried jointly):

2003	470 soldiers
2004	521 soldiers
2005 (<i>January–October only</i>)	542 soldiers

The number of Royal Navy and Royal Air Force trials has been as follows (some trials are of more than one defendant):

	RN	RAF
2003–04 (April–March)	60 trials	72 trials
2004–05 (April–March)	60 trials	57 trials
2005 (<i>April–September only</i>)	25 trials	41 trials

About two-thirds of prosecutions result in Guilty pleas. Contested trials range from minor matters up to murder, manslaughter, rape and child abuse trials which can take 40 sitting days or more to hear.

G. FINANCE

The Office of the Judge Advocate General has an annual provision of £1,418,000 from the DCA Vote, which is spent on the judges' salaries and fees, together with the expenses of their pensions contributions, recruitment, training, legal books, judicial robes, IT support and similar matters, judicial travel and subsistence (including overseas travel except for Germany), and cost of living allowances for judges resident in Germany; and for staff including their salaries, pensions contributions, cost of living allowances, recruitment, training, management and supervision, and the costs of supporting the London office.

The Ministry of Defence provides facilities to support judiciary and staff in Germany, either directly or by reimbursing expenditure. Thus MoD provides quarters for judiciary and staff, meets hotel bills, provides transport in the form of cars and drivers, meets expenses such as air fares and rail fares, and provides telecommunications.

Department for Constitutional Affairs

November 2005

Evidence submitted by the Ministry of Defence

ROLE OF THE JUDGE ADVOCATE GENERAL'S OFFICE IN RELATION TO THE MOD

1. The pivotal position of the independent civilian Judge Advocate General and his judicial staff in the service disciplinary system has evolved as a result of legal challenges to the system largely heard before the European Court of Human Rights (ECtHR) in Strasbourg, and also as a result of legislative changes made by various Acts of Parliament.

2. Prior to the ECtHR case of *Findlay v UK* (1997), the duties of the Judge Advocate General's Office, which then dealt only with army and RAE cases, comprised (1) the provision of trial judge advocates at court-martial trials and (2) the legal review of findings of guilt and of sentences imposed on accused persons by those courts.

3. The third duty of the Judge Advocate General's office during this period arose where civilians accompanying the armed forces overseas become subject to service law, and can be tried for the commission of civil and a limited number of Service law offences. The Armed Forces Act 1976 created the Standing Civil Court (SCC) which allows civilians to be tried in a more congenial environment for less serious offences than in front of a court martial. The SCC currently operates in Germany and Cyprus where service personnel and accompanying civilian personnel and their families live. The SCC deals with minor offences committed by civilians, adult and juvenile, subject to service law and a judge advocate will be appointed to sit as the magistrate of the SCC.

4. The ECHR case of *Findlay* altered the status of the trial judge advocate at a court martial. Prior to *Findlay*, the trial judge advocate enjoyed a status akin to a clerk to the justices in a magistrates' court. The board of officers, at the court martial, acted like a bench of lay magistrates and could, theoretically at least, ignore a ruling on the law of a trial judge advocate. Post *Findlay*, the trial judge advocate acquired a status akin to a crown court judge where he controlled the court and matters of law fell within his sole responsibility. The board of officers continued to decide the issue of guilt or innocence of an accused, like any jury. Previously the board of officers also decided the sentence to be imposed, where a finding of guilt had been recorded, having been advised of the range of sentencing options available by the trial judge advocate. Post *Findlay*, the trial judge advocate acquired a vote on sentence along with each member of the board of officers. It has become the role of the trial judge advocate to explain the reasons underlying a sentence of the court to an accused before the president of the board of officers pronounces the sentence that has been imposed.

5. The *Findlay* amendments (as they might be characterised) of which those mentioned above form only a part actually preceded the full ECtHR judgment in that case and were brought into force by the Armed Forces Act 1996.

6. The Royal Navy had its own parallel system of serving naval officers, trained as barristers, who through professional experience, prosecuting and defending at navy courts-martial, would ultimately be ticketed to be uniformed judge advocates, and to perform the same role as their civilian counterparts in the army and RAF court-martial system performed. This practice ended with the ECtHR judgment in the case of *Grievies v UK* (2003) where the practice of uniformed naval judge advocates was deprecated by the court. In the judgment of the court it was stated:

“Accordingly, the lack of a civilian in the pivotal role of Judge Advocate deprives a naval court-martial of one of the most significant guarantees of independence enjoyed by other services' courts-martial.”

7. The Judge Advocate General's Office now provides civilian trial judge advocates to Navy trials. The Royal Navy continue to have a parallel system of review to the other two Services where the legal review will be conducted by the Judge Advocate of the Fleet (JAF) who is a civilian crown court judge appointed to the position of JAF.

8. The Judge Advocate General's office has increasingly become responsible for case management of court martial cases from the moment of charge by the independent service prosecuting authorities. There is now provision for automatic hearings for directions where a judge advocate will seek to manage a case at an early stage, to arrange for the entering of pleas to charges, to identify issues between the prosecution and defence, and to minimise delay in a case proceeding to trial.

9. Two further key duties of the Judge Advocate General's office arose as a result of the Armed Forces Discipline Act 2000 (AFDA 2000). In the case of *Hood v UK* (1999) the ECtHR had held that there had been a breach of Article 5(3) of the Convention when *Hood* had been placed under close arrest (ie in custody) by his commanding officer from November 1994 until his court-martial in April 1995. This was because the commanding officer was not a “judge or other officer authorised to exercise judicial power”. As a result of AFDA 2000, the Service Disciplinary Acts (SDAs) were amended to provide judicial intervention in custody matters where issues of both precharge and post-charge custody arose. In the former case, service policemen, and in the latter case, the independent prosecuting authority, have to apply to “judicial officers” for authorisation for custody. “Judicial officers” comprise judicial officers drawn from the Judge Advocate General's Office.

10. AFDA 2000 also introduced another major change to the service disciplinary system which has impacted on the work of the Judge Advocate General's Office. The commanding officer (CO) has always dealt with the bulk of offences involving his service personnel, at summary hearings. He has limited jurisdiction, ie he is limited in what offences he can hear (the more serious offences must be dealt with by court-martial) and his powers of punishment are also limited. It was recognised, post *Findlay*, that a summary hearing by a CO is not an ECtHR compliant hearing. The army and the RAF, as a matter of policy, introduced a universal right of election for any accused, post *Findlay*, of trial by a court-martial. A court-martial does constitute an ECtHR compliant court. This position was regularised in statute by AFDA 2000 although the right of election as exercisable in naval proceedings is more limited. To prevent any disincentive to election for any accused, a court-martial can, in an election case, impose no greater punishment than could have been awarded by a CO. However where an accused had been dealt with by a CO, and had not exercised his right of election, AFDA 2000 created a right of appeal against both finding and sentence to a newly created court known as the Summary Appeal Court (SAC). The SAC will normally consist of a judge advocate appointed by the Judge Advocate General's Office and two officers. Where the appeal is against finding, the appeal will be by way of rehearing and the judge advocate will sit with the court in relation to the determination of finding as well as dealing with issues relating to sentencing. A SAC is an ECtHR compliant court.

11. The summary hearing process was recently challenged in the case of *Baines* (2005) EWHC 1399 and its integrity was upheld by the court. Mr Justice Field, giving the judgment of the court stated:

“In our judgement, on the evidence before us and in light of the relevant statutory and regulatory provisions, a soldier does have a free and unrestrained right to elect for trial by court-martial and to lodge an appeal following a summary dealing.”

12. Finally, the Armed Forces Act 2001 (AFA 01) placed further duties on judicial officers, again drawn from the Judge Advocate General's office, in relation to authorising the entry and search of certain premises by service policemen investigating offences under the SDAs. Formerly authorisation had been given by COs. The power was placed on a statutory footing by AFA 01 and essentially the premises comprise service living accommodation including private accommodation where service personnel under investigation live. Certain limited residual powers were left available in this area to a CO but where anything was seized or retained as a result of a search authorised by a CO, the seizure and retention has to be reviewed by a judicial officer under the Act.

13. The duties of the Judge Advocate General's Office therefore encompass:

- (a) trial judge at court-martial;
- (b) review;
- (c) acting as magistrate at SCC;
- (d) case management of CM cases;
- (e) authorisation of pre and post charge custody;
- (f) hearing appeals to the SAC; and
- (g) authorising entry and search of premises and seizure and retention of property under AFA 01.

14. Of the foregoing duties, only the review process will disappear as a result of the Armed Forces Bill.

Ministry of Defence

November 2005

