House of Lords
House of Commons

Joint Committee on Human Rights

Legislative Scrutiny: Armed Forces Bill

Twelfth Report of Session 2010–12

Report, together with formal minutes and appendices

Ordered by The House of Lords
to be printed 10 May 2010
Ordered by The House of Commons
to be printed 10 May 2010

HL Paper 145
HC 1037
Published on 17 May 2011
by authority of the House of Lords and
the House of Commons London:
The Stationery Office Limited
£0.00

Joint Committee on Human Rights

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Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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Report

Summary

The Armed Forces Bill was introduced into the House of Commons and was considered by a Special Select Committee which published its Report on 10 March 2011. This Report considers nine significant human rights issues raised by the Bill.

The treatment of detainees by members of the armed forces in Iraq is a subject which our predecessor Committee has considered a number of times. The allegations are the subject of a number of public inquiries and including Baha Mousa inquiry and the Al Sweady inquiry, while the Iraq Historical Allegations Team and the Iraq Historical Allegations Panel are also investigating the allegations. In light of the number of public inquiries and ongoing investigations into the issue, we do not consider the question in the context of this Bill. We may return to the issue in a future report, particularly if any inquiry finds the existence of systemic abuse of detainees by members of the armed forces.

The Bill contains provisions which are intended to enhance the structural independence of the service police and the independence and effectiveness of investigators. We do not come to a conclusion on whether these changes provide sufficient guarantees of independence of investigators in light of ongoing litigation directly concerning this issue. We do however believe that in order to give better, effect to the Government's intention that Her Majesty's Inspectorate of Constabulary report on the promptness as well as independence and effectiveness of service police investigations, an explicit reference to "promptness" should be added to the face of the Bill.

We are not persuaded that the Government has provided enough evidence to sufficiently justify the Bill's extension of the power of a judge advocate to authorise the entry and search of residential premises by service police to "all premises" on a potentially unlimited number of occasions. We do not believe the Government justification is weighty enough to justify the departure from the current procedures which protect against arbitrary or disproportionate interference with the right to respect for people's homes. We recommend that the power to authorise all premises and multiple entry warrants to enter and search residential premises be deleted from the Bill.

The Bill extends the power of Courts Martial to make Sexual Offences Prevention Orders in relation to persons who pose a risk of sexual harm while serving in the armed forces overseas. We welcome the Minister's assurance that the making of such an Order would be subject to the criminal standard of proof, but recommend that the Bill should be amended to make clear that the criminal standard should apply to any factual determinations necessary for the making or varying of any such Order.

The Armed Forces Act 2006 introduced Service Complaints Panels to deal with employment complaints, as there is no access for armed forces personnel to an employment tribunal. A recent judgment of the European Court of Human Rights found that in some cases the facts would need to be determined by an independent and impartial tribunal in order to comply with the right to a fair hearing. The Bill includes measures to respond to this judgment by increasing the flexibility of the Defence Council to convene a panel of independent members. We welcome the Government's proactive response to this judgement, but have concerns that there is still a risk that the power to convene the Panel may be exercised in a manner that is still inconsistent with the Article 6 right to a fair hearing. We welcome the

Minister's assurance that decisions of the Defence Council are subject to judicial review, which will allow individuals to challenge the composition of the panel.

We have continuing concerns about the compatibility of the trial of civilians in a military context with the right to a fair hearing and we do not share the Government's confidence that the changes made by the Armed Forces Act 2006 will ensure that civilians are only tried by military courts in "exceptional circumstances" as required by the European Court of Human Rights.

The Bill requires the Secretary of State to lay before Parliament an annual report on the armed forces covenant. We welcome this report as it enhances the Government's accountability to Parliament for the protection of the rights of members of the armed forces.

The Committee received representations on under-18s serving in the Armed Forces in the context of this Bill. The Bill provides a good opportunity for Parliament to debate the service of under-18s in the Armed Forces and the recommendations of the UN Committee on the Rights of the Child on UK compliance with the UN Optional Protocol on Children in Armed Conflict. We believe that the Government should adopt an action plan for responding to these recommendations, clarify the arrangements for the discharge of under-18s from the Armed Forces and amend the service commitment made by under-18s to bring it in line with the commitment made by recruits of other ages. We are further concerned over the lack of statistics on the number of under-18s who request a discharge and are refused and consider there is a risk that without special provision for discharge of under-18s, service may not be considered voluntary in the sense required by the Optional Protocol.

In our view, the broad exemption for service in the Armed Forces from the protection of the Equality Act 2010 is disproportionate and unnecessary, although we welcome the Minister's commitment to keep the reservation to the UN Convention of the Rights of Persons with Disabilities under review.

Government Bills

Bills drawn to the special attention of each House

1 Armed Forces Bill

Date introduced to first House	8 December 2010
Date introduced to second House	
Current Bill Number	HL Bill 115
Previous Reports	None

Introduction

1.1 The Armed Forces Bill was introduced into the House of Commons on 8 December 2010.[1] The Rt Hon Liam Fox MP, Secretary of State for Defence, has certified that, in his view, the Bill is compatible with Convention rights. The Bill received its Second Reading on 10 January 2011 and was considered by a Special Select Committee on the Bill which published its Report on 10 March 2011.[2]

Explanatory Notes/Human Rights Memorandum

1.2 The Explanatory Notes to the Bill set out the Government's analysis of the most significant human rights issues raised by the Bill at paragraphs 180–194. These contain a reasonably detailed human rights analysis of five clauses in the Bill,[3] but state that it is not considered that any other provision of the Bill raises issues in relation to the Convention or other human rights instruments.[4]

1.3 A more detailed human rights memorandum was provided by the Ministry of Defence (MoD), however, on 11 January 2011.[5] This human rights memorandum is a helpful document, covering a wider range of issues than the Explanatory Notes[6] and containing a useful summary of some significant human rights issues concerning the armed forces which have been litigated since the passage of the Armed Forces Act 2006. It cites relevant case-law and explains why in the Government's view various provisions of the Bill are compatible with relevant human rights standards as interpreted in those cases. The Bill team also made itself available to meet the Committee's staff, both before and after the Bill's introduction, and officials have been very constructive and co-operative throughout in assisting with our scrutiny of this Bill. We wrote to the Secretary of State for Defence on 8 February 2011 asking for further information on a number of specific human rights issues raised by the Bill.[7] We received a detailed and thorough reply from the Minister for Defence Personnel, Welfare and Veterans, Andrew Robathan MP, on 28 February 2011.

1 HC Bill 115.

2 The Special Select Committee on the Armed Forces Bill, *The Armed Forces Bill*, Special Report of Session 2010–11, HC 779.

3 Clauses 7, 8, 11, 17 and para. 4 of Schedule 3.

4 EN para. 194.

5 EV 2.

6 Although paras 45–59 of the memorandum reproduce paras 180–194 of the Explanatory Notes, paras 1–45 cover human rights issues not covered at all in the Explanatory Notes.

7 EV 3.

We welcome the proactive and facilitative approach taken by the MoD to our scrutiny of the Bill's human rights compatibility, including the provision of a detailed and helpful human rights memorandum, and we commend that approach to other Departments as an example of good practice.

1.4 In this Report we comment on the most significant human rights issues raised by the Bill.

Significant human rights issues

(1) Treatment of detainees by members of the Armed Forces

1.5 The treatment of detainees by members of the armed forces in Iraq is a subject into which our predecessor Committee inquired and on which it reported on a number of occasions.[8] The allegations of ill-treatment are acknowledged by the Secretary of State to be of the utmost seriousness. They include a range of forms of ill-treatment which include all of the so-called "five techniques" (hooding, stress positions, subjection to noise and deprivation of sleep, food and water) which were prohibited in the UK in 1972 following the decision of the European Court of Human Rights in *Ireland v UK*.

1.6 The allegations are currently the subject of a number of different public inquiries and investigations. The Baha Mousa inquiry, chaired by Sir William Gage, has finished hearing evidence and may report in the next few months. The Al Sweady inquiry, into alleged unlawful killings and ill-treatment in a different incident, will be chaired by Sir Thayne Forbes and will not begin hearing evidence until May 2011. Both inquiries will make findings about the allegations and, if appropriate, recommendations for the future.

1.7 The Secretary of State has set up the Iraq Historic Allegations Team ("IHAT") to investigate the allegations with a view to the identification and punishment of anyone responsible for wrongdoing. He has also set up a separate Iraq Historic Allegations Panel ("IHAP") to ensure proper and effective handling of information concerning cases subject to investigation by IHAT and to consider the results of IHAT's investigations, any criminal or disciplinary proceedings brought, and any other judicial decisions concerning the cases, with a view to identifying any wider issues which should be brought to the attention of the Secretary of State. The Secretary of State has not ruled out the possibility that a public inquiry into systemic issues may be required, in the light of IHAT's investigations and the outcome of the existing public inquiries, nor that there may be prosecutions in the light of those outcomes, but he says that it is premature to set up such a public inquiry now while these other inquiries and investigations are going on.

1.8 **We decided not to return to the substantive question of the alleged ill-treatment of detainees by members of the armed forces in the context of this Bill, but to keep open the possibility of doing so in a future Report. We made this decision in light of the fact that the allegations are currently the subject of a number of different public inquiries and ongoing investigation by the Ministry of Defence. If it is established by any of these inquiries or investigations that the allegations disclose the existence of systemic abuse of detainees by members of the armed forces, it might be appropriate to consider**

8 See for example, Twenty-eighth Report of 2007–08, *UN Convention against torture: Discrepancies in evidence given to the Committee about the use of prohibited interrogation techniques in Iraq,* HL Paper 157/HC 527.

whether any legislative responses are required to prevent such abuse from happening again. We may therefore return to the issue in a future Report in the light of any relevant findings and recommendations.

(2) Independence of service police investigations

1.9 The Bill contains provisions which, according to the human rights memorandum, are "intended to highlight and buttress the structural independence of the service police and to support best practice in the conduct of investigations."

1.10 These provisions include a new duty on the heads (the Provost Marshals) of each of the service police forces to seek to ensure that all investigations carried out by the force are free from improper interference.[9] Improper interference is defined to include, in particular, any attempt by a person who is not a service policeman to direct an investigation which is being carried out by the force.[10] The duty is owed by the head of the service police force to the Defence Council, the highest level of the MoD responsible for command and administration of the armed forces.

1.11 The Bill also provides for Her Majesty's Inspectors of Constabulary ("HMIC") to inspect and report to the Secretary of State on the independence and effectiveness of investigations carried out by each service police force, with such reports to be laid before Parliament by the Secretary of State.[11] Finally, it seeks to highlight and support the independence of the heads of the service police forces from the chain of command by providing for their appointment by the Queen.[12] The Bill also provides a power for the Director of Service Prosecutions (a civilian) to appoint civilian prosecutors.[13]

1.12 Each of these provisions has the potential to enhance the independence from the chain of command of service police investigations and subsequent charging decisions. This has been a live issue in the context of the numerous allegations that have been made about ill-treatment of detainees by British troops in Iraq. Articles 2 and 3 ECHR both impose positive obligations on the state to conduct effective, independent and reasonably prompt investigations into allegations of the use of lethal force (Article 2) or ill-treatment of detainees constituting inhuman or degrading treatment (Article 3) by members of the armed forces. This obligation to investigate extends to the investigation of systemic issues where they are raised by the individual allegations. More than 140 Iraqis have commenced civil proceedings for damages or judicial review proceedings alleging that they have suffered such ill-treatment.

1.13 At the time of our preliminary consideration of the Bill, the Government relied on the recent decision of the High Court in the *Ali Zaki Mousa* case to support its argument that service police investigations under the provisions of the 2006 Act are sufficiently independent and effective to meet the requirements of Article 3 ECHR.

9 Clause 3, inserting new s. 115A into the Armed Forces Act 2006.

10 New s. 115A(3) Armed Forces Act 2006.

11 Clause 4, inserting new s. 321A into the Armed Forces Act 2006.

12 Clause 5, inserting new s. 365A into the Armed Forces Act 2006.

13 Clause 21

1.14 Article 3 imposes a positive obligation on the State to conduct effective, independent and reasonably prompt investigations into allegations of ill-treatment of detainees constituting inhuman or degrading treatment. The Government pointed out that the High Court in the *Ali Zaki Mousa* case had found that the Royal Military Police were sufficiently independent for the purposes of Article 3 and that, although the Commanding Officer retained the decision on whether to prosecute in a few cases, the safeguards were such that in almost all relevant cases the decision would in practice be referred to the Director of Service Prosecutions. In the Government's view, the provisions in the Bill designed to bolster the independence of service police investigations were therefore not, strictly speaking, required by the positive obligations in Articles 2 and 3 ECHR.

1.15 Since our preliminary consideration of the Bill, permission to appeal to the Court of Appeal has been granted in the *Ali Zaki Mousa* case.[14] One of the issues which was judged to be of sufficient importance to warrant consideration by the Court of Appeal was whether the investigations by the Iraq Historic Allegations Team are sufficiently independent, in view of the involvement of Royal Military Police personnel who were embedded with the troops who are the subject of the investigation.

1.16 We asked the Government to explain why it considers that it is appropriate for the Commanding Officer (as opposed to an independent prosecuting authority) to continue to have any discretion in relation to charging decisions, and whether serving armed forces personnel can investigate cases where systemic failings are alleged, without endangering the perceived independence of those inquiries. The Government's responses to these questions rely on the findings of the High Court in the *Ali Zaki Mousa* case, but it acknowledges that it is "very likely" that the Court of Appeal in that case will consider the appropriateness of these provisions in the Bill designed to increase the independence of service investigations.

1.17 **We have considered whether the statutory scheme, as amended by the Bill, provides sufficient guarantees of independence of the investigators from the chain of command, but have concluded that it would be premature to express a view on this question pending the decision of the Court of Appeal in the *Ali Zaka Mousa* case.**

1.18 We also asked the Government whether Her Majesty's Inspectorate of Constabulary should be specifically required to report on the promptness of any investigation as well as its independence and effectiveness. In its response, the Government says that the reference to the "effectiveness" of investigations in the Bill is intended to include promptness.

1.19 **The promptness of an investigation is an important aspect of its compliance with the positive obligations under Articles 2 and 3 ECHR. We recommend that, to give better effect to the Government's intention that HMIC can be required to report on the promptness of service investigations, it be spelled out on the face of the Bill by including an explicit reference to "promptness" in new section 321A(4) of the Armed Forces Act 2006 (inserted by clause 4 of the Bill). The following amendment to the Bill is designed to give effect to this recommendation:**

Page 3, line 37, clause 4, before sub-clause (c) insert:

14 Order of Richards LJ, 10 February 2011.

'(ba) the promptness of such investigations;'

(3) Powers of entry and search

1.20 The Bill extends the power of a judge advocate to authorise the entry and search of residential premises by the service police.[15] The amended power will allow the issue of an "all premises warrant", which authorises the service police to enter and search "any relevant residential premises occupied or controlled by a person specified in the application", whether or not the premises are specifically identified in the application.[16] It will also allow the issue of a "multiple entry warrant", which authorises entry to and search of premises on more than one occasion if, on the application for the warrant, the judge advocate is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which the warrant is issued.[17] If the warrant authorises multiple entries, "the number of entries authorised may be unlimited".[18]

1.21 The purpose of the amendment is to bring the power to authorise entry and search by the service police in the Armed Forces Act into line with the extended power to authorise entry and search by the civilian police in the Police and Criminal Evidence Act 1984[19] following its amendment by the Serious Organised Crime and Police Act 2005.

1.22 The Explanatory Notes to the Bill acknowledge that this provision engages the right to respect for private and family life and home, under Article 8 of the ECHR, and the right to peaceful enjoyment of possessions under Article 1 Protocol 1 ECHR.[20] However, the Government considers it to be necessary for the purposes of the detection and prevention of crime, and proportionate to that aim, for two reasons. First, the power is limited to residential premises of persons who are subject to service jurisdiction and, second, "the clause mirrors section 8 of the Police and Criminal Evidence Act 1984."

1.23 When s. 8 of the Police and Criminal Evidence Act 1984 was amended by the Serious Organised Crime and Police Act 2005, the JCHR reported that the extended powers to issue all premises warrants and multiple entry warrants raised significant human rights concerns, both under the common law and Article 8 ECHR.[21] It said the provisions "give justices of the peace authority to issue a general warrant of a kind that has been anathema to the common law for centuries on account of the very wide discretion it confers on public officials, and the lack of effective prior judicial control over the decision to enter (if need be, by force) private premises including dwellings."[22] It also concluded that the extended powers gave rise to a significant risk of incompatibility with the right to respect for private life and home in Article 8 ECHR, because there was no means for ensuring judicial control over subsequent exercises of the authorisation to enter and search, even though the

15 Clause 7, substituting a new s. 83 of the Armed Forces Act 2006 (power of judge advocate to authorise entry and search).

16 News s. 83(1)(b) Armed Forces Act 2006.

17 New s. 83(5) Armed Forces Act 2006.

18 New s. 83(6) Armed Forces Act 2006.

19 Section 8 Police and Criminal Evidence Act 1984 (power of justice of the peace to authorise entry and search of premises), as amended by s. 113 of the Serious Organised Crime and Police Act 2005.

20 EN para. 180.

21 Fourth Report of 2004–05, *Scrutiny: First Progress Report*, HL Paper 26, HC 224.

22 *Ibid*. at para. 1.91.

circumstances affecting the continued necessity and proportionality of the entry and search might have changed considerably.[23]

1.24 We share the concerns of our predecessor Committee about the compatibility of all premises and multiple entry warrants with rights recognised both by the common law and in the UK's international human rights obligations. We therefore asked the Government a number of questions about the necessity of amending the power of a judge advocate to authorise a service policeman to enter and search residential premises so as to allow the issue of "all premises warrants" and "multiple entry warrants".

1.25 The Government response says that statistical evidence about the use of existing powers of entry is not readily available, and, in the absence of such statistics, it relies on examples of the sorts of circumstances in which the wider power is needed. The Government relies on two reasons in particular: first, it says that it is now not uncommon for Service personnel to have more than one place of residence and, second, it says that there is evidence that some Service personnel are now committing more crimes "involving difficult questions of evidence", such as weapons and drug smuggling, making indecent images of children and child grooming offences. Moreover, these changes in the pattern of the accommodation of Service personnel and the range of offences committed by them are said to have happened since the enactment of the Armed Forces Act in 2006, so that it is now clear that extending the general entry and search power to Service police is justified.

1.26 **We have considered carefully the justification provided by the Government for extending the Service police's power to enter and search residential premises but we are not persuaded that the Government's case is borne out by the evidence or that the justification relied on is sufficiently weighty to justify such a drastic departure from the procedures which protect against the arbitrary interference with the right to respect for people's homes.** The Government refers to one example which it says demonstrates the necessity for the extended power, a recent case in which seven soldiers were allegedly involved in the theft and supply of a substantial quantity of military firearms and explosives and several of the suspects had more than one place of residence. It says it is possible that the items were being moved from one location to another, possibly between residences of the suspects, and applications had to be made for separate search warrants in relation to each individual sets of premises. The Government argues that had a search of one set of premises indicated that the stolen items might be at other premises, it would have been necessary to apply for a new warrant, which might have frustrated or seriously prejudiced the purpose of the search.

1.27 We cannot see how this example demonstrates the necessity for a power to authorise entry and search of any residential premises occupied or controlled by a person subject to service jurisdiction, even if not specified in the warrant. A warrant authorising entry and search can specify more than one set of premises,[24] and that would have been sufficient in the example given by the Government. We do not accept that the changing pattern of service accommodation makes it necessary for the service police to have the power to obtain a general warrant authorising entry and search of any residential premises occupied or controlled by a particular service member. Indeed, the Government acknowledges that

23 *Ibid* at paras 1.95–1.96 and Eighth Report of 2004–05, *Scrutiny: Fourth Progress Report*, HL Paper 60, HC 388, paras 2.29–2.38.

24 New s. 83(1)(a) Armed Forces Act 2006.

there is no known case to date that has been lost because of the lack of the powers which are sought in the Bill, but argues that there is a greater risk of that happening if the wider powers are not available to the service police. Nor are we persuaded that the restriction of the power in the Bill to "relevant residential premises" is a significant limitation on the scope of the power: it merely reflects the fact that the Service police only have powers in relation to persons subject to service jurisdiction, and the general power to enter and search residential premises, including those not specified in the warrant, can only extend to the residential premises of such persons. This does not affect the central mischief in the extended power of entry and search, which is its availability in relation to residential premises not specified in the warrant and which may be entered and searched an unlimited number of times.

1.28 We also asked the Government what post-legislative scrutiny it has carried out of the operation of the power to issue all premises and multiple entry warrants since it was introduced in 2005, and how the proposed extension of entry and search powers in the Bill is compatible with the Government's commitment in the Coalition's Programme for Government to bring forward measures limiting powers of entry. In response the Government acknowledges that the recent review of the Police and Criminal Evidence Act, published in March 2010, highlighted the need to raise police accountability in relation to search warrants generally and also recommended that certain procedures be put in place in relation to all premises and multiple premises warrants. However, the Government states that these matters will be taken into consideration when detailed procedures for the application for and execution of these warrants, including safeguards, are made in the relevant statutory instrument governing the exercise of the powers.[25] As far as the Government's commitment to limiting powers of entry is concerned, the Government restates that commitment but argues that the extended powers of entry and search are necessary in order to ensure that those responsible for investigating crime have sufficient powers to do so effectively, subject to appropriate safeguards which, in the Government's view, the legislation contains.

1.29 **In our view, the strength of the concerns about the human rights compatibility of all premises warrants and multiple entry warrants makes their repeal a candidate for inclusion in the Government's Protection of Freedoms Bill which contains some provisions limiting powers of entry. Instead, they are being extended by the provisions in this Bill. We recommend that the power to authorise all premises and multiple entry warrants to enter and search residential premises be deleted from the Bill. The following amendment is designed to give effect to this recommendation:**

Page 4, line 30, clause 7, leave out sub-para (1)(b).

Page 5, line 49, clause 7, leave out sub-clauses (5) and (6).

(4) Service Sexual Offences Prevention Orders

1.30 Clause 17 of the Bill extends the power of Courts Martial to make Sexual Offences Prevention Orders (SOPO) in relation to persons who pose a risk of sexual harm while part of the armed forces community overseas. SOPO are Orders created under the Sexual

25 Currently the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009, SI 2009/2056.

Offences Act 2003. They are civil orders, similar to ASBOS or Violent Offender Orders, which may be sought in connection with certain sexual offenders. They are imposed on individuals for a set period of up to 5 years and can impose restrictions on their behaviour, subject to criminal sanction for breach of any order.[26]

1.31 Orders of this type engage both the right to respect for private life (Article 8 ECHR) and may also engage the right to a fair hearing (Article 6 ECHR). In order to ensure compatibility with the right to a fair hearing, the standard of proof applied on application for these type of orders is generally the enhanced civil standard, which is virtually indistinguishable from the criminal standard (proof beyond reasonable doubt) (*McCann v Crown Court at Manchester* [2002] UKHL 39). When the Courts Martial make an Order immediately following a conviction, they will have made a finding in connection with the guilt of the defendant and there are safeguards limiting the orders to those necessary for the purposes of protecting the service community from serious harm. In these circumstances, in our view, the provisions will be capable of being applied in a way which is compatible with the right to a fair hearing (Article 6 ECHR) and the right to respect for private life (Article 8 ECHR). There will be no serious risk of a violation, if the restrictions in the proposed orders are necessary and proportionate. However, the Orders are renewable after 5 years. In these circumstances, the trigger offence will be over 5 years old.[27] The Court may also make a SOPO in circumstances where an individual is deemed unfit to stand trial or deemed not guilty for reasons of insanity (these criteria mirror the provisions in the Sexual Offences Act 2003). In these circumstances, while the Court will be asked to impose an order restricting an individual's behaviour, which if breached will be an offence, there may have been no determination that the individual has been responsible for behaviour which gives rise to a risk of criminal offending.

1.32 We wrote to the Minister seeking confirmation that the Government considered that any SOPO or variation of a SOPO, where based on an assessment of relevant factual information, would be made after an assessment of the facts based on the criminal standard of proof ("beyond reasonable doubt").[28] In his response, the Minister confirms that the making or variation of any SOPO will be subject to the criminal standard of proof following the relevant domestic case law on civil orders relating to potentially criminal conduct.[29] The Minister does not consider that it is necessary that this is made clear on the face of the Bill, given that the standard is not mentioned in relation to other similar statutory provisions, including in the Sexual Offences Act 2003. He explained:

> [T]he courts have addressed the issue of the standard of proof and it is now clear that the criminal standard applies to the determination of relevant facts in all civil orders of this type. The MOD does not therefore consider that it would be helpful to mention the standard of proof on the face of the Bill.[30]

1.33 **We welcome the Minister's reassurance that it is the Government's intention that the criminal standard should be applied.** However, in our view, statutory provisions for civil orders of this type should make clear that the criminal standard should apply, in order

26 Sections 104-115.

27 Clause 17, New section 232A(3), Armed Forces Act 2006.

28 Ev 3

29 Ev 4

30 Ev 4

to enhance legal certainty.[31] **We recommend that, for the avoidance of doubt, the Bill should be amended to make clear that the criminal standard should apply to any factual determinations necessary for the making or variation of any service sexual offences prevention order.**

(5) Service Complaints Panels

1.34 Armed forces personnel have no contract of employment and no recourse to the employment tribunal, except in relation to equal pay and discrimination cases. The Armed Forces Act 2006 introduced a mechanism to deal with this type of complaint to ensure individuals would have access to some form of redress. This scheme of Service Complaints Panels is internal to the Armed Forces, subject to judicial review.[32]

1.35 In a recent case, *Crompton v UK*, relating to an earlier complaint, the European Court of Human Rights confirmed that in some circumstances judicial review would be inadequate to ensure that a mechanism for redress in circumstances determining the civil rights of armed forces personnel (including in connection with employment disputes) would comply with the right to a fair hearing by an independent and impartial tribunal. The Court accepted that on the facts of this case, judicial review was adequate. However, it indicated that in some circumstances, the right to a fair hearing would require the determination of the facts in the case by an independent and impartial tribunal. Judicial review would not be enough to make the process fair.[33]

1.36 In the Human Rights Memorandum, the Government explain that the judgment indicated that judicial review would be insufficient to provide compliance with Article 6 if all the following circumstances applied:

i. a civil right was in issue (and this is likely to be the case in a straightforward employment case, such as non-payment of pay or discharge from the armed forces);

ii. the dispute did not call into question the special duty of trust and loyalty which States may expect from their armed forces;

iii. the dispute was not one for which there were compelling reasons for the decision to be made by the chain of command; and

iv. the proper resolution of the dispute turned on a question of fact.

1.37 Clause 20 of the Bill proposes two measures designed to respond to this judgment. Clause 20(5) empowers the Defence Council (the highest level of the Ministry of Defence as regards command and administration of the armed forces) to appoint a panel (to deal with complaints) composed of independent members, or in part made up by independent members. Clause 20(7) empowers the Secretary of State to make regulations requiring in prescribed descriptions of complaint delegation of a case to a panel composed of independent members, or in part made up by independent members.

31 This was frequently recommended by our predecessor Committee: see, for example, Fifteenth Report of 2008–09, para 1.33 (Gangs Injunctions); Fifth Report of 2007–08, para 1.95 (Violent Offender Orders).

32 See Armed Forces Act 2006, Sections 334–339

33 App No. 42509/05, Judgment dated 27 October 2009.

1.38 The Human Rights Memorandum explains:

> [This] approach reflects the view that it is not yet easy to be sure how the European Court's approach would apply to different cases, or to formulate confidently rules as to when an independent fact-finding tribunal will be required. It is considered that further development of the court's jurisprudence is likely. The purpose of the clause is accordingly to allow decisions to be taken on a case by case basis, but also to allow general rules to be laid down as the application of Article 6 to complaints by service personnel becomes clearer.[34]

1.39 We wrote to the Minister to ask whether:

- creating a role for the Defence Council in determining when an independent panel would be appropriate would itself lead to allegations of a violation of Article 6 ECHR in due course;
- whether further detail could be provided on the face of the Bill better to define the discretion given to the Defence Council or the scope of the power of the Secretary of State to make further regulations governing the necessity for independent panels; and
- why the Government had chosen to legislate now, rather than wait for a negative finding that the current system is incompatible with Article 6 ECHR and bring forward a speedy change by Remedial Order under Section 10 HRA 1998.[35]

1.40 Broadly, the Minister's reply explains the Government's view that:

- the new provisions are designed to widen the circumstances when an independent element may be empanelled, not limited to circumstances when Article 6 ECHR may be engaged;
- it is impossible on the state of the current case law to accurately predict when an independent panel will be required by Article 6 ECHR; and
- the Government would prefer to act now to create a flexible system for the provision of independent panels, with categories of cases where independent panels are always necessary to be defined further by secondary legislation, which might then be amended as and when necessary to respond to shifting case law. The Minister explains the Government's view that where Article 6 ECHR requires an independent and impartial tribunal; its view on the current case law is that the panel must be fully independent.[36]

1.41 The Minister accepts that the decisions of the Defence Council may be subject to judicial review. We also asked whether the new arrangements were likely to lead to a further Article 6 ECHR challenge. The Minister's response expresses doubt as to whether the procedural decision alone will lead to a challenge, as it is more likely that any case will be brought after the complaint itself has been determined. Unfortunately, this does not

34 Ev 2.
35 Ev 3.
36 Ev 4.

address the issue that, if the Defence Council has decided not to empanel an independent panel, this failure may form part of any eventual challenge to the procedure as a whole. The Minister explained that the purposes of delegating these functions to the Defence Council were not limited to the design of Article 6 ECHR compatible hearings and that the Council may wish to use their powers to design panels for different purposes, where an independent element may be desirable, but not necessarily required.

1.42 **We welcome the decision of the Government to proactively respond to the decision of the European Court of Human Rights in *Crompton v UK* to attempt to increase the flexibility with which an independent Service Complaints Panel might be convened. There is a risk that the ad hoc decision making power of the Defence Council and the Secretary of State under the provisions in the Bill may be exercised in a way which creates a panel which is still inconsistent with the right to a fair hearing by an independent and impartial tribunal, as guaranteed by Article 6 ECHR. However, we welcome the recognition in the Minister's response that the decisions of the Defence Council will be subject to judicial review, including consideration of compatibility with Article 6 ECHR under the Human Rights Act 1998. This will allow individuals to challenge the composition of any panel at an early stage. We appreciate that this area of law is currently evolving and there is some need for flexibility. We will continue to monitor developments, including any secondary legislation produced under these proposals.**

(6) Civilians subject to service discipline

1.43 The Armed Forces Act 2006 makes detailed provision for the treatment of civilians subject to service discipline.[37] Clause 22 makes a number of minor amendments to the scope of their application.

1.44 Our predecessor Committee raised a number of questions about the propriety of the application of service discipline to civilians. The European Court of Human Rights in *Martin v UK* held that determination of criminal charges against civilians by military courts would only be compatible with the right to a fair hearing by an independent and impartial tribunal (Article 6 ECHR) in "very exceptional circumstances".[38] Our predecessor raised concerns about the compatibility of the Armed Forces Act 2006 with this decision. The previous Government considered that provided that there were adequate procedural safeguards, the European Court of Human Rights would not object to civilians being tried in special courts created by legislation relating to the armed forces and specifically designed to deal with the trial of civilians subject to military discipline. The predecessor Committee regretted that the Government had never fully explained the Government's analysis of the Court's approach in *Martin v UK*. [39] The Human Rights Memorandum reiterates that:

> The Ministry of Defence's view is that the European Court was not saying that the United Kingdom needs to put in place a UK civilian court jurisdiction such as the Crown Court, but a court jurisdiction which satisfies the requirements of a civilian

37 Armed Forces Act 2006, Part II.

38 App. No. 40426/98, Judgment dated 24 October 2006

39 Sixteenth Report of 2006–07, *Monitoring the Government's Response to Court Judgments finding Breaches of Human Rights,* HL Paper 128/HC 728, para 50–57.See also Thirty first Report of 2007–08, *Monitoring the Government's Response to Human Rights Judgments: Annual Report* 2008, HL Paper 173/HC 1078, Ev 56–59.

> court even if established under legislation dealing with the armed forces. The Ministry of Defence also considers that this meant that, if a trial of a civilian is to be heard before a Court Martial, all the lay members of the court must be civilians.

1.45 We wrote to the Minister to ask for a fuller explanation. The Minister's response simply reiterates the Government's previous view, that provided that civilian courts operating in a military context are adapted to replicate the safeguards which apply in civil courts broadly, then there will be no violation of Article 6 ECHR. The Minister explains that the aim and effect of the Armed Forces Act 2006 was to:

> [M]ake the courts which deal with civilians subject to service jurisdiction essentially civilian, except to the extent that some military connection is unavoidable, given that jurisdiction arises in relation to civilians forming part of the Service community outside the United Kingdom.[40]

1.46 The European Court of Human Rights has not revisited this issue or its decision in *Martin v UK*. To a certain extent, the Government's argument is persuasive, in so far as the amendments in the Armed Forces Act 2006 bring the trial of civilians in the military context far closer to the standards of independence and impartiality afforded to individuals accused in ordinary civilian courts, these substantive changes mean that these hearings are far more likely to comply with the requirements of Article 6 ECHR. However, the broad guidance in *Martin v UK* was not limited to the substantive differences between civilian and military trials, but instead referred to the fact that, in general, civilians should only be tried in military courts in "very exceptional circumstances". The question remains whether the significant amendments to the civilian system in the Armed Forces Act 2006 go far enough to establish that trial in the service civilian courts are not hearings in a "military court". In our view, this is far from certain and will not be clear until there are further developments in the case law on this issue. **We reiterate the view of our predecessor Committee that the compatibility of the trial of civilians in a military context, including in the service civilian court, with the right to a fair hearing (as guaranteed by Article 6 ECHR) is far from clear. We accept that this area of law is uncertain. We do not share the confidence of the Government that the changes made by the Armed Forces Act 2006 ensure that civilians are only tried in military courts in "exceptional circumstances" as defined by the European Court of Human Rights. We will continue to monitor the case-law of our domestic courts and the European Court of Human Rights on this issue.**

(7) Armed forces covenant report

1.47 The Bill requires that the Secretary of State prepare and lay before Parliament an annual report, the "armed forces covenant report", about the effects of membership (or former membership) of the armed forces on service people in the fields of healthcare, education and housing, and such other fields as the Secretary of State may determine.[41] The armed forces covenant report is intended to respond to the ways in which service in

40 Ev 4.

41 Clause 2 of the Bill, inserting new s. 359A into the Armed Forces Act 2006.

the armed forces may directly or indirectly affect the ability of service people and their families to benefit from provision in relation to health, education and housing in the UK.[42]

1.48 Rights to health, education and housing are human rights recognised by the international human rights treaties to which the UK is a party, such as the International Covenant on Economic, Social and Cultural Rights and the European Social Charter. It is well documented that former members of the armed forces have difficulty availing themselves of these rights.[43] They are disproportionately represented, for example, amongst the homeless population.

1.49 Our predecessors, in both the 2001–05 and 2005–10 Parliaments, were consistently of the view that "in a parliamentary democracy it is the democratic branches of the state (the Government and Parliament) which should have primary responsibility for economic and social policy, in which the courts lack expertise and have limited institutional competence or authority."[44] Requirements on Ministers to report to Parliament on the progress made towards securing access for vulnerable groups to social and economic rights such as housing, health and education are human rights enhancing measures: they facilitate parliamentary scrutiny and so increase the Government's political accountability for implementing the rights which the UK has recognised in its international treaty obligations. **We welcome the armed forces covenant report as a measure which enhances the Government's accountability to Parliament for the protection of the rights of members of the armed forces.**

(8) Under-18s serving in the Armed Forces

1.50 According to the Coalition to Stop the Use of Child Soldiers, in April 2010 3,510 under-18s were training or serving in the British Armed Forces. The UK has the lowest recruitment age in Europe and is one of less than 20 countries in the world which recruit from the age of 16.[45] Article 38 of the UN Convention on the Rights of the Child (UNCRC) obliges states to take all feasible measures to ensure that children under the age of 15 do not take a direct part in hostilities. The Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict, which the UK ratified in 2003, extends this protection by committing states to taking all feasible measures to ensure that members of their armed forces under the age of 18 do not take a direct part in hostilities.[46] At the time of its ratification of the Optional Protocol, the UK made a declaration to Article 1 of the Optional Protocol as to its understanding of the meaning of that provision, which our predecessor Committee previously criticised as being overbroad and serving to undermine the UK's commitment not to deploy under-18s in conflict zones.[47]

42 EN paras 17–19.

43 EN para. 17.

44 See e.g. Twenty-first Report of Session 2003–04, *The International Covenant on Economic, Social and Cultural Rights*, HL Paper 183, HC 1188 at para. 64; Twenty-ninth Report of Session 2007–08, *A Bill of Rights for the UK?*, HL Paper 165–I, HC 150–I at para. 167; Twenty-eighth Report of Session 2008–09, *Legislative Scrutiny: Child Poverty Bill*, HL Paper 183, HC 1114 at para. 1.26.

45 Coalition to stop the use of child soldiers, The recruitment of children by British armed forces: An assessment of the implementation of the recommendations of the Committee on the Rights of the Child, November 2010.

46 Article 1 Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict

47 Seventeenth Report of Session 2004–05, *Equality Bill*, HL Paper 98, HC 497, para. 41. UNCRC Concluding Observations on the UK, op. cit, para. 88

1.51 The UNCRC reported on the UK's compliance with the Optional Protocol for the first time in its 2008 report. The UK declaration has not been challenged. However, in its 2008 Report, the UN Committee on the Rights of the Child expressed its disappointment that the UK had chosen to maintain its view on the recruitment of 16-year-olds. The UN Committee asked that the UK "reconsider its active policy of recruitment of children into the armed forces and ensure that it does not occur in a manner which specifically targets ethnic minorities and children of low-income families". It also recommended that the UK government review existing, limited discharge rights for people under-18 and ensure "that parents are included from the outset and during the entire process of recruitment and enlistment." The UN Committee called on the UK to allow all current recruits under 18 years old to convert their commitment into a four year contract of service beginning with the first day of service, not their 18th birthday (currently a person recruited under 18 serves a full commitment from the time of joining the service plus four years from their 18th birthday. This is in contrast with a person over 18, whose commitment to regular service is for 4 years from the date of enlistment).[48]

1.52 Our predecessor Committee, in its Report on Children's Rights, recommended that the UK adopt a plan of action for implementing the recommendations of the UN Committee on the Rights of the Child in its 2008 Report on the UK's compliance with the Optional Protocol on Children in Armed Conflict.[49]

1.53 We wrote to the Minister to ask for further information. Specifically, we asked for further information on:

- The steps which the Government had taken to meet the concerns of the UN Committee on the Rights of the Child. The Minister's response explained that the Government had no plans to amend or withdraw the UK declaration to the Optional Protocol on the Involvement of Children in Armed Conflict. The Government "recognises" the importance of providing special treatment for young people serving in the armed forces and "no Service personnel under the age of 18 is knowingly engaged in or exposed to hostilities". The Government does not address the recommendations of the UN Committee which relate to the period of recruitment or the right to discharge or the better involvement of parents during the process of recruitment.[50]

- The discharge process for people recruited before 18: The Minister explained that after 28 days and before 6 months service, a recruit may leave as of right on provision of 14 days notice in writing. After 6 months until 3 months following their 18th birthday, recruits may identify themselves as an "unhappy" recruit and may be discharged at the discretion of their commanding officer. This latter discharge is entirely discretionary and there is no right to discharge after the initial 6 month period.[51]

48 These figures are based on service in the Army. Periods of minimum service vary across the three Armed Forces. The relevant date for the calculation for under-18s is the 18th birthday for all three.

49 Twenty-fifth Report of Session 2008–09, *Children's Rights*, HL Paper 157, HC 338, paras 139–143.

50 Ev 3.

51 Ev 3.

- Statistics, including statistics on the number of individuals requesting discharge and the number of requests refused. A significant number of helpful statistics were provided by the Government. However, we are concerned that statistics are not gathered on the number of young people requesting discharge then being either discharged or having their request refused.[52]

1.54 During the Special Select Committee debates on this Bill, amendments were debated (and withdrawn) which would have converted existing policy on unhappy minors under 18 leaving the army into a statutory right to leave on 14 days notice. The Minister explained that although he was not minded to change the current position, he would take this proposal away for further advice.[53] A second amendment proposed to require the Government to report annually to Parliament on the number of under-18s recruited into the Armed Forces and the number leaving per year. The Minister explained that the Government considered that such a report was unnecessary as statistics such as these were already prepared and published on a regular basis. Responding to this group of amendments, the Minister explained the Government's view that the status quo was "fully compliant" with the obligations of the UK under the Optional Protocol to the UN Convention on the Rights of the Child, which deals with the involvement of children in armed conflict.[54]

1.55 The Minister's statement, while technically correct, is disappointing. Under the Optional Protocol, States are entitled to voluntarily recruit persons under 18 into the armed forces provided a number of strict conditions are applied, including that recruitment is informed, involves parents and is genuinely voluntary. Compulsory recruitment is prohibited. States are required to take "all feasible measures" to prevent under-18s being deployed to active combat.

1.56 **We share the view of our predecessor Committee that the Government should adopt published action plan for responding to the recommendations of the UN Committee on the Rights of the Child on UK compliance with the UN Optional Protocol on Children in Armed Conflict.**

1.57 **We consider that this Bill provides a good opportunity for Parliament to debate the recommendations of the UN Committee and the service of under-18s in the Armed Forces. We are particularly concerned that the Government has not taken this opportunity to clarify (a) the arrangements for the discharge of under-18s from the Armed Forces if they decide that they no longer wish to serve; and (b) the equalisation of the duration of the service commitment made by under-18s to four years' service.**

1.58 **We welcome the Minister's commitment to reconsider the treatment of unhappy recruits. While we welcome the Minister's assurance that unhappy recruits are liable to discharge at the discretion of their commanding officers, the lack of statistics on under-18s who request a discharge but are refused makes scrutiny of the current arrangements difficult. We are concerned that, without special provision for discharge (other than at the discretion of the commanding officer), there is a risk that continued service may not be considered voluntary in the sense required by the Optional Protocol.**

52 Ev 3

53 See HC Deb, 17 Feb 2011, Col 114

54 See HC Deb, 17 Feb 2011, Col 113

We recommend that a right to discharge for under-18s be established, and that all those recruited under the age of 18 be told of this right.

1.59 **We do not consider that the Minister has provided a clear explanation of the Government's justification for maintaining a differential period of commitment for under-18s joining the Armed Forces. We recommend that this Bill be amended to equalise the initial period of service for people joining the Armed Forces.**

(9) UN Convention on the Rights of Persons with Disabilities: Service in the Armed Forces

1.60 Service in the Armed Forces is exempt from the application of the Equality Act 2010, in so far as that Act protects against discrimination on the grounds of disability.[55] The UK has entered a reservation to the UN Convention on the Rights of Persons with Disabilities ("the UN Convention") in order to preserve this exemption. Our predecessor Committee concluded that neither the exemption nor the reservation were necessary and both undermined the protection of people with disabilities from unjustified discrimination.

1.61 In its Report on the UN Convention, our predecessor Committee concluded:

> In our view, the existing exemption is inconsistent with the requirements of the Convention and would be subject to challenge without a reservation. We reiterate our recommendation that the existing exemption should be reconsidered in the Equality Bill.[56]

1.62 In its Report on the Equality Bill, they reiterated their assessment:

> We reiterate that the exemption of the armed forces from the scope of the disability provisions of the Bill is unnecessary and incompatible with the UN Convention on the Rights of Persons with Disabilities. It also may give rise to issues of incompatibility with the ECHR, in particular with the Article 8 ECHR right to respect for private life combined with the Article 14 ECHR right to equality and non-discrimination. We repeat our recommendation that the Government should at least reconsider the necessity for the reservation within 6 months of Royal Assent being signified to the Equality Bill.[57]

1.63 We wrote to the Minister to ask for further information on the Government's position on this reservation. We also asked for information on the treatment of Armed Forces personnel who are injured while in service. The Minister's reply provided some statistics on the type of injuries sustained by people injured while in service. He also confirmed that the Government would keep the "continuing need for this reservation under periodic review". However, the Government considers that the reservation is needed in order to "maintain the operational effectiveness of the armed forces". The Minister explained the Government's view that there is a "clear moral obligation for the Services to look after personnel who have been injured". However, it remains Armed Forces policy that it will discharge all persons medically unfit for military service. The Minister explains that some

55 Schedule 9(4)

56 Twelfth Report, 2008–09, *UN Convention on the Rights of Persons with Disabilities: Reservation and declaration*, HL Paper 70/HC 397, para 55.

57 Twenty-sixth Report, 2008–09, *Equality Bill*, HL Paper 169/HC 763, para 182.

personnel who are unfit, but capable of performing limited duties, are retained but classified "Medically downgraded". These cases are considered on a case-by-case basis.[58]

1.64 The Government's position is the same as the previous Government's when our predecessor Committee conducted its last inquiry on this issue (at the time that the reservation to the UN Convention was entered). The Minister has provided no further evidence that the blanket exemption in the Equality Act 2010 and the reservation to the UN Convention is necessary. There is nothing in the UN Convention which would require the Armed Forces to deploy disabled people who were not capable into combat situations. For example, no similar exemption applies to police forces or fire services in the UK. Equally, there is nothing in the Convention which would require the Armed Forces to retain personnel who were incapable of performing duties in the Armed Forces.

1.65 **We welcome the Minister's commitment to keep under periodic review the existing reservation to the UN Convention on the Rights of Persons with Disabilities for service in the Armed Forces.** During the passage of this Bill, we recommend that the Minister provide a fuller explanation to Parliament of how the Government intends to conduct this periodic review of the ongoing necessity for the reservation. The UK will report to the UN Committee of Experts on the Convention in summer 2011 on the implementation of the Convention by the UK. We hope that this will provide a further opportunity for a full review of all of the reservations entered by the UK. In light of the obligations in the Convention to involve disabled people in decision-making, we recommend that any review should be open for consultation and should actively involve disabled people and their organisations.

1.66 **We reiterate the view of our predecessor Committee that the broad exemption for service in the Armed Forces from the protection of the Equality Act 2010 is disproportionate and unnecessary. We are concerned that the reservation to the UN Convention is likely to be incompatible with the object and purpose of the treaty.**

Conclusions and recommendations

Explanatory Notes/Human Rights Memorandum

1. We welcome the proactive and facilitative approach taken by the MoD to our scrutiny of the Bill's human rights compatibility, including the provision of a detailed and helpful human rights memorandum, and we commend that approach to other Departments as an example of good practice. (Paragraph 1.3)

Significant human rights issues

(1) Treatment of detainees by members of the Armed Forces

2. We decided not to return to the substantive question of the alleged ill-treatment of detainees by members of the armed forces in the context of this Bill, but to keep open the possibility of doing so in a future Report. We made this decision in light of the fact that the allegations are currently the subject of a number of different public inquiries and ongoing investigation by the Ministry of Defence. If it is established by any of these inquiries or investigations that the allegations disclose the existence of systemic abuse of detainees by members of the armed forces, it might be appropriate to consider whether any legislative responses are required to prevent such abuse from happening again. We may therefore return to the issue in a future Report in the light of any relevant findings and recommendations. (Paragraph 1.8)

(2) Independence of service police investigations

3. We have considered whether the statutory scheme, as amended by the Bill, provides sufficient guarantees of independence of the investigators from the chain of command, but have concluded that it would be premature to express a view on this question pending the decision of the Court of Appeal in the Ali Zaka Mousa case. (Paragraph 1.17)

4. The promptness of an investigation is an important aspect of its compliance with the positive obligations under Articles 2 and 3 ECHR. We recommend that, to give better effect to the Government's intention that HMIC can be required to report on the promptness of service investigations, it be spelled out on the face of the Bill by including an explicit reference to "promptness" in new section 321A(4) of the Armed Forces Act 2006 (inserted by clause 4 of the Bill). The following amendment to the Bill is designed to give effect to this recommendation: (Paragraph 1.19)

(3) Powers of entry and serach

5. We have considered carefully the justification provided by the Government for extending the Service police's power to enter and search residential premises but we are not persuaded that the Government's case is borne out by the evidence or that the justification relied on is sufficiently weighty to justify such a drastic departure

from the procedures which protect against the arbitrary interference with the right to respect for people's homes. (Paragraph 1.26)

6. In our view, the strength of the concerns about the human rights compatibility of all premises warrants and multiple entry warrants makes their repeal a candidate for inclusion in the Government's Protection of Freedoms Bill which contains some provisions limiting powers of entry. Instead, they are being extended by the provisions in this Bill. We recommend that the power to authorise all premises and multiple entry warrants to enter and search residential premises be deleted from the Bill. The following amendment is designed to give effect to this recommendation: (Paragraph 1.29)

(4) Service Sexual Offences Prevention Orders

7. We welcome the Minister's reassurance that it is the Government's intention that the criminal standard should be applied. We recommend that, for the avoidance of doubt, the Bill should be amended to make clear that the criminal standard should apply to any factual determinations necessary for the making or variation of any service sexual offences prevention order. (Paragraph 1.33)

(5) Service Complaints Panels

8. We welcome the decision of the Government to proactively respond to the decision of the European Court of Human Rights in Crompton v UK to attempt to increase the flexibility with which an independent Service Complaints Panel might be convened. There is a risk that the ad hoc decision making power of the Defence Council and the Secretary of State under the provisions in the Bill may be exercised in a way which creates a panel which is still inconsistent with the right to a fair hearing by an independent and impartial tribunal, as guaranteed by Article 6 ECHR. However, we welcome the recognition in the Minister's response that the decisions of the Defence Council will be subject to judicial review, including consideration of compatibility with Article 6 ECHR under the Human Rights Act 1998. This will allow individuals to challenge the composition of any panel at an early stage. We appreciate that this area of law is currently evolving and there is some need for flexibility. We will continue to monitor developments, including any secondary legislation produced under these proposals. (Paragraph 1.42)

(6) Civilians subject to service displine

9. We reiterate the view of our predecessor Committee that the compatibility of the trial of civilians in a military context, including in the service civilian court, with the right to a fair hearing (as guaranteed by Article 6 ECHR) is far from clear. We accept that this area of law is uncertain. We do not share the confidence of the Government that the changes made by the Armed Forces Act 2006 ensure that civilians are only tried in military courts in "exceptional circumstances" as defined by the European Court of Human Rights. We will continue to monitor the case-law of our domestic courts and the European Court of Human Rights on this issue. (Paragraph 1.46)

(7) Armed forces covenant reports

10. We welcome the armed forces covenant report as a measure which enhances the Government's accountability to Parliament for the protection of the rights of members of the armed forces. (Paragraph 1.49)

(8) Under-18s serving in the Armed Forces

11. We share the view of our predecessor Committee that the Government should adopt published action plan for responding to the recommendations of the UN Committee on the Rights of the Child on UK compliance with the UN Optional Protocol on Children in Armed Conflict. (Paragraph 1.56)

12. We consider that this Bill provides a good opportunity for Parliament to debate the recommendations of the UN Committee and the service of under-18s in the Armed Forces. We are particularly concerned that the Government has not taken this opportunity to clarify (a) the arrangements for the discharge of under-18s from the Armed Forces if they decide that they no longer wish to serve; and (b) the equalisation of the duration of the service commitment made by under-18s to four years' service. (Paragraph 1.57)

13. We welcome the Minister's commitment to reconsider the treatment of unhappy recruits. While we welcome the Minister's assurance that unhappy recruits are liable to discharge at the discretion of their commanding officers, the lack of statistics on under-18s who request a discharge but are refused makes scrutiny of the current arrangements difficult. We are concerned that, without special provision for discharge (other than at the discretion of the commanding officer), there is a risk that continued service may not be considered voluntary in the sense required by the Optional Protocol. We recommend that a right to discharge for under-18s be established, and that all those recruited under the age of 18 be told of this right. (Paragraph 1.58)

14. We do not consider that the Minister has provided a clear explanation of the Government's justification for maintaining a differential period of commitment for under-18s joining the Armed Forces. We recommend that this Bill be amended to equalise the initial period of service for people joining the Armed Forces. (Paragraph 1.59)

(9) UN Convention on the Rights of Persons with Disabilities: Service in the Armed Forces

15. We welcome the Minister's commitment to keep under periodic review the existing reservation to the UN Convention on the Rights of Persons with Disabilities for service in the Armed Forces. (Paragraph 1.65)

16. We reiterate the view of our predecessor Committee that the broad exemption for service in the Armed Forces from the protection of the Equality Act 2010 is disproportionate and unnecessary. We are concerned that the reservation to the UN

Convention is likely to be incompatible with the object and purpose of the treaty. (Paragraph 1.66)

Formal Minutes

Tuesday 10 May 2011

Members present:

Dr Hywel Francis MP, in the Chair

Lord Bowness	Rehman Chishti MP
Baroness Campbell of Surbiton	Dr Julian Huppert MP
Lord Dubs	Mr Dominic Raab MP
Lord Morris of Handsworth	Mr Virendra Sharma MP
Baroness Stowell of Beeston	

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Draft Report, *Legislative Scrutiny: Armed Forces Bill*, proposed by the Chairman, brought up and read.

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

Paragraphs 1.1 to 1.66 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Twelfth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Bowness make the Report to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 15 February and 8 March was ordered to be reported to the House for printing with the Report.

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[Adjourned till Monday 16 May at 4.00 pm

Declaration of Lords Interests

No Members present declared interests relevant to this Report.

A full list of Members' interests can be found in the Register of Lords' Interests: http://www.publications.parliament.uk/pa/ld/ldreg/reg01.htm

List of Written Evidence

Written Evidence

1. Letter to the Committee Chair, from Rt Hon Andrew Robathan MP, Minister of State for Defence Personnel, Welfare and Veterans, Ministry of Defence, 19 January 2011

I am pleased to attach a copy of the Department's memorandum on the human rights aspects of the Armed Forces Bill.

The approach we have taken, which was agreed with Committee staff, was to delay production of the memorandum slightly so that it could deal adequately with two important judicial decisions going to the ECHR compliance of parts of the existing legislation governing the Armed Forces. The decisions were given just before the Christmas recess. As the memorandum explains, the relevant provisions were in both cases held to be ECHR compliant.

My officials have been in touch with committee staff for some time about the memorandum and the issues if should cover. I understand that these contacts have been most helpful and would like to take this opportunity to pass on my thanks.

19 January 2011

2. Memorandum submitted by the Ministry of Defence, 12 January 2011

1. The Armed Forces Bill makes provision with respect to a range of matters relating to defence and the armed forces. It also renews, subject to amendments made by the Bill, the Armed Forces Act 2006.

Renewal of the Armed Forces Act 2006 (clause 1)

2. Since the Bill of Rights 1688 the legislation governing the Army (and more recently the Royal Navy and the RAF) has been subject to regular renewal by Act of Parliament. The Bill accordingly provides for the continuation in force of the Armed Forces Act 2006 ("the 2006 Act") until no later than the end of 2016. A further Act will then be required.

3. The 2006 Act governs all the armed forces of the United Kingdom. Its preparation was preceded by a comprehensive review of the law governing the armed forces. One of the purposes of this review was to identify any provisions which might give rise to doubts about ECHR compatibility. A statement of compatibility was made in both Houses in relation to the Act.

4. The 2006 Act reflected changes previously made to armed forces' legislation as a result of a series of judgments between 1996 and 2003 relating to the compliance with the Convention (in particular Article 6) of a number of aspects of the armed forces' system of justice. The main changes reflected in the 2006 Act are summarised in paragraphs 5 to 21. Considerable detail of these changes is given in this memorandum principally to provide a context for the consideration in paragraph 22 and following of the impact of more recent ECHR developments.

5. **Courts-martial**. The system of armed forces' courts, and in particular courts-martial, was closely scrutinised in the following cases:

Findlay v UK (1997)[1]
Morris v UK (2002)[2]
R v Spear and others (2003) (House of Lords)[3]
Cooper v UK and Grieves v UK (2003) (Grand Chamber)[4]

6. The main changes resulting from Findlay were:

a) the establishment of independent prosecuting authorities for the armed forces;

b) the appointment of a statutory court administration officer with responsibility for selecting the lay members of courts-martial, instead of selection by the chain of command;

c) the ending of confirmation by the chain of command of the court-martial's decisions on verdict and sentence.

7. In the case of *Morris* the European Court approved the changes made in response to Findlay, but identified two other aspects of the system which they considered to be non-compliant. These were:

a) that the safeguards against undue pressure being brought against in particular junior service members of courts-martial were insufficient to guarantee impartiality, and

b) that the role of the "reviewing authority" was non-compliant. The reviewing authority was a non-judicial authority with power to overturn a conviction by a court-martial or to change the sentence (but only to one which the reviewing authority considered no greater than the original sentence).

8. In the case of *Spear and others* the House of Lords considered a number of aspects of the court-martial in relation to the Convention, as well as the general principle of trial by military courts. Among the issues considered were those identified by the European Court in *Morris*. The House of Lords examined the issues in great detail. They held that the system was compliant on all the issues before it, including those in which the European Court in *Morris* had found against the system. On the issue mentioned at paragraph 7(a) above the House of Lords concluded that the European Court had not been aware of certain safeguards (such as the application of the offence of attempting to pervert the course of justice to any person seeking to influence improperly a member of a court-martial) and had as a result made certain false assumptions. On the issue mentioned at paragraph 7(b) above, they concluded that the detailed statutory provisions prevented the reviewing authority from having any real discretion as to whether a substituted sentence was more or less severe than the sentence imposed by the court. They concluded that accordingly the application of review did not render the system non-compliant.

1 (1997) 24 EHRR 221.
2 (2002) 34 EHRR 1253.
3 (2003) 1 AC 734.
4 Judgments 16 Dec 2003: nos. 57067/00 and 48843/99.

9. In the cases of *Cooper and Grieves* the European Court again considered a number of grounds of challenge to the compliance of courts-martial. The cases were heard by the Grand Chamber of the European Court, because of the disagreement between the decision of the European Court in Morris and that of the House of Lords in *Spear and others*. The issues considered included both of those mentioned in paragraph 7(a) and (b) above. The Grand Chamber rejected all of the grounds of challenge in *Cooper* (which related to the RAF and by extension to the Army, which has essentially the same system), accepting the House of Lords' view on guarantees of independence and on the reviewing authority. In *Grieves* (which related to the Royal Navy) the Grand Chamber accepted one ground of challenge, that the (non-statutory) practice in the Royal Navy of appointing as judges in courts-martial (judge advocates) lawyers who were serving naval officers was contrary to Article 6.

10. The appointment as judge advocates of lawyers who are serving naval officers was accordingly ended.

11. However the Grand Chamber did express in *Cooper and Grieves* criticisms and doubts about the powers of the reviewing authority. Though intended to benefit an accused, the powers were criticised on the basis that their use involved a non-judicial interference with a judicial decision. It was considered by the Ministry of Defence that the European Court might in future adopt a stronger position against such powers. The 2006 Act accordingly repealed the provisions for review of courts-martial.

12. **Commanding Officers' summary jurisdiction and powers of punishment:** these required consideration of compatibility with Article 6. A hearing before a Commanding Officer is not itself compliant, but changes had been included in the Armed Forces Discipline Act 2000 to ensure that the summary system taken as a whole was compliant. The changes are reflected in the 2006 Act. As a result a system exists under the 2006 Act under which there is:

a) a right of appeal (by way of a full rehearing) on conviction or sentence to a compliant court (the Summary Appeal Court), and

b) a right of an accused to choose trial by the new standing Court Martial instead of a hearing by the Commanding Officer, but with the Court Martial applying only the powers of punishment of a Commanding Officer.

13. The Army's system was subsequently considered by the High Court in the case of *Baines* in 2005.[5] In that case the High Court rejected arguments that the system did not comply with Article 6. The High Court confirmed that the rights to elect and to appeal were the basis of the system being compliant.

14. **Investigation of alleged offences and decisions on prosecution.** Under the armed forces' legislation before the 2006 Act the Commanding Officer ("CO") was central to the decision whether to prosecute. If there was a service police investigation, the result was referred in all cases to the CO. The CO had an important role in deciding the charge. He also had power to dismiss any charge, even one which he could not try, and the effect of doing so was to prevent further proceedings within the military system. This was

5 Unreported; but a copy of the judgment can be provided.

considered by the Ministry of Defence to be unsatisfactory on a number of grounds, including in relation to Articles 2 and 3.

15. The main changes made by the 2006 Act are summarised in paragraphs 16 to 21. Details are also given about these provisions to provide a context for the comments on developments since the 2006 Act described below, in particular the decision of the High Court in *Ali Zaki Mousa v the Secretary of State*, referred to in paragraphs 26 and 27 below.

16. The CO's power to dismiss a case so as to prevent further proceedings within the military system was repealed.

17. The 2006 Act establishes a general duty on COs as to the investigation of possible offences by those under their command. In particular, section 115 provides so that, if a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that any offence under the Act may have been committed by someone under his command, the CO must ensure that the matter is investigated appropriately or ensure that a service police force is aware of the matter. The reference (in section 115(4)) to a commanding officer ensuring that a service police force is aware of a matter reflects the fact that the service police may already be investigating on their own initiative or after another police force has referred a matter to them (as to which the Joint Committee is referred also to section 116(1) of the 2000 Act).

18. If a CO becomes aware of an allegation or circumstances which would indicate to a reasonable person that any of a list of offences may have been committed by someone in his command, he must ensure that a service police force is aware of the matter (section 113 of, and Schedule to the 2006 Act. The list of offences includes murder, manslaughter, grave breaches of the Geneva Convention, torture, offences under section 51 or 52 of the International Criminal Court Act 2001 and many other serious offences.

19. The same duty (to ensure that a service police force is aware) also falls on a CO if he becomes aware of any circumstances prescribed by regulations (section 114).The circumstances are prescribed in the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009 (SI 2009/2055). These include a number of sensitive situations, for example, death or serious injury to persons who are not in the armed forces in a place occupied or controlled by the armed forces.

20. Where the service police have investigated any possible offence under the Act, they must refer it in certain circumstances to the independent, tri-service prosecuting authority (the Director of Service Prosecutions) established by the 2006 Act. Under section 116(2)(a) of the 2006 Act the duty to refer arises where a service policeman considers that there is sufficient evidence to charge an offence listed in Schedule 2 to the 2006 Act. Under section 116(2)(b) the same duty arises where a service policeman considers that there is sufficient evidence to charge any offence under the 2006 Act and is aware of circumstances prescribed under the regulations mentioned in paragraph 19 above.

21. If the service police consider there is sufficient evidence to charge an offence under the 2006 Act, but the duty to refer it to the Director of Service Prosecutions does not apply (The offence is not one within Schedule 2 to the 2006 Act or the service police are not aware of any prescribed circumstance), they must refer the case to the CO of the suspect. In those cases the CO may bring a charge which he can deal with summarily or refer the

case back to the Director of Service Prosecutions for a final decision on what to do about the case (section 120 of the 2006 Act).

ECHR issues arising since the 2006 Act

22. ***Martin v UK (2006)***[6]. During the final stages of the passage through Parliament of the 2006 Act, the European Court delivered its judgment in *Martin*. The court held in particular that only in "very exceptional circumstances" would the determination of criminal charges against civilians in military courts be compatible with Article 6.

23. The 2006 Act gives two courts (the Service Civilian Court and the Court Martial) criminal jurisdiction over certain categories of civilian outside the United Kingdom. The main groups of civilians subject to this jurisdiction are:

a) members of service families living with members of the armed forces in specified countries outside the UK (principally on the large bases in Germany and Cyprus):

b) civil servants who work in support of the armed forces and are in certain designated areas;

c) designated individuals or groups (principally contractors and other individuals working alongside members of the armed forces abroad).

24. The Ministry of Defence's view is that the European Court was not saying that the United Kingdom needs to put in place a UK civilian court jurisdiction such as the Crown Court, but a court jurisdiction which satisfies the requirements of a civilian court even if established under legislation dealing with the armed forces. The Ministry of Defence also considers that this meant that, if a trial of a civilian is to be heard before the Court Martial, all the lay members of the court must be civilians (the judge advocate must in any event be a civilian).The 2006 Act can be used to provide for such a civilian membership, as the requirement under that Act for military lay members of the Court Martial is subject to court rules.[7]

25. The Court Martial Rules[8] allow all the lay members of the Court Martial to be civilians in the case of the trial of a civilian. The Service Civilian Court is always composed solely of a (civilian) judge advocate. Trials of civilians before the Court Martial are exceptionally rare but, in such a case the court administration officer will select the lay members from a group of fifty or so MoD civil servants selected randomly. The court administration officer is appointed directly by the Defence Council (so as to be independent of the chain of command) and has responsibility for the selection of the lay members of service courts.

26. ***R (on the application of Ali Zaki Mousa) v Secretary of State for Defence.***[9] The Secretary of State for Defence is currently facing a series of legal challenges relating to allegations of wrongful actions by UK service personnel against Iraqi nationals during the conflict in Iraq. The leading case (*Mousa*) was by way of claims for judicial review, in particular with respect to the Secretary of State's decision not to hold a public inquiry into

6 Judgment 24 Oct 2006: no. 40426/98.

7 Sections 155(4) of the 2006 Act.

8 S.I. 2009/2041.

9 (2010) EWHC 3304 (Admin): case no. CO/1684/2010

the allegations but instead to investigate those of the allegations which are new and to reinvestigate those allegations previously made and investigated. The Secretary of State's decision is to do this through a dedicated team (of service police from the Royal Military Police Special Investigation Branch, with extra resources from experienced civilian prosecutors) reporting ultimately to the Provost Marshal of the Royal Military Police. The exercise of investigatory powers and the decision-making process is under the 2006 Act.

27. At a hearing in November the High Court considered in detail the regime under the 2006 Act summarised in paragraphs 14 to 21 above. This included consideration whether investigation under the new provisions of the 2006 Act will be sufficiently independent and effective to meet the requirements of Article 3.

28. The two main assertions by the Claimants in *Mousa* relevant to the ECHR compliance of the 2006 Act were that:

a) the Royal Military Police (to whom the team investigating the allegations, known as the "IHAT", would report) were not sufficiently independent for the purpose of Articles 3;[10] and

b) the provisions of the 2006 Act operated against such independence because they required at least some cases to be referred to the CO for decision on whether to prosecute and on how, if at all, the case should proceed.[11]

29. The Secretary of State argued in reply that the Royal Military Police (and therefore the IHAT) were sufficiently independent and that, under the 2006 Act almost all relevant cases would have to be referred for decision to the Director of Service Prosecutions; and that in the few cases in which the decision might lie with the CO, it was difficult to conceive of the CO not referring the case in practice to the Director.[12] The court accepted the Secretary of State's contentions on both issues, and the claim for judicial review was dismissed.[13]

30. **Bill provisions relating to service police forces (clauses 3 to 5).** Not withstanding the decision in *Mousa*, the Bill contains three clauses intended to highlight and buttress the structural independence of the service police and to support best practice in the conduct of investigations.

31. The relevant provisions are as follows:

a) clause 3 adds a new section 115A to the 2006 Act, providing that the heads (Provost Marshals) of each of the service police forces has a duty to seek to ensure that its investigations are free from "improper interference". "Improper interference" is defined to include an attempt by anyone who is not a service policeman to direct an investigation;

b) clause 4 provides for inspection by Her Majesty's Inspectors of Constabulary of the independence and effectiveness of service police investigations. The inspectors' reports are to be laid before Parliament;

10 Paragraphs 33 and 34 of the judgment

11 Paragraph 45 of the judgment

12 Paragraph 46 of the judgment

13 Paragraphs 37, 67 and 135 of the judgment

c) clause 5 provides for the appointment of Provost Marshals to be by Her Majesty and that (in line with what is already the policy) only an officer of a service police force may be appointed by her to be a Provost Marshal.

32. ***Eskelinen v Finland (2007)***[14] ***and Crompton v UK (2009).***[15] Members of the armed forces have no contract of employment and no system of collective bargaining. Pay, allowances and other benefits are determined and altered unilaterally. The armed forces do not have access to employment tribunals except with respect to equal pay and discrimination. It has therefore long been recognised that members of the armed forces should have some other effective way of obtaining redress other grievances. This is provided for in the 2006 Act (developing provisions in previous legislation).

33. The process under the 2006 Act is essentially internal to the armed forces, subject to judicial review. Before the 2006 Act was introduced into Parliament the process was considered in relation to Article 6. It was concluded on the basis of *Pellegrin v France (1999)*[16] that Article 6 did not apply to members of the armed forces in relation to the determination of civil rights, at least in relation to disputes akin to employment disputes, because the armed forces are bound by a special bond of trust and loyalty towards the State.

34. The European Court in *Eskelinen* held that, for Article 6 to be included in relation to civil rights:

a) the State in question must have expressly excluded access to a court for the post or category of staff in question;

b) the exclusion must be justified on objective grounds in the State's interest

The court explained that the special bond of trust and loyalty referred to in *Pellegrin* was not sufficient to determine whether there were sufficient grounds for the exclusion. The State had also to show that the subject matter of the dispute was related to the exercise of State power or called into question the special bond. The court made it clear that there was a presumption that Article 6 applied to ordinary employment disputes such as ones relating to pay.

35. In *Crompton* the complainant was in a very special category within the armed forces, the permanent staff of the Territorial Army. Most of these staff look after stores or provide clerical support. Moreover Mr Crompton's post had so little of the military about it that it was civilianised. He was made redundant. He brought a complaint about the process by which he was made redundant. While not conceding that Article 6 applied generally to the determination of civil rights between members of the armed forces and the State, the MoD accepted, on the basis of the very special facts of the case, that Article 6 was applicable. But, the MoD argued, the availability of judicial review of the Defence Council's decision on his complaint was sufficient to render the redress of complaints process compliant.

36. The European Court held that, on the facts of the case, judicial review was sufficient. The Court however made it clear that this would not always be the case where Article 6 applied. Broadly speaking, the Court's view was that Article 6 was not excluded wherever a

14 Judgment 19 April 2007; no. 63235/00.

15 Judgment 27 Oct 2009; no. 42509/05.

16 1999; no. 28541/95.

matter went to the determination of civil rights between members of the armed forces and of the State. The Court's judgment indicated that judicial review would be insufficient to provide compliance with Article 6 if all the following circumstances applied:

a) a civil right was in issue (and this is likely to be the case in a straightforward employment case, such as non-payment of pay or discharge from the armed forces);

b) the dispute did not call into question the special duty of trust and loyalty which States may expect from their armed forces;

c) the dispute was not one for which there were compelling reasons for the decision to be made by the chain of command; and

d) the proper resolution of the dispute turned on a question of fact.

Where all these circumstances applied, an independent and impartial tribunal appropriate to deciding questions of fact would be required by Article 6.

37. Following the judgment in *Crompton*, the Ministry of Defence concluded that, in cases where:

a) Article 6 applies (as explained in paragraph 36(a) to (c) above),

b) there is no access to an employment tribunal, and

c) a question of fact is central to the dispute,

the risk of a finding of incompatibility with Article 6 would be much reduced by ensuring that an independent, quasi-judicial body makes the finding of fact and that the Ministry of Defence was bound by that finding.

38. Clause 20 of the Bill (service complaint panels) has been designed to allow the judgment in *Crompton* to be met. Clause 20(5) amends the 2006 Act to empower the Defence Council (the highest level of the Ministry of Defence as regards command and administration of the armed forces) to appoint a panel (to deal with complaints) composed, or including a majority, of independent members.

39. Clause 20(7) amends the 2006 Act to empower the Secretary of State to make regulations (subject to affirmative resolution procedure) requiring in prescribed descriptions of complaint the delegation of functions to a panel composed, or including a majority, of independent members.

40. The above approach reflects the view that it is not yet easy to be sure how the European Court's approach would apply to different cases, or to formulate confidently rules as to when an independent fact-finding tribunal will be required. It is considered that further development of the court's jurisprudence is likely. The purpose of the clause is accordingly to allow decisions to be taken on a case by case basis, but also to allow general rules to be laid down as the application of Article 6 to complaints by service personnel becomes clearer.

41. For the purpose of the new provisions under clause 20, independent members must not be members of the armed forces or civil servants (New section 336A(3) of the 2006 Act, added by clause 20(7) and the existing section 336(7) of the 2006 Act).

42. **Findings of Guilty and Not Guilty in the Court Martial by simple majority verdict.** Under section 160 of the 2006 Act the finding of the Court Martial must be decided by a majority of the votes of the lay members of the court (usually a panel of officers and warrant officers).

43. The Judge Advocate General has a number of functions in relation to trials by the Court Martial and other service courts. These include sitting as a judge (called a "judge advocate") in service courts and selecting judge advocates (who are appointed by the Lord Chancellor) to sit in individual cases. Under section 34 of the Court Martial Appeals Act 1968 he may (by reference to the conviction of a person by the Court Martial) refer to the Court Martial Appeal Court a finding of the Court Martial which appears to him to raise "a point of law of exceptional importance". The Judge Advocate General under section 34 of the 1968 Act referred to the Court Martial Appeal Court the question whether a finding of guilt by a simple majority of the lay members renders the trial unfair for the purposes of Article 6. He asked the court whether, if that basis of making the finding does render the trial unfair, the court would make a declaration of incompatibility under section 4 of the Human Rights Act 1998.

44. As the Judge Advocate General sought a declaration of incompatibility, the Secretary of State was under section 5(2) of the Human Rights Act 1998 joined as a party. The Court Martial Appeal Court gave its judgment on 21 December 2010,[17] rejecting the Judge Advocate General's submissions that verdicts by simple majority were inherently unsafe and non-compliant with the requirement for a fair trial under Article 6.

Other provisions of the Bill raising ECHR issues

45. **Power of judge advocate to authorise entry and search (clause 7).** Under section 83 of the 2006 Act a judge advocate may in specified circumstances issue a warrant authorising a service policeman to enter and search certain premises. Clause 7 of the Bill provides for a new section 83. As amended, that section will allow the issue of a warrant for more than one premises and entry to premises on more than one occasion. The new section 83, like the current one, will permit the issue of warrants only for accommodation provided for those subject to service jurisdiction and for premises occupied as residence by such persons (these types of accommodation and premises are referred to below and in the Bill as "relevant residential premises"). The clause requires consideration of Article 8 and of Article 1, Protocol 1. However the clause mirrors section 8 of the Police and Criminal Evidence Act 1984 and is subject to the further restriction mentioned above to premises of persons within service jurisdiction. On this basis it is considered to be both necessary for the purposes of the detection and prevention of crime and proportionate to that aim.

46. **Power to make provision about access to excluded material etc (clause 8).** Section 86 of the 2006 Act empowers the Secretary of State to make provision enabling service police to obtain access to excluded material or special procedure material on certain premises.

17 Reference of the Judge Advocate General; appeal against conviction by Timothy Twaite (2010) EWCA Crim 2973; case nos 2010/05633/D5; 2010/05849/D5.

Excluded material and special procedure material have broadly the same meaning as in the Police and Criminal Evidence Act 1984 and the Secretary of State's power is to make equivalent provision to that in the 1984 Act relating to such material.

47. However, the provision that may be made under section 86 is limited to relevant residential premises. This makes the existing provision for access largely ineffective because material which qualifies as excluded material or special procedure material (such as bank records or social workers' files) is unlikely to be held on such premises. Clause 7 amends section 86 so that the Secretary of State may make provision enabling the service police to obtain access to material (other than legally privileged material) on premises which cannot be searched under section 83. Section 86 as amended would permit provision enabling a judge advocate to grant access to the material by making a "production order", which requires the person apparently in possession of the material to produce it to be taken away by a service policeman, or to give a service policeman access to it.

48. The clause requires consideration of Article 8 and Article 1, Protocol 1. However the provision allowed by the clause mirrors that in Schedule 1 to the 1984 Act and is subject to the further restriction that in the case of material not on relevant residential premises, section 86 as amended would not permit provision enabling a judge advocate to issue a search warrant. Instead section 86 would only permit provision enabling a failure to comply with a production order to be treated as contempt of court. Direct access by means of a warrant is therefore excluded if the premises are not relevant residential premises. On this basis it is considered that the clause is both necessary for the purposes of the detection and prevention of crime and proportionate to that aim.

49. **Access to service living accommodation (paragraph 4 of Schedule 3).** The provision for the 2006 Act which deals with the powers of search and entry replaced provisions of the Armed Forces Act 2001 in which such powers could be exercised by reference to "service living accommodation", defined in the 2001 Act as including accommodation occupied either by service personnel or by civilians to whom service law applied. In the 2006 Act the expression was erroneously defined to include only service personnel. Paragraph 4 of the Schedule corrects the error by including accommodation occupied by any of the limited categories of civilian, who, outside the United Kingdom, are subject to service jurisdiction.

50. Again the provision requires consideration of Article 8 and Article 1, Protocol 1. However, the power in question goes no further than those applied to service personnel or, under the 1984 Act, to the civilian population generally. The provision is necessary for the prevention and detection of crime and is considered proportionate, as being completely consistent with those under the 1984 Act.

51. **Testing for alcohol and drugs (clause 11).** The 2006 Act preserves the offence of unfitness for duty through alcohol or drugs. Clause 10 of the Bill provides for service personnel to be guilty of an offence if they exceed a prescribed limit on alcohol when performing, or when they might reasonably be expected to perform, a safety-critical duty. Clause 11 empowers a CO to require a member of the armed forces to take a preliminary test for drugs or alcohol where the CO has reasonable grounds to believe that the person has committed a "relevant offence". One relevant offence is that of unfitness for a duty which, if carried out with impaired ability, would result in a risk of death, serious injury, serious damage to property or serious environmental harm. The other relevant offence is

that of exceeding a prescribed limit on alcohol imposed in respect of prescribed safety-critical duties. The service police, investigating such an offence fully may require the provision of breath, blood or urine samples. The same testing regime applies to the limited categories of civilians who are subject to service jurisdiction but only in respect of offences under the 2006 Act by reference to specified sections of the Railways and Transport Safety Act 2003 (maritime and aviation offences) or an offence under the 2006 Act of conduct outside the United Kingdom which would be one of those offences under the 2003 Act if committed in England or Wales.

52. The provisions require consideration of Articles 6, in particular the right against self-incrimination, and 8. In relation to both Articles it is considered that the provisions are in response to the interests of public safety and are proportionate because the powers are restricted to safety-critical duties.

53. **Service sexual offences prevention orders (clause 17).** Part 2 of the Sexual Offences Act 2003 (SOA 2003) gives both civilian and service courts the power to make sexual offences prevention orders when dealing with an offender for certain sexual offences or offences of violence. A sexual offences prevention order made under these provisions protects members of the public or any particular members of the public in the United Kingdom from serious sexual harm from the defendant. Clause 17 extends the powers of the Court Martial and the Service Civilian Court so that they can make service sexual offences prevention orders for the protection of members of the service community outside the United Kingdom. It is recognised that the powers under the SOA 2003 themselves raised questions about the Convention, in particular Articles 5, 6, 7 and 8.

54. The orders are only available against members of the armed forces, the limited categories of civilians who are subject to service jurisdiction when outside the United Kingdom and persons who a service court is satisfied are intending to become, or likely to become, such civilians. It is considered necessary to cover the last group mainly because members of service families cease to be within service jurisdiction whenever they return to the United Kingdom. In such a case the court will have to be satisfied that the defendant intends or is likely, to rejoin his family outside the United Kingdom and become a civilian subject to service discipline again. It may make a service sexual offences prevention order if this is necessary for the protection of the service community outside the United Kingdom.

55. Prohibitions within the order must be necessary for the purpose of protecting the service community outside the United Kingdom from serious sexual harm from the defendant. The power to make the orders is otherwise subject to the same restrictions as those under SOA 2003, and a right of appeal is provided.

56. The clause also empowers the Court Martial to make new extended prohibitions orders in respect of a person subject to service law or civilian subject to service jurisdiction. These orders can be made where the person is subject to a sexual offences prevention order made under Part 2 SOA 2003 (the principal sexual offences prevention order), and there are members of the service community outside the United Kingdom who would be protected by the sexual offences prevention order if they were in the United Kingdom. An extended prohibition order will extend the prohibitions in the principal sexual offences prevention order for the protection of members of the service community outside the United Kingdom. The orders will be made on the application of a Provost Marshal. The Court

Martial must make an extended prohibitions order if is satisfied that there is in existence a sexual offences prevention order made under Part 2 SOA 2003 in respect of a person, and that there are members of the service community outside the United Kingdom who would be protected by the sexual offences prevention order if they were in the United Kingdom.

57. An extended prohibitions order is a mirror order which will stand or fall with the principal sexual offences prevention order. However, the clause also provides for an appeal to the Judge Advocate General against the making of an extended prohibitions order.

58. In view of the limitations under the clause, closely reflecting those under the 2003 Act, it is considered that the provision is proportionate to the need to provide for members of the armed forces community outside the United Kingdom provision equivalent to that provided within the United Kingdom. The option of relying on local jurisdictions was considered, but it is decided that they would be ineffective to deal with situations arising within United Kingdom families living within United Kingdom military bases.

Other provisions

59. It is not considered that any other provision of the Bill raises issues in relation to the Convention or other human rights instruments.

60. It is on this basis that the Bill is considered to be compatible with the Convention, and Ministers were advised that they might make a statement of compatibility under section 19 of the Human Rights Act 1998.

12 January 2011

3. Letter from the Committee Chair, to Rt Hon Liam Fox MP, Secretary of State for Defence, 8 February 2011

The Joint Committee on Human Rights is considering the compatibility of the Armed Forces Bill with the human rights obligations of the UK. We are grateful for the human rights memorandum prepared by the Ministry of Defence, which we received on 11 January 2011, shortly after the Bill was published. It has assisted us greatly in our scrutiny of the human rights implications of this Bill. We are also grateful to your officials who have made themselves available to meet with our staff and have constructively and helpfully responded to queries about the Bill. We would be grateful if you could provide some further information on specific issues arising in connection with the Bill, outlined below.

(a) Independence of service police investigations

We are currently considering whether the provisions in the Bill which are designed to strengthen the independence of service police investigations satisfy the requirements of the positive obligations in Articles 2 and 3 ECHR. As you point out in your human rights memorandum, the High Court in the recent case of *Ali Zaki Mousa* rejected arguments that investigations by the Royal Military Police under the provisions in the Armed Forces Act 2006 are not sufficiently independent and effective to meet the requirements of Article 3.[1] We note your view that amendments to the 2006 Act in the Bill, bolstering the

1 [2010] EWHC 3304.

independence of service police investigations, are not required by the positive obligations in Articles 2 and 3 ECHR in light of the *Mousa* judgment. However, we understand that there is the possibility of an appeal against the High Court's judgment in *Mousa* and in any event we would be grateful for your views on the following questions.

1. Bearing in mind the High Court's view that it is difficult to conceive of the Commanding Officer not referring the case in practice to the Director of Service Prosecutions, please explain why the Government considers that it is appropriate for the Commanding Officer (as opposed to an independent prosecuting authority) to continue to have any discretion in relation to charging decisions.

2. Can serving Armed Forces personnel investigate cases where systemic failings are alleged, without endangering the perceived independence of those inquiries?

3. In the interests of promoting compliance with the procedural requirements of Articles 2 and 3 ECHR, should Her Majesty's Inspectorate of Constabulary be specifically required to report on the promptness of any investigation, as well as its independence and effectiveness?

(b) Powers of entry and search

The Bill amends the power of a judge advocate to authorise a service policeman to enter and search residential premises.[2] The amended power will allow the issue of an "all premises warrant", which authorises entry to all residential premises occupied or controlled by the person specified, whether or not the premises are specifically identified by the application.[3] It will also allow the issue of a "multiple entry warrant", which authorises entry to and search of premises on more than one occasion.[4]

The Explanatory Notes to the Bill acknowledge that this provision engages the right to respect for private and family life and home, under Article 8 of the ECHR, and the right to peaceful enjoyment of possessions under Article 1 Protocol 1 ECHR.[5] However, the Government considers it to be both necessary for the purposes of the detection and prevention of crime and proportionate to that aim, for two reasons. First, the power is limited to residential premises of persons who are subject to service jurisdiction and, second, "the clause mirrors section 8 of the Police and Criminal Evidence Act 1984."

When s. 8 of the Police and Criminal Evidence Act 1984 was amended by the Serious Organised Crime and Police Act 2005, the JCHR reported that the extended powers to issue all premises warrants and multiple entry warrants raised significant human rights concerns, both under the common law and Article 8 ECHR.[6] It said the provisions "give justices of the peace authority to issue a general warrant of a kind that has been anathema to the common law for centuries on account of the very wide discretion it confers on public officials, and the lack of effective prior judicial control over the decision to enter (if need be, by force) private premises including dwellings."[7] It also concluded that the extended

2 Clause 7, substituting a new s. 83 of the Armed Forces Act 2006.

3 New s. 83(1) Armed Forces Act 2006.

4 New s. 83(5) Armed Forces Act 2006. Under new s. 83(6), if the warrant authorises multiple entries, "the number of entries authorised may be unlimited".

5 EN para 180.

6 Fourth Report 2004–05, *Scrutiny: First Report*, HL Paper 26, HC 224.

7 *Ibid* at para 1.91.

powers gave rise to a significant risk of incompatibility with the right to respect for private life and home in Article 8 ECHR, because there was no means for ensuring judicial control over subsequent exercises of the authorisation to enter and search, even though the circumstances affecting the continued necessity and proportionality of the entry and search might have changed considerably.[8]

4. On what evidence does the Government rely to demonstrate that the extension of the power to authorise entry and search is necessary? In particular (a) please provide statistics on the use of existing powers and (b) any circumstances in which the existing powers have proved adequate.

5. Why were these powers not extended in the Armed Forces Act 2006, which postdated the 2005 extension of the general entry and search power in Section 8 PACE?

6. What post-legislative scrutiny has the Government carried out of the operation of the power in Section 8 PACE since its extension in 2005?

7. Please explain how the proposed extension of entry and search powers in the Bill is compatible with the Government's commitment to bring forward measures in the Freedom Bill limiting powers of entry.

(c) Service Sexual Offences Prevention Orders.

Clause 17 of the Bill extends the power of Courts Martial to make Sexual Offences Prevention Orders (SOPO) in relation to persons who pose a risk of sexual harm while part of the armed forces community overseas. SOPO are Orders created under the Sexual Offences Act 2003. They are civil orders, similar to ASBOS or Violent Offender Orders, which may be sought in connection with certain sexual offenders. Clause 17 of the Bill limits the power of the Courts Martial or civilian court to make an order in relation to risks overseas to circumstances either when the Court has convicted the relevant person or made a finding that the defendant is either not fit to stand trial or he or she is guilty by reason of insanity. Courts Martial will also have the power to make an Extension Order in circumstances where an order has already been made under the SOA 2003.

Orders of this type engage both the right to respect for private life (Article 8 ECHR) and may also engage the right to a fair hearing (Article 6 ECHR). In order to ensure compatibility with the right to a fair hearing, the standard of proof applied to facts relevant on application for these type of orders is generally the enhanced civil standard, which is virtually indistinguishable from the criminal standard (proof beyond reasonable doubt) (*Mccann v Crown Court at Manchester* [2002] UKHL 39; see also *Cleveland Police v H* [2009] EWHC 3231, para 32).

After a conviction or a relevant finding, the relevant facts will have been ascertained by the civilian court or the Court Martial to a criminal standard of proof. However, SOPO are renewable up to 5 years after an Order has been made. In these circumstances, the trigger offence or relevant finding will be over 5 years old. Equally, Orders may be varied at any time, including those Orders which have been subject to renewal. Extension orders are not time-limited and can be made at any time when an original Order is in operation. This

8 *Ibid* at paras 1.95–1.96 and Eighth Report of 2004–05, *Scrutiny : Fourth Progress Report*, HL Paper 60, HC 388, paras 2.29–2.38.

means that the terms of an order could be considered some time significantly later than the original conviction or relevant finding of the Court. The facts relevant to the assessment of the necessity for the Order may necessarily be broader than the facts ascertained in connection with the Conviction and the relevant finding.

8. Can you confirm that the criminal standard of proof (beyond reasonable doubt) will apply in relation to the determination of any relevant facts relevant to the variation or renewal of an Order or the making, variation or renewal of an Extended Order under Clause 17?

9. If so, please explain why the Government considers that it is not necessary to make this clear on the face of the Bill.

(d) Service Complaint Panels

Clause 20 of the Bill proposes two measures designed to respond to the judgment in *Crompton v UK*. Clause 20(5) empowers the Defence Council (the highest level of the Ministry of Defence as regards command and administration of the armed forces) to appoint a panel (to deal with complaints) composed of independent members, or in part made up by independent members. Clause 20(7) empowers the Secretary of State to make regulations requiring in prescribed descriptions of complaint delegation of a case to a panel composed of independent members, or in part made up by independent members. The Human Rights Memorandum explains:

> [This] approach reflects the view that it is not yet easy to be sure how the European Court's approach would apply to different cases, or to formulate confidently rules as to when an independent fact-finding tribunal will be required. It is considered that further development of the court's jurisprudence is likely. The purpose of the clause is accordingly to allow general rules to be laid down as the application of Article 6 to complaints by service personnel becomes clearer.

The provisions in the Bill provide very broad discretions for the Defence Council and the Secretary of State. They may determine the size and nature of the panels they consider necessary to meet the requirement for independence, including providing for panels which are only in part constituted of independent members and may split the functions of the panel, to provide that certain functions are provided by service members and others by independents. The Human Rights memorandum explains that the Government has taken an interim approach, subject to more permanent rules being established in light of more definitive case law.

10. The Defence Council is not an independent body for the purpose of Article 6 ECHR. Please explain why the Government considers that it will be appropriate for this body to exercise a very broad discretion to determine (a) the cases where a more independent process is necessary; and (b) what any more independent process should look like.

11. Has the Government considered whether such determinations might be likely to lead to further challenges to this discretionary mechanism under Article 6 ECHR?

12. Has the Government considered whether further guidance can be given to the Secretary of State in Clause 20(7) to better define the circumstances when an independent and impartial tribunal will be necessary, including by reference to the existing Strasbourg case-law? If so, we would be grateful if the Government could explain why the power of the Secretary of State could not be better defined and/or the discretion of the Defence Council removed. In particular:

a) **In any case where an independent hearing is required, does the Government consider that a tribunal comprising a minority of independent members could satisfy the requirements of Article 6 ECHR?**

b) **Please provide examples of cases where the functions of a complaints panel could be split and satisfy the requirements of Article 6 ECHR.**

13. In light of the ability of the Government to propose amendments to primary legislation using the remedial order procedure in the HRA 1998, I would be grateful if you could explain the Government's decision to create broad discretionary powers for both the Defence Council and the Secretary of State in relation to the need for an independent inquiry in relation to certain service complaints.

(e) Civilians subject to service discipline

The Armed Forces Act 2006 makes detailed provision for the treatment of civilians subject to service discipline. In some circumstances, individuals may be tried before the Service Civilian Court and in others by a Court Martial. Clause 22 makes a number of minor amendments to the scope of their application. Our predecessor Committee raised a number of questions about the propriety of the application of service discipline to civilians. The European Court of Human Rights in *Martin v UK* held that determination of criminal charges against civilians by military courts would only be compatible with the right to a fair hearing by an independent and impartial tribunal (Article 6 ECHR) in "very exceptional circumstances". The Human Rights Memorandum reiterates that:

> The Ministry of Defence's view is that the European Court was not saying that the United Kingdom needs to put in place a UK civilian court jurisdiction such as the Crown Court, but a court jurisdiction which satisfies the requirements of a civilian court even if established under legislation dealing with the armed forces. The Ministry of Defence also considers that this meant that, if a trial of a civilian is to be heard before a Court Martial, all the lay members of the court must be civilians.

14. Please provide a fuller explanation of the Government's analysis of the decision in *Martin v UK*. In particular, please elaborate on the Government's view that special civilian courts designed to deal with civilians in a military context are not "military courts" for the purposes of the Court's guidance that civilians should only be tried by military courts in "very exceptional circumstances".

(f) Service in the Armed Forces under 18 years

The Committee's predecessor, in its Report on Children's Rights, recommended that the UK adopt a plan of action for implementing the recommendations of the UN Committee on the Rights of the Child in its 2008 Report on the UK's compliance with the Optional

Protocol on Children in Armed Conflict.[9] Those recommendations include raising the minimum age for recruitment to the armed forces from 16 to 18 and reviewing the requirements for permitting the discharge of child recruits.

15. What steps have been taken by the Government to implement the recommendations of the UN Committee on the Rights of the Child in 2008 on service in the Armed Forces of personnel aged under 18?

16. I would be grateful if you could confirm: (a) the number of 16 and 17-year-olds currently serving in the Armed Forces; (b) the number of 16 and 17-year-olds recruited in the past 3 years (2008–10).

17. Please confirm the current arrangements for personnel recruited as 16 and 17-year-olds who wish to be discharged before the age of 22. In particular, please explain any discretionary arrangements which apply to allow young people to leave the Armed Forces before they reach 22.

18. Please provide the figures for (a) personnel recruited as 16 and 17-year-olds leaving the Armed Forces before age 22 between 2006–2011; and (b) personnel recruited as 16 and 17-year-olds requesting discharge before age 22 between 2006–11. If possible, provide reasons for refusal in cases where discharge was requested and refused.

19. Please provide the number of servicemen and women under the age of 22 who have been (a) killed and (b) injured in Afghanistan and Iraq since 2002. If possible, please indicate the approximate proportion of the total of those killed and injured.

The UK has entered an interpretative declaration to the Optional Protocol, reserving the right to deploy people aged 16 and 17 in hostilities where removing them from their units would be impractical or could compromise operational effectiveness. The UN Committee on the Rights of the Child has called for the declaration to be amended. In 2007, then Minister for the Armed Forces, Adam Ingram MP, explained that although measures were taken within the UK to ensure that 16 and 17-year-olds were not deployed to active hostilities, that 16–17-year-olds had been deployed in 15 cases between 2003–05.[10]

20. Please explain what mechanisms currently exist to track 16 and 17 year old Armed Forces personnel and to prevent their deployment to participate in hostilities.

21. Please provide details of any personnel aged 16 and 17 deployed into hostilities between 2005–11, including (a) the circumstances in which they were deployed; (b) the duration of their deployment and (c) the reasons for their deployment, including any justification and supporting evidence related to operational effectiveness.

(g) UN Convention on the Rights of Persons with Disabilities: Reservation and Service in the Armed Forces

All service in the Armed Forces is exempt from the application of the Equality Act 2010, in so far as that Act protects against discrimination on the grounds of disability in relation to work.[11] The UK has also entered a reservation to the UN Convention on the Rights of

9 Twenty-fifth Report of Session 2008–09, Children's Rights, HL Paper 157, HC 338, paras 139–143.

10 HC Deb, 1 Feb 2007, c 508W

11 Schedule 9(4)

Persons with Disabilities in order to preserve this exemption. Our predecessor Committee concluded that neither the exemption nor the reservation was necessary and both undermined the protection of people with disabilities from unjustified discrimination. In its Report on the UNCRPD, our predecessor Committee concluded that neither the exemption nor the reservation was necessary and both undermined the protection of people with disabilities from unjustified discrimination. In its Report on the UNCRPD, our predecessor Committee concluded that the exemption was unnecessary and the reservation was likely to be incompatible with the object and purpose of the Convention.[12] In its Report on the Equality Bill, our predecessor Committee confirmed its view that a blanket exemption was inappropriate and called for a review within 6 months of Royal Assent.[13]

22. I would be grateful if you could explain the Government's position on the continuing justification for the exemption for service in the armed forces from (a) the full application of the disability discrimination provisions in the Equality Act 2010 and (b) the UN Convention on the Rights of Persons with Disabilities.

23. Please also provide figures for the retention of officers and men who become disabled while in service during the last 3 years (2008–10), including as a percentage of the total number of persons who became disabled during that period while in service, including service in the reserved forces.

24. Please provide further information on Armed Forces' policies on the treatment of persons who become disabled while on service, including service in the reserved forces.

I would be grateful for a response by 23 February 2011. I would be grateful if you could provide a copy of your response in Word format, to assist with publication.

8 February 2011

[12] http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/70/7006.htm#a3

[13] http://www.publications.parliament.uk/pa/jt200809/jtselet/jtrights/169/16909.htm#a28

4. Letter to the Committee Chair, from Rt Hon Andrew Robathan MP, Minister of State for Defence Personnel, Welfare and Veterans, Ministry of Defence, 28 February 2011

Thank you for your letter of 8 February to Liam Fox seeking further information on specific issues arising in connection with the Armed Forces Bill. I am replying as the Minister responsible for the legislation.

The answers set out below follow the sequence of questions in your letter and are numbered accordingly. I have included the text of your original questions for ease of reference.

INDEPENDENCE OF SERVICE POLICE INVESTIGATIONS

1. Bearing in mind the High Court's view that it is difficult to conceive of the Commanding Officer not referring the case in practice to the Director of Service Prosecutions, please explain why the Government considers that it is appropriate for the Commanding Officer (as opposed to an independent prosecuting authority) to continue to have any discretion in relation to charging decisions.

1.1 The starting point of the Department's consideration of the issue raised in question 1 is that it is legally appropriate, and essential to the practical, day-to-day maintenance of discipline and so for the maintenance of operational effectiveness, for commanding officers to have a disciplinary role. The CO's summary jurisdiction was held in the case of Baines (2005) to be compliant for the purposes of Article 6.[1] Under the Armed Forces Act 2006 the criminal offences that a CO may charge and try are very limited. They are listed in Parts 1 and 2 of Schedule 1 to the 2006 Act. Of these, any offence listed in Part 2 may only be tried by a CO, if either the CO is of at least the high rank of major general (or the equivalent in the other two Services), or he has the permission of higher authority in his chain of command.

1.2 This role of the CO reflects the fact that there are simpler and less serious examples of some offences, such as lesser disciplinary offences and even minor assaults occasioning actual bodily harm or minor offences of dishonesty, such as sometimes occur between members of the Armed Forces and even between Service personnel and members of the public, which may properly be dealt with by a CO, and perhaps without the bringing of a criminal charge. So it is the Ministry's view that there is a range of minor cases in which the CO has a legitimate discretion. In a range of these cases, it will still be necessary for him to take legal advice (most obviously as to any criminal charge). Then there are those cases, referred to by the Court (especially in paragraph 65 of its judgment), in which it will be exceptional for the CO (and only with appropriate advice) to decide not to charge. Within that group the Court referred to cases of violence or abuse against persons in service custody, in relation to which the guidance to the CO is even tighter.

1.3 The Court in its judgment in *Ali Zaki Mousa* considered whether the safeguards in place were adequate to ensure that those cases which should be referred to the Director of Service Prosecutions would indeed be referred. Without attempting to set out the whole

1 Further reference may be made to paragraphs 12 and 13 of the Ministry's first memorandum to the Joint Committee.

system of safeguards referred to in the Court's judgment, it may be helpful to mention here:

a) the CO's duty (under section 115(4) of the 2006 Act) to ensure that any allegation which would indicate to a reasonable person that any service offence (disciplinary or criminal) may have been committed is investigated appropriately or known to the Service police (so that they may take the initiative as to investigation); and

b) the CO's duty to ensure that the Service police are aware of any evidence of a possible Schedule 2 offences or of any "prescribed circumstance".[2]

The Court recognised that there were some lower level cases which could still raise Article 3 issues. As to these, the Court considered[3] that the guidance given as to taking legal advice, and the further guidance given about cases of violence or abuse against persons who are not members of the United Kingdom's Armed Forces or against a person held in any form of service custody, was sufficient.

1.4 Given the issues considered at First Instance in *Ali Zaki Mousa*, it seems to the Department very likely that the appropriateness of our provisions will be considered by the Court of Appeal, on appeal in that case.

2. Can serving Armed Forces personnel investigate cases where systemic failings are alleged, without endangering the perceived independence of those inquiries?

2.1 In the view of the Ministry of Defence, and subject of course to the results of the forthcoming appeal, there is nothing in the Court's judgment in *Ali Zaki Mousa* to suggest that service personnel cannot investigate evidence of criminal or disciplinary offences without prejudicing consideration of whether the evidence indicates that there may be wider, systemic issues which need consideration. The Court made it clear that "article 3 imposes requirements of promptness and reasonable expedition in the discharge of the state's investigative obligation".[4] The Court also stated that "If delay were liable to jeopardise the effectiveness of any investigation of systemic issues that might ultimately be called for, then that would be a powerful factor against deferral" [of a decision whether to hold an immediate public inquiry]. But the Court then considered whether, in the circumstances of the case, delay might frustrate a wider inquiry; the Court was "not persuaded […] that that is a real risk in this case".[5] Further, the Court consider that there were "a number of good reasons for waiting" [before deciding whether to hold an inquiry into systemic issues]. These good reasons included:

a) that "individual allegations may be found to lack all credibility or substance, with the result that any systemic issues depending upon them will fall away"; and

2 As to which reference is made to sections 113 and 114 of the 2006 Act and to the Armed forces (Part 5 of the Armed Forces Act 2006) regulations 2009, S.I. 2009/2055.

3 Paragraph 65.

4 Paragraph 120 of the judgment.

5 Paragraph 122 of the judgment.

b) some systemic issues may themselves be investigated in practice as part and parcel of the circumstances of the individual allegations".[6]

2.2 These statements suggest to the Ministry that the Court concluded that investigations by Armed Forces personnel would not prejudice the independence of any subsequent wider investigation of systemic issues, and that such investigations could appropriately cover systemic issues.

3. In the interests of promoting compliance with the procedural requirements of Articles 2 and 3 ECHR, should Her Majesty's Inspectorate of Constabulary be specifically required to report on the promptness of any investigation, as well as its independence and effectiveness?

3.1 The approach adopted in the Bill, of focussing specifically on the "independence and effectiveness" of Service police investigations does derive in part from the requirements of Articles 2 and 3. In particular, the MOD had in mind that:

a) the duty to investigate allegations is implied in relation to those Articles to ensure the effective protection of the rights specified in the Articles; it is therefore linked to the requirement in Article 13 that there be an "effective" remedy for breach;

b) while promptness is often specifically referred to by the Courts, it also derives from the requirement for an "effective" remedy, and the MOD considers that reference to the effectiveness of Service police investigations will include the promptness with which the Service police carry them out; as quoted above in paragraph 2.1 of this memorandum, the Court in *Ali Zaki Mousa* linked promptness directly to effectiveness; as in the statements "If delay were liable to jeopardise the effectiveness of any investigation [...] that would be a powerful factor against deferral" and again "There is still a question, of course, whether [...] delay might in practice frustrate an inquiry and thereby give rise to a breach of the duty to carry out an effective investigation";

c) as a matter of common usage the MOD considers that the "effectiveness" of investigations would clearly include promptness.

POWERS OF ENTRY AND SEARCH

4. On what evidence does the Government rely to demonstrate that the extension of the power to authorise entry and search is necessary? In particular:

a) **please provide statistics on the use of existing powers; and**

b) **any circumstances in which the existing powers have proved inadequate.**

4.1 Statistics on the use of existing powers of entry are not readily available. There is no central database recording the application for, issue or use of search warrants. In the absence of such statistics, the requirement for the extension of the power is perhaps best illustrated by example.

4.2 The current law requires the Service police to apply for separate warrants in relation to separate sets of premises. In a recent case, seven soldiers were allegedly involved in the

6 Paragraph 124 of the judgment.

theft and supply of a substantial quantity of military firearms and explosives. It was possible that the items were being moved from one location to another, possibly between the residences of the suspects, and several of the suspects had more than one place of residence. When the senior investigating officer planned the searches he had to make applications for separate search warrants in relation to each individual set of premises. Had a search indicated that the stolen items might be at other premises, he would have been required to apply for a new warrant. The purpose of the search might have been frustrated or seriously prejudiced had such a situation occurred. Under the provisions requested a search warrant could apply to more than one set of premises and to unspecified premises, and allow entry on more than one occasion.

4.3 It is now not uncommon for Service personnel to have more than one residence, and for these residences to be in different countries.[7] Moreover, the Service police consider that there is evidence that some Service personnel are now committing more crimes involving difficult questions of evidence. These have included cases of making indecent images of children and child grooming offences. Investigations of this nature tend to be fast-moving and, while there is no known case to date which has been lost because of a lack of the type of warrants provided for in clause 7, this risk must be greater because of a lack of powers which are available to the Home Office police. Meanwhile, if Service police are aware that Armed Forces Act 2006 search warrants are inadequate to the purpose of search, Service police investigators do enlist the support of civil police, who already have access to these types of warrant; but this requires close liaison and is only possible in the UK.

5. Why were these powers not extended in the Armed Forces Act 2006, which post-dated the 2005 extension of the general entry and search power in section 8 PACE?

5.1 The relevant amendments to the Police and Criminal Evidence Act 1984 were made by the Serious Organised Crime and Police Act 2005. They came into effect on the very end of 2005, and represented a significant change in Home Office police force powers. The MOD decided to wait to see:

a) whether they gave rise to difficulties; and

b) whether a case for an extension to the Service police was justified.

5.2 This decision was taken in the light of the fact that the equivalent Service police powers to obtain search warrants were limited to "relevant residential premises" (broadly speaking the accommodation and homes of those subject to military jurisdiction). There was no intention to widen the scope of premises searchable.[8] During 2005 it was still the case that the accommodation and homes of service personnel could usually be easily identified, and the type of offence generally being investigated did not require the search of a number of premises. Since then the pattern of the accommodation of Service personnel has changed, as has the range of offences. Service accommodation is more frequently "off base" and more Service personnel have their own homes; and the Service police are aware of most offences, such as weapon and drugs smuggling, which may require use of the wider powers provided for in the Bill.

7 Further reference I made to paragraph 5.2 below.

8 This remains the case; section 83 of the Armed Forces Act 2006, as proposed to be amended by the Bill will remain restricted to "relevant residential premises".

6. What post-legislative scrutiny has the Government carried out of the operation of the power in Section 8 PACE since its extension in 2005?

6.1 A PACE Review was commenced in March 2007, and a report was published in March 2010. The Memorandum to the Home Affairs Committee Post-Legislative Assessment Organised Crime and Police Act 2005 Cm 7974 http://www.official-documents.gov.uk/document/cm79/7974/7974.pdf includes detailed references to the PACE review. Paragraphs 32 and 36, and Annex B to that Memorandum refer. Access to the PACE Review (Commenced March 2007), the Government's Response and the Final Published Outcomes (4 March 2010) are available at http://webarchive.nationalarchives.gov.uk/20100413151426/http://police.homeoffice.gov.uk/operational-policing/powers-pace-codes/PACE-Review/index.html

6.2 Chapter 5 of the Final Published Outcomes highlighted the requirement to consider ways to raise police accountability in relation to search warrants generally. In addition, it was recommended that procedures be put in place to enable endorsed redacted copies of all premises and multiple premises warrants to be given to the owner or occupier. These matters will be taken into consideration when detailed procedures for the application for and execution of these warrants, including safeguards, are made by amendment to or reissue of the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009, SI 2009/2056.

7. Please explain how the proposed extension of entry and search powers in the Bill is compatible with the Government's commitment to bring forward measures in the Freedom Bill limiting powers of entry.

7.1 Part 3 of the Protection of Freedoms Bill deals with the protection of property from disproportionate enforcement action. Chapter 1 of that Part deals with repealing, adding safeguards for, and rewriting powers of entry. It includes a requirement to review all existing powers of entry. The Government is committed to limiting rights of entry, and the Ministry of Defence has already conducted an initial review of all existing rights of entry with a view to identifying any that might be repealed. The existing Service police powers of entry are all considered essential, but there may be room for increasing the safeguards when those powers are reviewed under the Freedom Bill. Meanwhile, the Ministry of Defence is very conscious of the requirement not to create unnecessary new powers of entry.

7.2 The Government's policy recognises the requirement to ensure that those charged with the investigation of crime should have sufficient powers to do so effectively, subject to appropriate safeguards. Clause 7 of the Bill substitutes a new section 83 governing the power of Service police to apply to a judge advocate for a warrant to enter and search. The new provisions will not create new grounds of entry. As explained in the answer to question 5 above, the new provisions only extend the existing provisions in line with the wider powers of the Home Office police forces, so as to allow the judge advocate to grant entry on more than one occasion and to grant entry to unspecified premises of a person. But the power of the Service police will remain much narrower than that of the Home Offices forces, because the Service police power will only be available in relation to "relevant residential premises", broadly speaking residential premises of persons subject to the Armed Forces Act 2006. Limiting the availability of the warrants in this way ensures

compatibility with the Government's policy that only such powers as are absolutely necessary should be retained. The circumstances which have led to a decision to seek this power for the Service police are set out in paragraph 5.2 above.

7.3 The Joint Committee may also be interested in clause 8 of the Bill. This clause makes provision extending the powers of the Service police to seek though a judge advocate access to "excluded material" and "special procedure material" (such as bank records or social workers' files). The provision it replaces is limited to material on relevant residential premises; the new provision is not. Its extent and purpose are very closely based on powers of the Home Office forces; but it is subject to a major restriction. The Home Office forces are able to enforce an order to produce material by a warrant to enter and search. The Service police will not have such a power. Failure to comply with a production order will be dealt with as a contempt of court.

SERVICE SEXUAL OFFENCES PREVENTION ORDERS ("SOPOS")

8. Can you confirm that the criminal standard of proof (beyond reasonable doubt) will apply in relation to the determination of any relevant facts relevant to the variation or renewal of an Order or the making, variation or renewal of an Extended Order under Clause 17?

8.1 The criminal standard of proof will apply where the Court Martial has to decide facts which engage a standard. This will be the case where the Court Martial considers an application for the renewal or variation of a Service SOPO,[9] because the court will be required to be satisfied that the power needs to be exercised to protect persons from serious sexual harm. This will involve assessing such matters as the defendant's conduct since the original order was made. This follows from the decisions in *McCann v Crown Court at Manchester [2002] UKHL* and more recently in *R (on the application of Cleveland Police) v Haggas [2009] EWHC 323* that, because of the seriousness of the matters to be decided and the serious consequences for the defendant, the higher criminal standard must apply to the determination of facts when the courts make civil orders of this type.

8.2 The criminal standard of proof will not apply to the making of extended prohibitions orders.[10] Such orders are essentially only extensions of existing SOPOs. The relevant questions as to the defendant's contact and the danger to members of the public in the UK will have been dealt with (to the criminal standard) when the SOPOs was made. For the extended prohibitions order the Court Martial will only have to be satisfied as to the existence of the SOPO and that there are members of the Service community outside the UK who would be protected by the SOPO if they were in the UK.

8.3 As extended prohibitions orders are effectively mirror orders, they stand and fall with the SOPOs they extend, and cannot be varied or revoked. New section 232E(5)(b) provides that if a SOPO is varied, renewed or discharged, a related extended prohibitions order no longer has effect.

9. If so, please explain why the Government considers it not necessary to make this clear on the face of the Bill?

9 Section 232C of the Armed Forces Act 2006, added by clause 17 of the Bill.

10 Under section 232E of the Armed Forces Act 2006, added by clause 17.

9.1 The standard of proof is not set out in the legislation relating to similar civil orders such as Anti-Social Behaviour Orders under the Crime and Disorder Act 1998; nor is it mentioned in section 108 of the Sexual Offences Act 2003, on which our provisions for variation and revocation of Service SOPOs are based. As stated above, the courts have addressed the issue of the standard of proof and it is now clear that the criminal standard applies to the determination of relevant facts in all civil orders of this type. The MOD does not therefore consider that it would be helpful to mention the standard of proof on the face of the Bill.

SERVICE COMPLAINTS PANELS

10. The Defence Council is not an independent body for the purposes of Article 6 ECHR. Please explain why the Government considers that it will be appropriate for this body to exercise a very broad discretion to determine (a) the cases where a more independent process is necessary; and (b) what any more independent process should look like.

(a) Determination by the Defence Council of the cases where a more independent process is necessary

10.1 The MOD considers that it is important to bear in mind that the powers of the Defence Council to provide for an independent element in a panel are not limited in the Bill to where a decision must be taken by an independent tribunal in accordance with Article 6. The Armed Forces Act 2006 already includes provision allowing the Secretary of State to require an independent element in a complaint panel. This was not included to meet the requirements of Article 6 but because of a recognition that a number of factors may suggest the inclusion of an independent element in the complaint process. Clause 20(5) of the Bill gives the Defence Council power to include an independent element in any Service complaint panel.

10.2 It is true that a very important purpose of the new provision is to allow the Defence Council to respond to developing case-law as to when a panel must be independent and when particular decisions must be made independently. Where the Defence Council is considering whether, in accordance with Article 6, a decision by an independent panel or by independent members is required, the Defence Council's discretion itself will not be a broad one. This is because a failure to appoint, where required, an independent panel or independent members to decide a complaint or a particular issue relating to a complaint will mean that the decision may be successfully challenged. A failure to take the appropriate approach to deciding the question may also lead to judicial review. Until the case-law on *Crompton* is sufficiently developed to allow the legal requirements to be set out in subordinate legislation, the Defence Council will have to consider complaints on a case by case basis (or perhaps by reference to categories of case) as to whether to appoint a panel of independent members. That question will have to be decided by the application to the issues in the case of the principles stated in *Crompton*. Without doubt this will involve taking legal advice. The decision will be made by reference to the issues raised and the MOD does not foresee that it will require any preliminary decision on the facts; accordingly the availability of judicial review of the decision should be sufficient to ensure that the decision-making process itself is compliant.

10.3 The powers of the Defence Council to decide on the membership of panels and whether to appoint panels are of course subject to the power to lay down requirements as to these matters in subordinate legislation.

(b) What any more independent process should look like?

10.4 As explained at 10.1 above, the Bill will give the Defence Council a wide power to include an independent element, even where not required by Article 6. Where Article 6 requires an independent and impartial tribunal, the MOD considers (on the basis of *Crompton*) that a requirement for all the members of a panel to be independent will be sufficient. It may well be that the case-law will simply require a wholly-independent panel, based on an overall characterisation of the case, where independence is required. But the MOD bears in mind that:

a) the facts and issues in redress cases are sometimes complex;

b) there is a possibility that the case-law will recognise that certain matters within one redress case may appropriately be decided by the Defence Council or by a panel including members who are not independent, while others must be decided by an independent panel or the independent members of a panel.

The powers provided in the Bill are intended to allow an adequate response to the full range of approaches which case-law may recognise as appropriate. They will also allow the Secretary of State to take a cautious view, and to provide for an independent decision on certain matters, even where the case-law does not characterise (or does not clearly characterise) a category of complaint as requiring independence.

11. Has the Government considered whether such determinations might be likely to lead to further challenges to this discretionary mechanism under Article 6 ECHR?

11.1 The possibility of challenge to the process by which the Defence Council makes decisions on appointing a panel has been considered by the MOD. As stated in the final sentence of paragraph 10.2 above, the possibility of judicial review of that process is seen as one of the safeguards justifying that approach (while recognising the benefit of having clear, general rules once the case-law on *Crompton* is developed). The possibility of an ECHR challenge to (rather than a judicial review of) that process before the complaint itself is decided is considered less likely. It is thought more likely that a challenge on that basis would be made after the final outcome of the complaint process.

12. Has the Government considered whether further guidance can be given to the Secretary of State in clause 20(7) to better define the circumstances when an independent and impartial tribunal will be necessary, including by reference to the existing Strasbourg case-law? If so, we would be grateful if the Government could explain why the power of the Secretary of State could not be better defined and/or the discretion of the Defence Council removed.

12.1 The MOD has considered the existing case-law and considers that there are a number of aspects of the decisions in *Crompton* and in *Eskelinen*[11] which are so uncertain as to create, on the present development of the case-law, a high risk of error by the MOD if it

11 Reference is made to paragraph 32ff in the MOD's first memorandum to the Joint Committee.

were to attempt at this stage to give general guidance which is more than provisional. Some of these issues are likely to be considered in a Ministry of Defence case which is currently before the High Court.[12] The areas of uncertainty include:

a) what issues which may be the subject of a complaint relate to "civil rights" within the meaning of Article 6;

b) what sort of complaints call into question the "special bond of trust and loyalty", so as to justify an exclusion of access to an independent and impartial tribunal;[13]

c) in respect of what sort of disputes can there be a "compelling reason" for the decision to be by the Defence Council.[14]

Question 12 continues: In particular:

a. In any case where an independent hearing is required, does the Government consider that a tribunal comprising a minority of independent members could satisfy the requirements of Article 6 ECHR?

The MOD considers that, for any matter requiring an independent decision for the purposes of Article 6, it would be insufficient for the decision-makers to include only a minority of independent members.

b. Please provide examples of cases where the functions of a complaints panel could be split and satisfy the requirements of Article 6 ECHR.

The power has been put in place because of the possibility of case-law developing on these lines. An example of the sort of situation which might lead to such a development is given below (but is necessarily based on speculation, given the current state of the case-law):

A soldier, X, is discharged from the service on the ground that he failed a drugs test. X seeks redress on the grounds that: (a) he had not taken drugs and the test was improperly carried out; there is a dispute of fact about what actually happened; (b) even if he had taken drugs, there were mitigating circumstances which as a matter of policy the Army had taken into account in comparable cases; the Board should at least consider these circumstances. In such a case (a) might be considered a key question of fact, requiring an independent finding. But if the finding is against X, there will still be the issue of policy, (b), as to what should be done.[15]

13. In light of the ability of the Government to propose amendments to primary legislation using the remedial order procedure in the HRA 1998, I would be grateful if you could explain the Government's decision to create broad discretionary powers for both the Defence Council and the Secretary of State in relation to the need for an independent inquiry in relation to certain service complaints.

13.1The MOD considers that the approach taken in the Bill allows it to develop practice and regulations with the benefit of clarifying court decisions without having to rely on

12 Crosbie v Secretary of State (Claim no. CO/6534/2009).

13 Reference is made to paragraph 62 of the judgment in Eskelinen.

14 Reference is made to paragraph 77 of the judgment in Crompton.

15 The Ministry acknowledges that the example is inevitably artificial, but hopes that it will still be helpful.

emergency legislation. The Secretary of State's power will allow him to lay down rules (and revise them as the law develops) so that the redress system is operated compatibly. Having legislation which can be applied compatibly is considered by the MOD to be preferable to waiting for a decision that the legislation is incompatible and then amending it under emergency powers. This is particularly important, given the possibility that:

a) no one case will necessarily give a comprehensive answer allowing all issues to be resolved in a single piece of remedial legislation; and

b) the law in this area is likely to develop, as it has previously in the cases of *Pellegrin (1999), Eskelinen and Crompton.*

CIVILIANS SUBJECT TO SERVICE DISCIPLINE

14. Please provide a fuller explanation of the Government's analysis of the decision in *Martin v UK*. In particular, please elaborate on the Government's view that special civilian courts designed to deal with civilians in a military context are not "military courts" for the purposes of the Court's guidance that civilians should only be tried by military courts in "very exceptional circumstances"

14.1 The Court's judgment in *Martin*[16] was based fundamentally on Article 6: the requirement of an independent and impartial trial of criminal liability. The Court stated[17] that the question to be answered was whether the applicant's "doubts about the independence and impartiality of a particular court-martial can be considered to be objectively justified and, in particular, whether there were sufficient guarantees to exclude any such legitimate doubts".

14.2 The Court went on to state that the trial of civilians by military courts "should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6".[18]

14.3 The approach of the Government in response has been to remove from courts dealing with civilians subject to service jurisdiction the characteristics which it is considered might lead to those courts being characterised as "military courts" and to ensure that there are in place adequate safeguards against any legitimate doubt as the courts' independence and impartiality. In particular:

a) the courts are composed solely of civilians: a civilian judge advocate, appointed by the Lord Chancellor, and in the Court Martial, civilian lay members appointed by a civilian court administration officer;

b) appeal from the Court Martial is to the Court Martial Appeal Court, which is composed entirely of civilian judges of the Court of Appeal (Criminal);

c) legal aid is available and there is full access to civilian defence lawyers;

16 Judgment 24 Oct 2006: no. 40426/98.

17 Paragraph 43 of the judgment

18 Paragraph 44 of the judgment.

d) there is no liability to the disciplinary offences applicable to Service personnel, such as desertion, mutiny, disobedience to lawful orders. A few special Service offences apply, but these are closely akin to criminal offences, for example looting, obstructing the Service police and breach of standing orders (which cover traffic and other regulatory provisions for bases).

14.4 The aim has been to make the courts which deal with civilians subject to service jurisdiction essentially civilian, except to the extent that some military connection is unavoidable, given that the jurisdiction arises in relation to civilians forming part of the Service community outside the United Kingdom.

SERVICE IN THE ARMED FORCES UNDER 18

15. What steps have been taken by the Government to implement the recommendations of the UN Committee on the Rights of the Child in 2008 on service in the Armed Forces of personnel aged under 18?

15.1 There are no plans to review the operation of the interpretative declaration on article 1 of the Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. We recognise the importance of providing special treatment for young people under the age of 18 serving in the Armed Forces and Defence policy is that no Service personnel under the age of 18 is knowingly deployed on any operation, outside of the UK, which would result in them becoming engaged in, or exposed, to hostilities. Administrative guidelines and procedures are in place to ensure that under-18s are withdrawn from their units before they are deployed on operations.

15.2 We have no plans to amend or withdraw our interpretative declaration with regard to article 3 to the Optional Protocol on the Involvement of Children in Armed Conflict. The UK Armed Forces will continue to recruit from age 16 and there are no plans to change this policy.

16. I would be grateful if you could confirm: (a) the number of 16 and 17-year-olds currently serving in the Armed Forces; (b) the number of 16 and 17-year-olds recruited in the past 3 years (2008–10).

16.1 The information is as follows:

a) The number of 16-year-olds currently serving in the Armed Forces is 580; the number of 17-year-olds is 1,970.

b) The numbers of 16 and 17-year-olds recruited in each Service are:

Royal Navy
Overall figures for under-18s recruited:
2008 805
2009 696
2010 360

Army (recruiting years 1 April–31 March)

2007–08 (age 16) 2191 (plus 3 TA); (age 17) 2319 (plus 360 TA)
2008–09 (age 16) 2157 (plus 2 TA); (age 17) 2127 (plus 518 TA)
2009–10 (age 16) 1864 (plus 3 TA); (age 17) 1678 (plus 398 TA)
2010–11 (age 16) 1342 (0 TA); (age 17) 962 (plus 191 TA)

RAF
Transfer of databases means that the statistics cannot be provided immediately. If desired by the Committee they can be made available next week.

17. Please also confirm the current arrangements for personnel recruited as 16 and 17-year-olds who wish to be discharged before age 22. In particular, please explain any discretionary arrangements which apply to allow young people to leave the Armed Forces before they reach 22.

17.1 Recruits who are under 18 years of age at the time of enlistment and who wish to end their service have a right to leave by giving at least 14 days' notice to their commanding officer. Such notice can take effect when the recruit has completed 28 days' service and is within 6 months of enlistment. Additionally, recruits who before their eighteenth birthday have made their unhappiness with military life known to their CO can request permission to leave up to three months after they reach age 18, and in those cases the policy is to treat all these cases with great sympathy. This does not give a right to discharge. It is considered that extending a right to discharge would be likely to reduce the Services' chance to solve the problems that the young recruit may be facing. After the age of 18 years and 3 months, the usual procedures for leaving the relevant Service apply.

18. Please provide the figures for (a) personnel recruited as 16 and 17-year-olds leaving the Armed Forces before age 22 between 2006–11; and (b) personnel recruited as 16 and 17-year-olds requesting discharge before age 22 between 2006–11. If possible, provide reasons for refusal in cases where discharge was requested and refused.

18.1The information is as follows:

a) Personnel recruited under age 18 and leaving before 22 between 2006 and 2011 is 12,290.

b) On the number of person's requesting discharge, figures are not held for discharges requested up to the age of 22.

19. Please provide the number of servicemen and women under the age of 22 who have been (a) killed and (b) injured in Afghanistan and Iraq since 2002. If possible, please indicate the approximate proportion of the total of those killed and injured.

19.1The information is as follows:

a) Between 1 January 2002 and 21 February 2011 (the latest date for which death information is available) there were 535 UK Service personnel who died in Afghanistan or Iraq. Of these 125 (23%) were under the age of 22.

b) Between 1 January 2002 and 31 January 2011 (the latest date for which casualty information is available) there were 3,217 UK Service personnel reported with an injury

in Afghanistan and Iraq by the initial Notification of Casualty (NOTICAS) system. Of these 891 (28%) were under the age of 22.

20. Please explain what mechanisms currently exist to track 16 and 17-year-old Armed Forces personnel and to prevent their deployment to participate in hostilities.

20.1 Service personnel under the age of 18 are not to deploy to any operations outside of the United Kingdom, except where the operation does not involve personnel becoming engaged in, or exposed to, hostilities. Personnel under 18 are not to be deployed on UN peacekeeping operations in line with UN policy. No personnel under 18 are to carry out operational patrols in Northern Ireland, although 17-year-olds can be based in the Province.

20.2 Orders and regulations explicitly state that no one under the age of 18 years is to deploy. Local Commanders will take appropriate precautions to ensure that this is the case. In addition, passport checks are carried out by movements staff at Brize Norton to minimise any potential for an under 18 deploying to an operational theatre.

21. Please provide details of any personnel aged 16 and 17 deployed into hostilities between 2005–11, including (a) the circumstances in which they were deployed; (b) the duration of their deployment and (c) the reasons for their deployment, including any justification and supporting evidence related to operational effectiveness.

21.1 There were no 16 year old Service personnel deployed to Afghanistan or Iraq between April 2007 and April 2010. Five 17-year-old Service personnel have been deployed between April 2007 and April 2010; three to Afghanistan and two to Iraq. Of these five Service personnel, two were within two days of their 18th birthday, and two were identified on their arrival in theatre and returned to UK; they redeployed after their 18th birthday. The fifth individual was not identified until after turning 18.

21.2 Data on personnel deployed to Afghanistan or Iraq prior to April 2007 can only be derived from departmental legacy systems. As such, determining the ages of personnel at the time of deployment prior to April 2007 is not possible.

22. I would be grateful if you could explain the Government's position on the continuing justification for the exemption for service in the armed forces from (a) the full application of the disability discrimination provisions in the Equality Act 2010 and (b) the UN Convention on the Rights of Persons with Disabilities.

22.1 The continuing need for the Armed Forces' exemption from domestic disability legislation was reviewed during the development of the Equality Act 2010 and it was concluded that the exemption was still required. The rationale for the exemption and the reservation to the UN Convention is based on the need to maintain the operational effectiveness of the Armed Forces. This is particularly important in the context of the Armed Forces' current operational commitments. I do not expect that this will change, but we will keep the continuing need for a reservation under periodic review.

22.2 However, not all forms of disability are incompatible with service in the Armed Forces. The Armed Forces demonstrate a willingness to follow the spirit of disability legislation by recruiting people who have some degree of impairment where this does not

compromise operational effectiveness. Such impairments include myopia, facial disfigurement, ligament repairs and mild dyslexia.

23. Please also provide figures for the retention of officers and men who become disabled while in service during the past 3 years (2008–10), including as a percentage of the total number of persons who became disabled during that period while in service, including service in the reserve forces.

23.1 It is not possible to identify those Service personnel who have been disabled whilst in Service, because disability for the purposes of domestic legislation is very wide. However, it is possible to identify those Service personnel who have:

a) been seriously injured or become ill on operations; and

b) have been subsequently categorised by medical staff as being Medically Non Deployable (MND) or Medically Limited Deployable (MLD).

23.2 Between 1 January 2008 and 31 December 2010, there were 407 UK Service personnel listed as seriously injured or ill whilst deployed on operations in Iraq or Afghanistan.

23.3 Of the 407 personnel, 387 were still in service as at 1 January 2011. Of these:

43 (11%) were categorised as permanently MND;
229 (59%) were categorised as temporarily MND;
2 (<1%) were categorised as MND (not defined as temporary or permanent);
13 (3%) were categorised as permanently MLD;
23 (6%) were categorised as temporarily MLD;
41 (11%) were categorised as medically fully deployable; and
36 (9%) are yet to have a medical board.

23.4 There were accordingly 20 UK Service personnel seriously injured or ill whilst deployed on operations in Iraq or Afghanistan between 2008 and 2010 who were no longer serving in the Armed Forces as at 1 January 2011. Of these, four were medically discharged.

23.5 The figures provided include regular and reserve personnel.

24. Please provide further information on Armed Forces' policies on the treatment of persons who become disabled while on service, including service in the reserve forces.

24. There is a clear moral obligation for the Services to look after personnel who have been injured in the course of their duties and recovery and rehabilitation can often best be facilitated within a military environment, particularly as the individuals concerned often have very relevant experience which can be applied to the benefit of all serving. However, it remains the Armed Forces' overarching policy that they will discharge all those medically unfit for military service.

24.2 In the case of members of the regular Armed Forces, a number of personnel are retained who, having been trained and having gained experience, fall below Service medical standards but who are able to fulfil a limited range of military duties. They are generally not referred to as disabled, but as "Medically Downgraded". It is not possible to

retain everyone who becomes disabled. Cases are considered on an individual basis, taking account of manpower requirements.

24.3 Wounded, injured and sick Service personnel are provided with comprehensive support to maximise the chances of a full recovery. All Armed Forces' personnel are supported by dedicated and comprehensive medical services, including mental health support. The Ministry has made changes to both the policy and provision of medical and welfare support for injured Service personnel due to operational circumstances and their changing needs.

24.4 The Armed Forces Compensation Scheme (AFCS) provides compensation for injuries, illness and death arising from service since April 2005. (War pensions are paid to veterans with injuries caused by their service to that date). The AFCS covers all serving and ex-Service personnel and provides an immediately-available tax-free lump sum for pain and suffering, the size of which reflects the severity of the injury or illness sustained. There are 15 tariff levels with associated lump sum awards which currently range from £1,155 to £575,000.

24.5 The AFCS also provides an income stream known as the Guaranteed Income Payment, which is a tax-free, index-linked monthly payment from discharge until death. This is in addition to the lump sum and is an enhancement to an individual's ill-health pension, paid to recognise the injury or illness sustained as a result of service.

24.6 In the case of mobilised reserves, the Services would not seek to retain a reservist who was very seriously injured and unable to meet the required medical fitness standard. Reservists seriously injured while serving are eligible for the full range of Defence Medical Services healthcare on the same basis as regulars and are covered by the AFCS.

I hope the Committee members find this information helpful.

28 February 2011

List of Reports from the Committee during the current Parliament

Session 2010-11

First Report	Work of the Committee in 2009–10	HL Paper 32/HC 459
Second Report	Legislative Scrutiny: Identity Documents Bill	HL Paper 36/HC 515
Third Report	Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)	HL Paper 41/HC 535
Fourth Report	Terrorist Asset-Freezing etc Bill (Second Report); and other Bills	HL Paper 53/HC 598
Fifth Report	Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010	HL Paper 54/HC 599
Sixth Report	Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill	HL Paper 64/HC 640
Seventh Report	Legislative Scrutiny: Public Bodies Bill; other Bills	HL Paper 86/HC 725
Eighth Report	Renewal of Control Orders Legislation	HL Paper 106/HC 838
Ninth Report	Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report	HL Paper 111/HC 859
Tenth Report	Facilitating Peaceful Protest	HL Paper 123/HC 684
Eleventh Report	Legislative Scrutiny: Police Reform and Social Responsibility Bill	HL Paper 138/HC 1020
Twelfth Report	Legislative Scrutiny: Armed Forces Bill	HL Paper 145/HC 1037

List of Reports from the Committee during the last Session of Parliament

Session 2009-10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008–09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-	HL Paper 45/ HC 328

	second Report of Session 2008–09	
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Government Response to the Committee's First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's Role in Relation to Human Rights Judgments	HL Paper 85/HC 455
Sixteenth Report	Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In	HL Paper 86/HC 111