MEMORANDUM TO THE JOINT COMMITTEE ON HUMAN RIGHTS

THE ARMED FORCES BILL 2015

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, which would otherwise expire at the end of 2016.

Renewal of the Armed Forces Act 2006 (clause 1)

2. Since the Bill of Rights 1688, the legislation making the provision necessary for the army to exist as a disciplined force (and, more recently, the legislation for the Royal Navy and the Royal Air Force) has been subject to regular renewal by Act of Parliament. Since the 1950s, renewal has been by five-yearly Armed Forces Act, each Act renewing the legislation for one year and permitting further annual renewal thereafter by Order in Council. Accordingly, clause 1 of the Bill provides for the continuation, for a further period up to the end of 2021, of the Armed Forces Act 2006 ("the 2006 Act"), which would otherwise expire at the end of 2016. A further Act will then be required.

3. The 2006 Act governs all the armed forces of the United Kingdom. The Act introduced a single system of service law that applies to all service personnel wherever in the world they are operating. The Act provides nearly all the provisions for the existence of a system for the armed forces of command, discipline and justice. It covers matters such as offences, the powers of the service police, and the jurisdiction and powers of commanding officers and of the service courts, in particular the Court Martial. It also contains a large number of other important provisions as to the armed forces, such as provision for enlistment, pay and redress of complaints.

4. The preparation of the 2006 Act 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 2006 Act.

The 2006 Act as enacted

5. 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 as enacted concerned the armed forces' courts (in particular, courts-martial), the commanding officer's summary jurisdiction and powers of punishment, and the investigation of alleged offences. Those changes were summarised in the memorandum of 12 January 2011 to the Joint Committee on Human Rights on the most recent five-yearly Armed Forces Bill (now the Armed Forces Act 2011) prior to this Bill.

ECHR issues arising since the 2006 Act

6. The Armed Forces Act 2011 was much smaller in scale than the 2006 Act. Most of the provisions of the 2011 Act amended the 2006 Act but, in common with previous five-yearly Acts, it also contained some provisions that fell outside the traditional area of service discipline. The memorandum of 12 January 2011 to the Joint Committee on Human Rights summarised ECHR issues that arose between commencement of the 2006 Act and introduction of the Bill that was to become the 2011 Act. Those issues included:

- the compatibility with Article 6 of the determination of criminal charges against civilians in military courts (raised in the case of *Martin v UK*[1]);
- the independence, for the purposes of Article 3, of the service police (raised in the case of *R (on the application of Ali Zaki Mousa and others) v Secretary of State for Defence*[2], a legal challenge relating to allegations of wrongful actions by UK service personnel against Iraqi nationals during the conflict in Iraq);
- the system for redress of complaints for members of the armed forces; and
- the compatibility with Article 5 of findings of Guilty and Not Guilty in the Court Martial by simple majority verdict.

[1] Judgment 24 Oct 2006: no. 40426/98.
[2] (2010) EWHC 3304 (Admin): case no. CO/1684/2010.

Detail of the latter three issues is given in this memorandum principally to provide a context for the consideration in paragraphs 15 to 18 below of more recent ECHR developments.

7. Service police independence. Before the 2011 Act, the Secretary of State for Defence faced a series of legal challenges relating to allegations of wrongful actions by UK service personnel against Iraqi nationals during the conflict in Iraq. The High Court considered in detail the exercise of investigatory powers and the decision-making process under the 2006 Act and accepted that investigation under the 2006 Act would be sufficiently independent and effective to meet the requirements of Article 3. Notwithstanding this, the 2011 Act made changes to the 2006 Act which were intended to highlight and buttress the structural independence of the service police and to support best practice in the conduct of investigations:

(a) section 3 added a new section 115A to the 2006 Act, which provides 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) section 4 added a new section 321A to the 2006 Act, which 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;

(c) section 5 added a new section 365A to the 2006 Act, which provides for the appointment of Provost Marshals to be by Her Majesty and that (in line with what was already the policy) only an officer of a service police force may be appointed by her to be a Provost Marshal.

8. Redress of complaints. 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 for other grievances. This is provided for in the 2006 Act.

9. ECHR case law establishes that the process for the redress of certain types of service complaints engages Article 6[3]. This is so in respect of those complaints where:

(a) a civil right is in issue;

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

(c) the dispute is not one for which there are compelling reasons for the decision to be made by the chain of command[4].

10. A civil right is likely to be in issue in disputes relating to pay[5], pensions and allowances entitlements. A civil right may also be in issue in disputes concerning allegations of discrimination prohibited under equality legislation.

11. Following the judgment in *Crompton v UK*, Leading Counsel advised that in cases where:

(a) Article 6 applies;

(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 is bound by that finding. As a consequence, appropriate amendment was made, in section 20 of the Armed Forces Act 2011, to sections 335 and 336 of the 2006 Act. The amendments empowered the Defence Council to appoint panels composed of, or including, independent members.

12. 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).

[3] *Pellegrin v France* (Application no. 2854/95, judgment 8 December 1999), *Eskelinen v Finland* (Application no. 63235/00, judgment 19 April 2007) and *Crompton v UK* (Application no. 42509/05, judgment 27 October 2009).
[4] *Crompton* supra.
[5] In *Pellegrin*, the ECtHR made it clear that there was a presumption that Article 6 applied to ordinary employment disputes such as ones relating to pay.

13. 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, the Judge Advocate General 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". In 2010, the Judge Advocate General referred, under section 34 of the 1968 Act, the question to the Court Martial Appeal Court 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.

14. 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[6], 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.

ECHR issues arising since the 2011 Act

15. Service police independence. The ECHR compliance (in particular as regards Articles 2 and 3) of the provisions of Part 5 of the 2006 Act (governing investigation of alleged offences, charging and prosecution) has been the subject of a number of judgments. Most recently, the structural and practical independence of the service police was again examined (in relation to the investigation of offences in Iraq) in *R (on the application of Ali Zaki Mousa and others) v Secretary of State for Defence (No.2)*[7], particularly in the High Court's judgment of 24 May 2013, and in relation to arrangements in Afghanistan in the High Court's judgment of 6 November 2013 in *R (on the application of AB) v Secretary of State for Defence*[8]. The courts held the provisions in Part 5 of the 2006 Act governing the

[6] Reference of the Judge Advocate General; appeal against conviction by Timothy Twaite (2010) EWCA Crim. 2973; case nos 2010/05633/D5; 2010/05849/D5.
[7] [2013] EWHC 1412 (Admin): case no. CO/5503/2012.
[8] [2013] All ER (D) 96 Nov.

investigation, charging and prosecution of criminal and disciplinary offences under that Act to be compliant in principle with the ECHR (but see paragraph 27 of this memorandum).

16. Findings of Guilty and Not Guilty in the Court Martial by simple majority verdict. The issue of the compatibility with Article 6 of findings of Guilty and Not Guilty in the Court Martial by simple majority verdict was raised again in the case of *R v Alexander Wayne Blackman and Secretary of State for Defence*[9]. The appellant was a member of the armed forces who was appealing against a conviction of murder arising out of an incident on active service in Afghanistan during which he shot a captured, wounded insurgent. He contended that a simple majority conviction is inherently unsafe. He also argued that it was discriminatory to be tried by Court Martial rather than by jury in the Crown Court, on the basis that the Court Martial offers less protection to the accused than jury trial. He argued that the court should declare section 160(1) of the 2006 Act incompatible with the Convention rights under section 4 of the Human Rights Act 1998.

17. The Ministry of Defence was given leave to intervene on this issue and argued that the court was bound by *R v Twaite*[10], and moreover the decision of the Strasbourg Court in *Engel and Others v The Netherlands*[11] demonstrated that section 160(1) was entirely compatible with the appellant's human rights. The Court Martial Appeal Court agreed. The Lord Chief Justice stated, "it is well-recognised that, under the changes that have been made to the Court Martial system in the United Kingdom, that system now ensures a trial that is fair and compatible with Article 6". He added, "the Strasbourg Court reviewed the system of military discipline in *Engel* [and] it concluded at paragraph 92, with regard to Article 14, that the distinctions between the courts and Courts Martial were justified by the differences between the conditions of military and civil life. They could not be taken as amounting to discrimination against members of the armed forces. The great advantage of reaching a decision by majority is that it avoids "a hung jury"". The court also referred to the judgment in *Taxquet v Belgium*[12], in which the Strasbourg Court recognised the diversity of the different systems of jury trial. Concluding that there was no discrimination, the Lord Chief Justice stated, "It cannot be said that there is anything objectionable about a system that decides guilt or innocence by simple majority".

[9] [2014] EWCA Crim. 1029.
[10] [2010] EWCA Crim. 2973.
[11] Application No. 5100/71, decision 8 June 1976.
[12] Application No. 926/05.

18. Redress of complaints: The Armed Forces (Service Complaints and Financial Assistance) Act 2015 amended the 2006 Act to buttress the system for redress of individual grievances of members of the armed forces. The broad effect of the amendments made to that system by the 2011 Act to enable the use of an independent person to decide complaints was extended. The 2015 Act:

- repeals provision in the 2006 Act for the office of the Service Complaints Commissioner and provides for the creation of the office of Service Complaints Ombudsman (with powers and functions greater than those of the Commissioner);
- sets out the framework for the redress of service complaints, including who can make a complaint and how complaints will be investigated (both internally by the armed forces and, if necessary, by the Ombudsman. The Secretary of State may specify by regulations when disputes must be determined by an independent tribunal);
- introduces a reformed and streamlined appeals process;
- gives the Ombudsman powers in relation to the complaints system including the ability to review the decision on a complaint and to recommend action to the Defence Council to put matters right.

It is intended to bring the new provisions into force early in 2016. While the reason for making them was not to meet ECHR requirements, it is considered that they will provide further support to the ECHR compatibility of the redress system.

Other provisions of the Bill raising ECHR issues

(a) Commanding officer's power to require preliminary alcohol and drugs tests (clause 2)

19. Currently, a commanding officer may only require a member of the armed forces or a civilian subject to service discipline to co-operate with a preliminary test for drugs or alcohol on suspicion of an offence. It is an offence to fail, without reasonable excuse, to comply with a requirement to co-operate with such a test. The changes made by clause 2 extend the circumstances in which commanding officers may require co-operation with preliminary tests. They provide for post-accident preliminary testing of a person for alcohol and drugs without the need for suspicion that the person may have committed an offence.

20. The new powers provide for the testing, after an accident involving an aircraft or a ship of:

(a) a person who was carrying out an "aviation function" in relation to the aircraft or a "marine function" in relation to the ship at the time of the accident; or

(b) a person who carried out such a function before the accident occurred, where the carrying out of the function by that person may have caused or contributed to the occurrence of the accident or its consequences.

21. These powers are similar to those in the Railways and Transport Safety Act 2003 which provide for the testing of civilians after civilian aircraft or maritime accidents.

22. The new powers also provide for the testing, after other (serious) accidents, of a person who carried out a "safety-critical function" before or at the time of the accident, where the carrying out of that function by that person may have caused or contributed to the occurrence of the accident or its consequences.

23. The clause would make it an offence to fail, without reasonable excuse, to comply with a requirement to co-operate with a post-accident test. The results of such a test could lead to an investigation into whether the person tested has committed an offence.

24. Article 6 ECHR, which is linked to privilege against self-incrimination, may be engaged by the provisions requiring a person to co-operate with preliminary tests. However, there is case-law authority that the protection against self-incrimination does not extend to physical or objective specimens. The Supreme Court of Canada in *Curr v The Queen*[13] held that the protection against self-incrimination (enshrined in the Canadian Bill of Rights) only extended to "self-incriminating statements" and did not embrace "incriminating conditions of the body" such as alcoholic content of the breath or blood. In *PG and JH v United Kingdom*[14] it was stated: "in so far as the applicants complained of the underhand way in which voice samples for comparison were obtained and that this infringed their privilege against self-incrimination, the Court considers that the voice samples, which did not include any incriminating statements, may be used as akin to blood, hair or other physical or objective specimens used in forensic analysis and to which privilege against self-incrimination does not apply."

[13] (1972) S.C.R. 889.
[14] (2008) 46 EHRR 51.

25. On this basis, we do not consider that Article 6 is engaged. In any event, in *O'Halloran and Francis v United Kingdom*[15] the Court did not accept that the right not to incriminate oneself (by incriminating statement) was an absolute right. It noted that a person who chose to keep and drive a car could be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, including informing the authorities of the identity of the driver. This rationale would seem applicable to the regulation of other potentially dangerous activities.

26. Testing under the powers conferred by clause 2 of the Bill has the following legitimate aims:

(a) to assist the thorough investigation of aviation, maritime, and other serious accidents with a view to contributory factors being identified and appropriate disciplinary or administrative action being taken, and

(b) to protect public safety and to prevent crime, including by promoting an alcohol and drug-free working environment.

Any interference with Article 6 rights would be proportionate and in accordance with law, being limited to testing in limited circumstances (after certain kinds of accidents) of a limited class of persons (those who carried out the functions referred to above).

(b) Investigation and charging (clauses 3, 4 and 5)

27. In a series of judgments, the most recent being that in *R (on the application of AB) v Secretary of State for Defence*[16], the courts have held the provisions in Part 5 of the 2006 Act governing the investigation, charging and prosecution of criminal and disciplinary offences under that Act to be compliant in principle with the ECHR. Nonetheless, the process of explaining those provisions to the courts, and the complexities of those provisions (which examination by the courts drew out) were significant in leading to the conclusion that there was scope for simplifying and speeding up those processes and in so doing buttressing our assertions as to their independence and effectiveness. Clauses 3, 4 and 5 accordingly make a number of changes to Part 5 of the 2006 Act. The main changes made by those clauses are to provide that:

[15] (2008) 46 EHRR 397.
[16] [2013] All ER (D) 96 Nov.

(a) wherever the service police consider that there is sufficient evidence to charge an offence which a commanding officer cannot try summarily, the case must be sent to the Service Prosecuting Authority (SPA);

(b) cases linked to those cases must also be sent to the SPA; and

(c) the SPA can bring charges themselves as an alternative to directing the commanding officer to do so.

(c) Ministry of Defence fire-fighters (clauses 14 and 15)

28. These clauses give Ministry of Defence fire-fighters statutory powers to act in an emergency to protect life or property. These powers would, for example, allow fire-fighters to enter premises (by force, if necessary) without the consent of the owner or occupier, and to prevent a person putting their own life in danger (for example by trying to enter a burning building).

29. There are legitimate aims (the protection of life and property), the power is necessary (a lesser power would not meet the purposes for which it is needed) and any interference would be proportionate (being limited to efforts to save life or damage to property in emergency situations). The powers have been considered by Home Office officials under the Powers of Entry Gateway process and they have confirmed that they are content. The powers are identical to those of Fire and Rescue Authority fire-fighters in England and Wales (under section 44 of the Fire and Rescue Services Act 2004).

Other provisions

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

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