

Select Committee on the Armed Forces Bill

Oral evidence: Armed Forces Bill, HC 1281

Thursday 11 March 2021

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Members present: James Sunderland (Chair); Stuart Anderson; Tonia Antoniazzi; Dan Carden; Miss Sarah Dines; Leo Docherty; Martin Docherty-Hughes; Darren Henry; Mrs Sharon Hodgson; Mr Richard Holden; Mr Kevan Jones; Jack Lopresti; Johnny Mercer; Carol Monaghan; Stephen Morgan; Mrs Heather Wheeler.

Questions 104-167

Witnesses

I: His Honour Shaun Lyons CBE, and Professor Sir Jon Murphy, Professor of Advanced Policing Studies, Liverpool John Moores University.

II: His Honour Jeff Blackett, former Judge Advocate General.

III: His Honour Judge Alan Large, Judge Advocate General, and Jonathan Rees QC, Director of Service Prosecutions.



Examination of Witness

Witness: His Honour Jeff Blackett.

Chair: Good afternoon, and welcome to the second panel of this witness session for the Armed Forces Bill Select Committee. My name is James Sunderland MP, and I am delighted to welcome His Honour Jeff Blackett as our witness. By way of introduction, His Honour is a retired senior circuit judge and former Royal Navy officer, and he was Judge Advocate General of the armed forces from 2004 to 2020. I am delighted that you joined the Royal Navy as a supply officer. Your Honour, you are very welcome. We are going to come now to the questions. We have a prescribed list from Members. I am going to come first of all to Stuart Anderson.

Q133 **Stuart Anderson:** Thank you, Chair. Hello, Judge. It is nice to speak to you on another Committee again. For the opening question: many of the clauses in the Bill stem from the Service Justice System Review. Can you expand for the Committee what your involvement was in that review?

Jeff Blackett: I helped Judge Lyons, as many other people did. He consulted me. I put forward a number of suggestions. We discussed those suggestions. We agreed on most of what he has got in his report, which I think is an excellent report. We disagree on one or two major issues. I did not help write it, but I was certainly involved in discussing it with Judge Lyons.

Q134 **Stuart Anderson:** You say you agreed with most and disagreed on a few points, but do you think overall it gave a fair representation of the service justice system?

Jeff Blackett: Yes, I do. Overall it did. I think there are a number of matters which have moved on and that is why I disagree with Judge Lyons. No doubt we will get into those in a second. Overall I think it was an excellent report, and it identified the issues that needed to be resolved.

Stuart Anderson: I believe my colleague Tonia wants to come in on that point.

Q135 **Tonia Antoniazzi:** I do not know if it is exactly that point, but thank you. Judge, do you think there is merit in the argument that serious service complaints which involve bullying, harassment and discrimination should be taken outside of the chain of command and should be handled by a central defence authority for cultures and behaviours, which was recommended in the Wigston review?

Jeff Blackett: I wouldn't say I am an expert in that. You are just asking me for a personal view. I have been involved in the court martial system, not the complaints system, so any evidence I gave you in that regard I don't think would be particularly valuable. It would simply be my personal view.

Q136 **Tonia Antoniazzi:** Okay. I will just follow on with another one then. Do you think that bereaved families of forces personnel should have the right to make a service complaint—for example, for issues which may arise



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following a death and allegations such as bullying?

Jeff Blackett: Again, I don't want to be evasive but that is not really my area of expertise. I was in the Navy for 31 years. I have handled, as a naval lawyer, lots of complaints; but that was a long time ago, so I don't think it would be valuable for me to give my opinions on that particular issue.

Tonia Antoniazzi: Okay. Thank you very much, Judge.

Q137 **Mrs Hodgson:** Good afternoon, Judge, and thank you for joining us this afternoon. To what extent were you consulted on the service justice elements of this legislation prior to the end of your tenure as Judge Advocate General?

Jeff Blackett: Consulted by whom? By the services or by Judge Lyons?

Mrs Hodgson: Both.

Jeff Blackett: I think I have already answered on the way in which Judge Lyons and I interacted. Once the services got the Lyons report obviously they started to work on certain issues which they were going to bring in. We have heard a lot about the constitution of court martial boards, the qualified majority—all those sorts of things. On each occasion the Ministry of Defence would ask the Office of the Judge Advocate General our view of the recommendation and whether we supported it, and any comments on it. So we were properly engaged in that exercise.

Q138 **Mrs Hodgson:** Excellent. That's great. Bearing in mind what is on the face of the Bill—and I am sure you have had a good look at that—are there any additional measures to improve service justice that you would have liked to see on the face of the Bill?

Jeff Blackett: There were. I wanted to see the ability to transfer cases between jurisdictions. I think Ms Wheeler hinted at that earlier, when she asked a question of Judge Lyons. I will come to murder, manslaughter and rape later, I am sure, because I believe that the system is the right place to deal with them—I do not agree with Judge Lyons on that particular recommendation—but the way in which I felt that the service justice system should handle this is that cases should be transferred between jurisdictions, so it does not depend on which police force turns up first having the jurisdiction.

In my view, there is no reason—or should be no reason—why the civilian police cannot investigate and put a case into the court martial, and vice versa, and there is no reason when a case gets to court, in front of a judge, for the judge not to say, "This shouldn't be here. It should be in the other jurisdiction." Therefore, there should be the ability to transfer. Also, where a serviceperson is in a civilian court and has pleaded guilty, the civilian judge should be able to transfer that back to the service court for the service court to sentence in certain circumstances—to support the operational effectiveness of the service. I am sad that was not in.



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There were some other technical matters. The Judge Advocate General issues a sentencing guide and practice memoranda. I would have liked to see them get legislative authority. The governance arrangements around the court martial system—the Service Justice Board and the Service Justice Executive Group—should have legislative force. Since then, some of the recommendations that I made in relation to the overseas operations Bill—which is judicial oversight of certain investigations—could have gone into this Bill. Finally, summary-only matters and matters that are de minimis should have time limits, as they do in civilian life. Those last ones are technical matters.

Q139 Mrs Hodgson: That is extremely helpful. I am jotting stuff down, I am sure that my assistant will have been doing the same and, obviously, it will all be reported by *Hansard*, so we will have this on the record. With regard to the ability to transfer and your wish that it had been included, do you have any thoughts on why it was not or on what barriers might be in the way of it being included, or do you think it is possible for it to be included in the Bill?

Jeff Blackett: It was one thing that Judge Lyons was asked to look at in his review. His recommendation was that there should be no change and no transfer. I think the services themselves were worried that it was a bit of a land grab, trying to get everything back into the court martial, but in my view it was not designed to make everything come back into one jurisdiction; it was having the ability to transfer, so that the right court dealt with the right offence.

Mrs Hodgson: Excellent. Thank you so much.

Chair: Before I bring in Sarah Dines, Kevan Jones has his hand up.

Q140 Mr Jones: Hi Jeff, nice to see you again. For the sake of the Committee—I think I know this inside out—will you explain the issues with the overseas operations Bill and investigations that the Government did not agree to put in that Bill, even though the Minister indicated that they might be in this Bill, though they are not? Will you explain the three points that you recommended for the overseas operations Bill that could be included to improve investigations?

Jeff Blackett: Yes, of course. I better refer to my notes, otherwise I might make something up on the hoof, so to speak.

First, any matter that is summary only, as in the civilian courts, if not investigated within six months, or if the defendant is not charged within six months of the offence being committed or discovered, should go nowhere.

Secondly, in more serious offences, the matter should be brought to the court within six months, so that the court may case manage it. The judge who deals with it should be able either to stop the case there, or to set a timetable out, in effect.



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The third matter is related to raising the bar for reinvestigation and investigation, as you remember. I am happy to send my notes, which explain that rather better than I have just done so, to the Committee if that would be helpful.

Q141 **Mr Jones:** I think that would be helpful, Jeff. The purpose of those recommendations was to not only speed up investigations but ensure that there was some type of case management in the system. Is that correct?

Jeff Blackett: That is correct. It was to give judicial oversight, so that somebody could stop a case if it was vexatious or going nowhere, or set a timetable for a case to speed it up, definitely.

Q142 **Miss Dines:** Thank you, Judge Blackett, for giving evidence today. A general question first: can you tell me what you think is the best part—the most fundamental good news story—of the reforms, please?

Jeff Blackett: The biggest criticism of the service justice system at the moment is the standard of investigations. As Professor Murphy said, I think that we have some really good people, but they simply do not get enough experience. It is shocking that somebody does a course and does not have a single case, whereas civilian policemen probably have 100 cases, etc.

Anything that brings the elements of the service justice system together with the civilian system is good, so the establishment of a defence serious crime unit—of course, it is not on the face of the Bill, but it is work that is going on—is probably one of the biggest recommendations that came out that will improve the system.

I, for a long time, have worried about a simple majority, particularly in serious cases. I have been lobbying for a long time that we should have a qualified majority. I think that the Lyons recommendations of a board of six with a qualified majority is going to be very helpful. Those are probably the main things.

Q143 **Miss Dines:** You have answered my second question, which was really about the constitution of the boards. You agree that the way we are going now with the proposals is a good step forward and allays the professional concerns that you had before. So it is a good step in the right direction.

Jeff Blackett: Definitely a good step in the right direction.

Q144 **Jack Lopresti:** Thank you, Judge Blackett. Do you think that extending eligibility for court martial boards to other rank 7 is the right approach?

Jeff Blackett: I listened to what Judge Lyons said, and I do not disagree with anything that he said. The issue is the level of confidence, of course. You have to remember that, in a military context, despite what other questioners might have said, my view is that there is a significant level of confidence in the chain of command by the juniors.



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The evidence I have to support that is that I suppose there are around 200 summary appeal court applications a year, and most of those come not from individuals appealing their commanding officer's punishment but from the reviewing authority saying that the commanding officer has exceeded his powers of punishment and therefore the punishment should be rectified.

For example, the power of punishment might have been a maximum fine of £500, and the commanding officer has fined the individual £550, so the reviewing authority puts it back to the summary appeal court to reduce the fine. You can only do that if the individual agrees that it should go to the court, and there have been numerous occasions where the servicemen say, "It's over and done with. I accept what my commanding officer did. I don't want to challenge the system. Leave it as it is. I'm happy to pay the £550." That happened quite a lot.

The second point that I think is very valid is that the court martial is sometimes a hybrid between a criminal court and an employment court, in that some of the sanctions are employment measures—reduction in rank, dismissal and those sorts of things. One would not expect members of the shop floor, so to speak, to be taking part in those sorts of decisions.

Finally, whoever is on the board has to be senior to the defendant because you cannot have junior people sentencing senior people in a discipline-structured environment. Is OR-7 the right level? As Judge Lyons said, it is the art of the possible. It may be that, in due course, you can go a bit lower, but let's take it one step at a time. This is a tri-service Act, and where one of the services feels uncomfortable, it is very difficult to get agreement, so this is a good start.

Q145 **Jack Lopresti:** What would you say to somebody who says, "Why can't it be all ranks?" when anybody over the age of 18 who is registered to vote can sit on a civilian jury?

Jeff Blackett: Because a court martial board is not a civilian board. Yes, it is guilt or innocence; that's the first part of the trial. The second part of the trial, if they are found or plead guilty, is sentence. One of the criticisms from the European Court of Human Rights of the court martial system was around the lay members not having sufficient training. For a jury, anybody over 18 who is qualified can just turn up. That's not the case to make a board compliant with article 6 of the European convention on human rights, because there needs to be some sort of training in terms of sentencing.

Q146 **Jack Lopresti:** I understand what you are saying, so are you saying that other ranks, below the level of 7, are not able to exercise some judgment in a court martial setting?

Jeff Blackett: No, I am not saying that at all.

Jack Lopresti: You said something that sounded slightly disparaging about people from the shop floor.



Jeff Blackett: It wasn't meant to be disparaging.

Jack Lopresti: With respect, it sounded like it.

Jeff Blackett: I am terribly sorry. It wasn't meant to be. I have the utmost respect for all ranks and members of the armed forces. When you see the level of responsibility that corporals have on patrols in hostile environments, it is amazing what they do on behalf of this country. It wasn't disparaging at all. I was simply saying that if a decision is made on whether somebody is employed or not in Marks & Spencer, members of the shop floor would not be involved in that decision. That is what I was saying.

Jack Lopresti: But there are potentially instances where serious crimes would be equivalently tried in the civilian court. Well, I will leave it there. Thank you.

Q147 **Stephen Morgan:** Good afternoon Judge Blackett, it is good to see you again. It is always good to have a former student of Portsmouth Grammar School providing evidence to the Committee. The service justice system review made a recommendation about investigations of serious offences being led by civilian police officers. Do you support this?

Jeff Blackett: No, and let me tell you why—it is rather a long answer. In 2006—Kevan Jones will remember this—the Committee said, "Why do we need a service justice system at all?" I gave evidence to that Committee. They adopted it, and it is in their report. I will go slowly through the reasons that you need a service justice system, because I think it is important, and any change should be tested against those criteria.

There are four criteria. First, to support the operational effectiveness of the armed forces and morale. What does that actually mean? It means doing things quickly and having control of all the people within your organisation. For instance, if a nuclear submarine is about to go on patrol and all the witnesses to a crime are members of that ship's company, then there needs to be some control on how that is dealt with. It is better done with the court martial. It has got to be flexible, so it can sit anywhere in the world, not just anywhere in the country, so that supports operational effectiveness.

Secondly, assisting the maintenance of discipline. Discipline is obviously central to command. Without the ability to exercise punitive powers over subordinates, the fabric of discipline would be weakened.

Thirdly, it reflects the special and unique nature of the armed forces, by setting criminal and service disciplinary offences into context. We have to remember that the armed forces are unique in contemporary society. They are lawfully required to use lethal force to support Government policy and to place themselves in situations where their own lives may be expended in support of that policy, unlike the police, who are not using force in the furtherance of Government policy. They are using force in self-defence or for lawful arrest.



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So some criminal offences, such as petty theft in barracks or minor drug offences, are much more serious than similar offences in civilian life. On the other hand, if an offence is committed by somebody who has just returned from hazardous operations, he deserves understanding and consideration from those who understand the pressures of those operations—I could give examples.

The fourth criterion is obviously to extend the law of England and Wales to personnel serving overseas outside the jurisdiction. Those are the reasons why we should have a separate system of justice.

Then you measure MMR—if I can use the shorthand—against that. First of all, the court is lawful, as Judge Lyons said. It is article 6-compliant; it is perfectly capable of dealing with all these offences. The weakness in the systems that we talked about before is the level of investigations, and the recommendations of the Serious Crime Unit and working with the civilian police should fix that.

Secondly, in my view, it is nonsense to have a system where serious offences overseas can be dealt with by the court martial, but not those committed in the UK, unless they are exceptional.

Thirdly, there are alternative service offences when elements of the civilian offence cannot be proved, or as alternatives. Let me turn particularly to sexual offences, because I know there has been a lot of debate about that. Professor Murphy made a very good point: he said that you should put the trial where the victim will receive the best justice. Everyone automatically assumes that is in the civilian system, but I beg to differ, and you only have to look at the statistics in relation to rape. In 2019 in England and Wales, 63,666 complaints of rape were made to the civilian police. Of those, the police referred only 5,114—only 8%—to the CPS, and of those, the CPS only prosecuted 1,758; that is, 2.8% of the total number of complaints.

The civilian system, in my view, is not the answer. The chief inspector of the CPS said in his foreword to his report in 2019, "If 58,657 allegations of rape were made in the year ending March 2019 but only 1,925 successful prosecutions for the offence followed, something must be wrong." In the services, of course, there are much fewer cases, but the referral rate from the police to the SPA is much higher than from the civilian police to the CPS: 82% in 2017, 73% in 2018 and 57% in 2019. In 2019, there were 178 investigations into sexual assault, including 36 rapes. The prosecution rate was much higher, even though the conviction rate was lower.

My fear is that if all those cases were put into the civilian system, they would get lost. Fewer of them would actually get to court, because the statistics show that. I think the real problem is the law—it is not the jurisdiction; it is the law around rape. I think most of the rape trials that come into the service justice system, and indeed most of the rape trials I dealt with when I sat as a civilian judge, are about consent or capacity to consent. That seems to be the issue in so many cases, where two people have sexual intercourse, they both had too much to drink, and the next



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morning the issue comes up about whether it is consent or not. If the judge says to the jury or to the board, "You must be satisfied. You must be sure. You must be beyond reasonable doubt that there was no consent," and the young man is a man of good character, and all of the recollection is fuzzy because of drink, it is not surprising that there are so many acquittals in both systems. It is not surprising that they are turned off, so it is the law around that that is the difficulty, not the jurisdiction.

It is a long answer, but my view is that we have moved on from 2006. The court martial system is in a significantly better shape, and I think it would be wrong now to go back to the old system, simply because that is how it used to be before the 2006 Act.

Q148 Stephen Morgan: Thank you for that reply. Do you think the clause on the prosecutors' protocol goes far enough to address the ongoing concerns about the outcomes for cases of rape and other serious offences?

Jeff Blackett: Yes, and I think that's exactly the right way of dealing with this. The legal framework is right and we must let professionals sort it out between them so that the case can be put into the right court.

Chair: Thank you. Does anyone have any further questions for the judge?

Carol Monaghan: Chair, can I come in on the back of Stephen's question?

Chair: Of course. We have about four minutes left. I will bring in Carol Monaghan first of all, and then Sharon. Could you give brief answers, please?

Q149 Carol Monaghan: Judge, you gave us a lot of numbers for prosecutions and successful prosecutions, as opposed to numbers for complaints of rape. Do you have similar numbers for military prosecutions?

Jeff Blackett: Yes, I do—

Carol Monaghan: I just think it would be helpful to get an insight into your thoughts about this and where you are coming from.

Jeff Blackett: There were 178 investigations into allegations of sexual assault, including rape, in the service justice system in 2019. That led to 59 defendants being charged in the court martial—with a total of 98 charges—of whom 17 were guilty of 31 charges. Judge Large, who is the current Judge Advocate General, may not have those statistics at his fingertips, but I am sure he can get them to the Committee in due course, if necessary.

Q150 Carol Monaghan: Those numbers are not too impressive either, in terms of convictions, although they are slightly higher percentage-wise. It is also a much smaller set, so there is greater uncertainty. Given those numbers, do you have confidence that that is a more appropriate system for trial?



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Jeff Blackett: The figures in both systems are appalling, aren't they? That is because of the law, not because of the systems, if I can put it that way. This is not for this Committee, but Parliament and Government really need to look at the law around rape in particular, and it needs to be redefined to assist, I think.

Carol Monaghan: Thank you, Judge Blackett.

Q151 **Mrs Hodgson:** Judge, it is interesting to hear you say that the problem of the small number of convictions resulting from rape allegations is caused by the law rather than the jurisdiction. With that in mind, what is your opinion on the number that are even reported? Sarah Atherton MP, who is a member of the Defence Sub-Committee looking into women and the military justice system, told me that there is no hard evidence because it isn't possible to know something that hasn't been reported. She says that, from what she has read and the evidence she is taking, there could be about six out of 10 that aren't even reported in the first place. She feels that it goes up through the line of command and that, therefore, that creates a problem for even reporting these incidents. She has suggested to us that there should be an independent element to reporting the incident in the first place and that that may lead to more being reported. I take what you say about it being the law rather than the jurisdiction, but what is your opinion about these incidents even being reported?

Jeff Blackett: It's really difficult, isn't it? It's a societal difficulty. It was International Women's Day this week. I listened to a lot of people, and every woman on television seemed to have a shocking story about something that seemed to go nowhere. This is way off my brief, of course, but there's a lot of non-reporting in civilian life as well. I suppose that when there's a chain of command, it is an added issue. I have heard it said that some women won't complain because they've got their careers to think about—all the things that you have heard as well. It is difficult—I have no answer—it is very difficult, and it needs to be addressed.

Being able to phone a helpline helps, sometimes, but even helplines, when they are set up, don't seem to get too much traffic—perhaps because there is no confidence in those either. That is an awful answer—I am sorry—I understand the point that you're making and empathise entirely with it; I haven't got an answer.

Mrs Hodgson: I can imagine that there is a reluctance if the person you have to take your complaint to also has your career in their hands; there might be a conflict of interest there, and especially hesitancy on behalf of the woman or man wanting to bring that complaint.

I don't think that we will ever see the number of convictions anywhere near where we would like them if we don't even get the complaints coming forward in the right numbers. However, I appreciate your thoughts on that. Thank you, Judge.

Chair: Thank you, Sharon. We have come to the end of the session; it has



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now just gone 4 o'clock, so I will wrap it up there. May I thank His Honour, Jeff Blackett, for being an expert witness this afternoon—a very enlightening session. Your Honour, thank you so much indeed.

Jeff Blackett: Thank you very much.

Chair: We are just going to break, very briefly, to get organised for the next session.