CHAPTER 2: RECOMMENDATIONS

5.100 The Inquiry's terms of reference are to "*investigate and to report...and to make recommendations*". This section of my Report deals with the latter requirement.

5.101 I acknowledge the work carried out by Sir William Gage in his Report on the death of Baha Mousa. In particular, he has already covered many of the areas in which I would have had to consider making recommendations in this Inquiry. Sir William made a total of 73 Recommendations. Initially, the Ministry of Defence ("MoD") decided to implement all but one of them (i.e. Recommendation 23, dealing with the interrogation technique known as "harshing).[5157] Of those, Recommendations 5, 7 (in part, viz. deprivation of food and drink), 11, 12, 13, 14, 15, 17, 18, 22, 23, 24, 25, 26, 27, 29, 30, 33, 36, 40, 42, 43, 44, 57, 59, 62, 66, 67 might well have formed part of the recommendations at the conclusion of the Al-Sweady Report. The others are concerned with subject matter that falls outside my terms of reference. However, I was also informed by letter dated 8th July 2014, from Dr Ben Sanders of the MoD to the Inquiry Solicitor, that the MoD continues to carry out reviews of investigations into wrongdoing, arising from military operations overseas, and to correct any wider or systemic issues that could otherwise lead to a recurrence of such incidents. The results of the reviews carried out to date have been published online at https://www.gov.uk/government/publications/review-of-systemic-issues-arising-from-military-operations-overseas. I am assured that further updates will follow, probably annually.

5.102 In my view, it would be a disproportionate exercise to re-consider that which has already been considered and implemented, or is being implemented. Moreover it is clear from the letter from Dr Sanders, mentioned in the preceding paragraph, that the MoD continues to have regard to the need to implement the Baha Mousa Inquiry recommendations.

5.103 In the event, there are three main areas in which I believe it is appropriate for me to make recommendations. The first area concerns the collection of, storage and ability to search documents and other records, in whatever form they may be. The second area concerns the Shooting Incident Policy. The third area concerns the need to have an accurate contemporaneous record of the circumstances of a prisoner's detention. I have also identified a further four areas where I have concluded that there were shortcomings in the MoD's existing practices and procedures.

1. Documents

5.104 The context is that the genesis of the Al-Sweady Inquiry was the Secretary of State's recognition in his letter to the Administrative Court, dated 3 July 2009, that the searches for documents carried out on his behalf had not been effective (see paragraph 1.5 of the Introduction to this Report). That concession led directly to the Order of the Court on 10th July 2009 that there should be an investigation into the allegations of unlawful killing and ill-treatment (see paragraph 1.6 of the Introduction to this Report).

5.105 As is clear from the Introduction (Part One) of this Report, the work of this Inquiry has been complicated and delayed to a significant degree by the difficulties it has encountered in locating and obtaining relevant documentation and electronically stored data.

[5157] By letter dated 31 March 2014, the MoD informed me that this recommendation had not been adopted "for operational reasons". However, shortly before the Baha Mousa Report was published, the MoD had in fact withdrawn the harsh technique from use and replaced it with a technique entitled "Challenging Direct". This new approach has itself been recently considered by the Court of Appeal in Hussein v SSD (supra). See paragraphs 3.373 – 3.374)

5.106 I refer also to the witness statement of Dr. Ben Sanders, dated 4 April 2014 (ASI025194-01), in which he detailed the efforts made by the Ministry of Defence ("MoD") to respond to the requests from the Inquiry for documents and other records. I refer in particular to paragraph 14 of that statement and the shortfalls there described, together with his explanation that "*IT systems returned to the UK were generally cleansed of data".* However, I am aware that in response to a freedom of information request from Rights Watch (UK) of 11 July 2013, the MoD modified that paragraph in Dr Sanders witness statement as follows:

> *"the above mentioned statement does not accurately reflect MOD policy in 2004. Material deemed worthy of preservation was printed off and incorporated into the (hardcopy) operational/corporate record, in accordance with Joint Service Publication 441: Defence Records Management Manual (JSP 441) and the Land Component Handbook. In addition, while some servers were cleansed of data and redeployed, an electronic archive capability had been put in place.*
>
> *The policy continues to evolve as the type and amount of data changes over time. Records are now recovered from theatre at regular intervals, so that they can be retrieved to support appropriate activities."*[5158]

5.107 In paragraph 19 of the statement, Dr Sanders confirmed that the majority of the MoD's hard copy records are held "*...[in] many thousands of boxes holding a variety of records which are not readily searchable*." At paragraph 24 he explained that there is no record of how the Prisoners of War material, that was eventually located, had actually arrived at its place of storage or from whence it had come. Furthermore, there is no written manifest detailing the contents of the storage boxes in question. At paragraph 26, Dr Sanders explained that the Central Health Records Library does not hold medical records for all those who were detained in Iraq, only such records as were sent to them. The consequence of the above is that, as Dr. Sanders recognised at paragraph 30 of his statement, where searches have failed to locate materials sought by the Inquiry, those "*...materials, if they ever existed, have either been misplaced or have not been preserved."*

5.108 I regard this state of affairs as deeply unsatisfactory. I make plain that I do not consider it likely that there is or has been any document or other material, which has not been made available to me, that would have altered my view of the facts in any material particular. However, it is highly regrettable that a Government Department cannot give an assurance that all relevant material has been found and disclosed. The inability to do so may understandably damage public confidence in the Inquiry process. Moreover that inability may result in the need to make another concession in the future such as that which was made by the MoD to the Administrative Court (on 3 July 2009) in the judicial review proceedings that gave rise to this Inquiry. If it had not been necessary to make that concession in the judicial review proceedings, there might well have been no need to hold the Al-Sweady Inquiry, with all its attendant costs and expenditure.

5.109 In any event, such was the concern within the Inquiry about the possibility of destruction of documentary records/information by the MoD that the Inquiry wrote to the MoD on 2 September 2011, in order to express that concern. I am glad to say that in response the MoD issued a Defence Instruction Notice through its Directorate of Judicial Engagement Policy ("DJEP"), which reminded all recipients of the requirement not to destroy any information relevant to the Inquiry's terms of reference. But that should not have been necessary. There should not be routine destruction of documents/information that may be relevant to a judicial or similar Inquiry and/or some other form of appropriate legal investigation.

[5158] MoD response of 7 August 2003 to Rights Watch (UK)

5.110 Thus, there are the following two main themes to my concern:

- the transfer from theatre of records and their collation and retention; and
- the need to ensure that the routine destruction of records, which may be relevant, does not take place.

5.111 By Written Submissions dated 15 April 2014, Rights Watch (UK) urged me to make strong recommendations concerning the need for the MoD to have in place robust policies and practices concerning data collection that are properly followed and implemented. I am broadly sympathetic to that approach as a matter of general principle. The difficulty is that over 10 years have passed since the events, with which this Inquiry is concerned, actually took place. Furthermore, in response to a request under the Freedom of Information Act by Rights Watch (UK), the MoD has provided a number of documents that reflect the policies and practices that have been or are to be adopted, including Version 3 of the Defence Records Management Manual, dated 2007 (5th attachment). In that version there is reference to the Corporate Memory Guidance leaflet entitled "*Your records are your defence.*" Also, in the Operational Record Keeping (7th attachment) document, dated October 2005, the final page summary section clearly states that "*the rigorous keeping of an operational record will provide valuable protection for commanders and soldiers against false or malicious allegations.*"

5.112 The upshot is that it appears that there have been some important developments in policy and practice with regard to record keeping since 2004 and that much of what Rights Watch (UK) seeks may already be in place.

5.113 In its Written Closing Reply Submissions, dated 30 April 2014, the MoD said this:

> *"It is understood that Rights Watch (UK) invite the Chairman to undertake an investigation into the Ministry of Defence's systems for recording and retaining information. It is respectfully submitted that such an investigation is inappropriate and would fall outside the Terms of Reference. It is entirely within the Inquiry's Terms of Reference to collate the information that is necessary to carry out the investigations necessary to determine the allegations of unlawful killing and ill-treatment. That is precisely what the Inquiry has done. The Inquiry has secured expert evidence to assess whether any material has been improperly deleted. Again, that is entirely within the Inquiry's Terms of Reference. It is, however, submitted that it is (several steps) beyond the Terms of Reference to embark on a free-standing investigation into the (huge) topic of the management of information. The Ministry of Defence does not for a moment suggest that its systems are perfect. They are not. However, it is respectfully submitted that it is not the function of this Inquiry to address that issue."*[5159]

5.114 I stress that I do not propose to carry out such an investigation. I prefer to frame my recommendation as one that "*consideration be given by the Ministry of Defence*". If the outcome of that consideration is that the twin mischiefs that I have identified in paragraph 5.110 above have already been remedied, that will be an end to the matter. However if and to the extent they have not been remedied, it is to be hoped that appropriate steps will be taken to remedy those deficiencies, as part of the outcome of that process of consideration.

5.115 By letter dated 18 August 2014 the Solicitor to the Inquiry informed Core Participants that I was considering making a recommendation in the following terms:

[5159] MoD Written Closing Reply Submissions (24) [72]

> *"Consideration should be given to the establishment of a policy by the Ministry of Defence to ensure that all documents or other material, including electronic material, are retrieved from theatre and elsewhere at the conclusion of an operation, listed and stored in secure accommodation for a period of at least 30 years and all searches of that material recorded, so that the Department is able to say what material is available and its location, and if the need arises, to confirm in litigation or to a Public Inquiry that it has complied with its obligation to disclose relevant material."*

5.116 By letter dated 5 September 2014, I received a response from the MoD, who provided me with information regarding current practices. They accepted that they had been slow to recognise that a more comprehensive approach to operational record keeping was required than had been previously envisaged. Nonetheless, they informed me of a number of key changes that had been implemented in relation to the MoD's record keeping policy.

5.117 In 2011, a requirement to repatriate and retain all records created in theatre was incorporated into "*JSP (Joint Service Publication) 441 Defence Records Management Policy and Procedures*".[5160] That requirement creates a 15 year retention policy from the date of creation for all operational information created in overseas theatres, unless there are outstanding legal proceedings in which case the information is to be retained for the duration of those proceedings.

5.118 There is a further requirement in JSP 441 in relation to Key Operational Records (a subset of operational information for use in historical operational analysis). This requirement makes provision for the Single Service and Joint Key Operational Records to be transferred to the National Archives for permanent preservation once national security and personal sensitivities no longer apply.

5.119 The MoD went on to explain that the 15 year retention policy was adopted to comply with two obligations:

a. the Civil Procedure Rules, which require that information is retained only for as long as there is a "*reasonable prospect*" of litigation being brought; and

b. the Public Records Act 1958 (as amended by the Constitutional Reform and Governance Act 2010),[5161] which reduced the period after which records should be released to the public from 30 years to 20 years. Information can only be retained beyond that point with the agreement of the Lord Chancellor, if they are required for administrative purposes or if there is a "*special reason*" to retain them.

5.120 In relation to the proposed recommendation that all documents (which include all relevant electronic records) are listed and stored in secure accommodation and that searches of that material are recorded, the MoD provided me with the information summarised in the following subparagraphs.

a. Hardcopy material is currently returned from theatre and stored by TNT but there are no procedures for this to be catalogued in any way. For electronic documents, deployed IT systems have been wide ranging and are thus complex to archive centrally. IT systems in long-lasting theatres of operations are known to reach capacity and are susceptible to

[5160] In their letter dated 5 September 2004 the MoD referred to all "*records created in theatre*" but JSP 441 itself refers to "*all operational information*." It is assumed that these terms are interchangeable. If not, this should be clarified and the ambiguity resolved

[5161] In their letter dated 5 September 2014, the MoD referred to the Public Records Act 1967 which had in fact introduced the 30 year retention policy

data loss. However, the MoD has expressed an intention and/or aspiration of seeking to ensure the preservation of electronic records in a more proactive way.

b. The logistical challenges associated with the recovery of vast quantities of electronic and hardcopy information from an operational situation means that it is impossible to store that information all in one place. Although the MoD is getting closer to achieving centralised storage of such information, through shared information management systems, the MoD made it clear that multiple archives will continue to exist for the foreseeable future.

c. At the moment, search instructions create a comprehensive record of each such search process. However, these searches are not themselves currently compiled into a searchable database. Moreover, there is no database of Digital Archive System searches (although a subsequent search for the same term will highlight the previous search).

5.121 The MoD has assured me that it has taken robust steps to prevent the further destruction of records that may be relevant to litigation. The steps taken so far have been threefold, as follows:

a. Preservation Orders were issued in relation to individual cases that had come before the courts;

b. in April 2013 DJEP sponsored "*Document and Material Retention and Preservation – Iraq and Afghanistan Operational Theatres*" which required immediate action to be taken to preserve all documents and other materials related to operations in Iraq and Afghanistan and which might be relevant to future litigation; and

c. in July 2014 the MoD's Head of Information, Strategy, Policy and Process wrote to remind each of the Commands[5162] that the above requirement remains extant in relation to Iraq and Afghanistan and to advise that a similar requirement in respect of Northern Ireland would be formalised.

5.122 By letter dated 29 September 2014 the Iraqi Core Participants responded to my proposed recommendation. In brief, they considered that there were a number of deficiencies in the MoD's current policy on document/record retention and invited me to recommend a minimum retention period of 30 years. Although I do not propose to set out their submissions in full, I refer to the following particular aspects of those submissions.

a. The amendment to the Public Records Act 1958, still allows for retention beyond the 20 year period, where there is a special reason for doing so. There are likely to be circumstances where a longer retention period is likely to be appropriate in the case of military documentation/records. When the Lord Chancellor notified Parliament of this change in a Written Ministerial Statement of 13 July 2012, he confirmed that its purpose was to "*provide greater openness and accountability, strengthening democracy through more timely public scrutiny of government policy and decision making.*"

b. Whilst the Civil Procedure Rules create an obligation to preserve information/documents for as long as there is a reasonable prospect of litigation, they do not impose any requirement that the information/documents in question should be subsequently destroyed. In the case of military documents/records, there are circumstances in which

[5162] In this context the word 'commands' refers to the various component parts of the MoD. The distribution list on the last page of that document indicates that it went to each of the three services which at various times have been referred to as the Front Line Commands, to Joint Forces Command (JFC), to Head Office and Corporate Services (HOCS), to Defence Equipment and Support (DE&S), and to the Defence Infrastructure Organisation (DIO)

the MoD may need to preserve those documents/records, even after the period in which a reasonable prospect of litigation has expired

c. The enhanced retention procedure, as outlined by the MoD, when dealing with "*Key Operational Records*," deals with retention of documents (including electronic records) for different purposes[5163] than that of ensuring that all relevant documentary information is preserved for any future litigation/Inquiry or other investigative process. The enhanced retention procedure with regard to Key Operational Records therefore does not obviate the need to have an adequate detention period for all relevant documentation that may be required for the purposes of future litigation/investigation.

5.123 I have taken the information provided to me by the MoD and the Written Submissions by the Iraqi Core Participants fully into account. Although I am satisfied that significant steps have already been taken by the MoD, with regard to both the retention and cataloguing of information/records from theatre, it is my view that further measures need to be introduced and/or implemented in order to ensure that all relevant documentary information/records (including electronic records) are properly stored in such a way that they can be identified and searched if necessary. Although I do not intend to analyse the management systems already in put into place by the MoD, there is an obvious current deficiency in that there does not appear to be any present system for cataloguing hard copy information obtained from theatre. Furthermore, JSP 441 does not seem to address the issue of potential data loss amongst electronic IT systems, which the MoD recognised in their response to me was a matter of concern. These two obvious deficiencies should not be regarded as necessarily exhaustive.

5.124 Having regard to all the foregoing and being very aware that military operations and/or activities are a very special area, where allegations of possible misconduct, atrocities and/or malpractice may take a very long time to emerge, out of an abundance of caution I remain of the view that all documentary information/records (including electronic records) should be stored in secure accommodation for a minimum period of 30 years.

5.125 It therefore remains the case that I make the following recommendation (**Recommendation 1)**:

> ***"Consideration should be given to the establishment of a policy by the Ministry of Defence to ensure that all documents or other material, including electronic material, are retrieved from theatre and elsewhere at the conclusion of an operation, catalogued and stored in secure accommodation for a period of at least 30 years and all searches of that material recorded, so that the Department is able to say what material is available and its location, and if the need arises, to confirm in litigation or to a Public Inquiry that it has complied with the obligation to disclose relevant material."***

5.126 In a letter dated 13 October 2014, the Inquiry informed the MoD that I was considering extending this recommendation to include two other areas. The MoD was given the opportunity to provide me with any information by way of assistance in relation to these further areas. In fact, the substance of both had been raised as areas of concern by the Iraqi Core Participants in their initial response to my proposal in relation to Recommendation 1, as outlined above. In the paragraphs that follow, I deal with those two additional areas of concern. In the event, as appears below, I have decided that it is more satisfactory to deal

[5163] As confirmed in MoD's letter to the Inquiry Solicitor dated 23 September 2014, the purpose of the enhanced retention procedure is to "*provide a body of information that can be used for historical operational analysis to support MoD decision making, the development of operational capability and lessons processes as well as providing a basis for much of the record [sic] required to assist legal activity involving the Department*."

with these two additional areas by making two further recommendations (Recommendations 2 and 3, below), rather than by extending Recommendation 1, as originally proposed.

Recording and retention of recordings of interrogations and tactical questioning

5.127 In a letter dated 13 October 2014 the Solicitor to the Inquiry informed the Ministry of Defence ("MoD") that I was considering expanding Recommendation 1 in order to include a requirement that consideration be given to the making of digital video and audio recordings of both interrogation and tactical questioning and that such recordings should be preserved. It had become clear to me during the course of the Inquiry that the recording of both the tactical questioning and the interrogation sessions of the detainees would have been invaluable in providing an accurate record as to how those procedures had actually been carried out and what had actually been said and done during those sessions. The conduct and content of such sessions were highly contentious and as it seems to me, are always likely to be a controversial aspect of operations. The need for tactical questioning and interrogation sessions to be recorded was also raised by the Iraqi Core Participants in their letter dated 29 September 2014.

5.128 By letter dated 16 October 2014, the MoD provided the Inquiry with further information relating to this particular matter. The MoD accepted that the Standard Operating Procedure for the Joint Forward Interrogation Team ("JFIT") in May 2004 had stipulated that the interrogation and search sessions were to be videoed and then retained for archive purposes (and labelled appropriately). However, the MoD also recognised that equipment failures at Shaibah Logistics Base meant that interrogation sessions, including the interrogations of the detainees with whom this inquiry is concerned, had not actually been recorded.

5.129 The current MoD policy for interrogation,[5164] dated 16 May 2012, contains an express requirement for interrogation sessions to be audio and video recorded and for these recordings to be retained. An Interrogation Controller is to monitor the process and the policy states that an Intelligence Exploitation Facility is to have "*appropriate resilience measures, such as portable cameras and microphones.*" In the event that both the main and the resilience systems fail, interrogations should only proceed where it is operationally essential and the continuation of such interrogations has been approved by the theatre J2X(I).[5165] It should also be noted that it appears that, when only the video recording system does not function, the policy is to allow interrogation to proceed on the basis of an audio recording only as a temporary measure.[5166]

5.130 However, the current policy governing tactical questioning[5167] does not contain any requirement that tactical questioning sessions should be recorded. The MoD explained that the reason for this is that it would be impractical to place audio and video equipment into the numerous facilities in which tactical questioning is conducted.

5.131 Although the recording of interrogations is now clearly governed by policy, it seems to me that insufficient consideration has been given to assessing how the necessary resources for recording tactical questioning sessions could be made available in temporary holding facilities.

[5164] Provided to the Inquiry as (MOD-02-0015062-A) marked "Secret." It has therefore not been disclosed to CPs or uploaded on to Lextranet. The provisions referred to above are limited to those accurately recited in MoD's letter of 16 October 2014

[5165] J2X is a staff element subordinate to the J2 (Intelligence and Security Branch of a Headquarters). J2X is the primary advisor on HUMINT and Counter Intelligence and is the focal point for all HUMINT and Counter Intelligence activities within a Joint Task Force ("JTF"), such as MND(SE). J2X(I) is a further subordinate within J2X and deals specifically with interrogation operations

[5166] (MOD045164-87)

[5167] Provided to the Inquiry as (MOD-02-0015061-A) marked "Secret." It has therefore not been disclosed to CPs or uploaded on to Lextranet

Whilst routine recording may not always be practical, given the likely *ad hoc* nature of some temporary holding facilities, it seems to me that the fact that appropriate resilience measures are available for recording interrogation sessions strongly suggests that similar arrangements could be taken to record tactical questioning sessions. I am therefore satisfied that further thought should be given to the implementation of guidelines for best practice in arranging for the recording of tactical questioning sessions wherever possible.

5.132 I can see no good reason why the recordings of such sessions should not be subject to the same rules of preservation and retention as other forms of information/records. Indeed, the MoD made it clear in its letter dated 16 October 2014, that such recordings would be covered by the relevant provisions of JSP 441. That being the case, it is curious to see that the MoD policy on Defence HUMINT Data Management, dated 25 October 2013, states that all audio-visual recordings of Interrogations are to be retained for "*at least ten years*" at PJHQ.[5168] I therefore invite the MoD to review the instruction given in the Defence HUMINT Data Management Manual on this particular point and to amend the retention period accordingly.

5.133 It is clear that any such recordings of interrogations/tactical questioning should be treated in a manner consistent with MoD policies on data retention and that such recordings should not be used for any improper purposes, such as in training sessions.[5169] I therefore consider that a recommendation in the following terms is appropriate (**Recommendation 2**):

> ***"Digital video and audio recordings should be made of both interrogation and tactical questioning sessions. Such recordings should be retrieved from theatre, catalogued and stored in the same way and for the same period of time as the other documents/ records to which reference is made in Recommendation 1".***

Dating and archiving of training documents

5.134 During the course of the Inquiry, it became necessary to review the training course materials relating to the Prisoner Handling and Tactical Questioning Course undertaken by M004. It soon became apparent that the Ministry of Defence ("MoD") was unable to date some of the course material that was provided to the Inquiry. It was, of course, necessary to establish the date of the course material, in order to determine whether it was in force or existence at the relevant time. The fact that the material in question was undated meant that the Inquiry had to estimate the date of the material from reviewing the metadata of the documents provided. This was clearly an unsatisfactory state of affairs, which could and should have been avoided by ensuring that the training material was properly dated and stored/retained in such a way as to make it easily searchable by date.

5.135 By letter dated 18 August 2014, the Solicitor to the Inquiry informed the MoD that it was considering a recommendation that training documents produced by the MoD should be both dated and archived. In the event, the response from the MoD did not take the matter any further.

5.136 I can see no good reason why all material relating to training courses should not be dated and properly archived. This would allow the date or dates, when the training material in question was composed and then brought into use, to be determined without difficulty. For the same

[5168] See (MOD045164-87)

[5169] There was a suggestion in the oral evidence (see M002 [156/88]) that to do so might amount to a contravention of the 1949 Geneva Conventions. Note also that MOD-02-0015060-A states at (17) that audio visual recordings of interrogation sessions may be utilised for review or as an aid to future interrogations. It seems to me that this should be modified to ensure that any such use is unobjectionable or (preferably) that it should be deleted altogether, particularly the latter part

reasons and purposes, consideration should also be given to the need to retain and archive suitably any such training material that is no longer in use.

5.137 As it seems to me, all such training material should be subject to the same retention time periods as those specified by JSP 441, and could be archived in the same way (with the date clearly recorded).

5.138 Having regard to all the foregoing, I make the following recommendation (**Recommendation 3**):

> ***"All training material should be dated, appropriately retained and archived in such a way that it can easily be established when the training material was composed, when it came into force and the period during which it remained in force."***

2. The Shooting Incident Investigation Policy

5.139 In paragraph 5.70 above I set out what happened in relation to the policy and my conclusions. As I explain, it is clear to me that all regarded the then current policy as unworkable in theatre, and indeed I accept that it was unworkable in the conditions as they were in that part of Iraq in 2004. The result of this was that the commencement of the 2004 Royal Military Police ("RMP") investigation was delayed. That is deeply unsatisfactory. The need for such a policy is clear: it is to ensure a speedy investigation in order to protect the interests of both the British Military and the then enemy. Therefore, it must be effective to achieve that aim and it must also be workable in practice.

5.140 By letter dated 18 August 2014 the Solicitor to the Inquiry informed Core Participants that I was considering making a recommendation in the following terms:

> *"Consideration should be given to the drafting of a Shooting Incident Policy which is practically achievable in Theatre and which enables the ascertainment of the relevant facts leading up to, during and consequent upon the Shooting Incident by an independent body such as the Royal Military Police within a time limited but reasonable period after the Shooting Incident."*

5.141 On 5 September 2014, I received a response from the Ministry of Defence ("MoD"). In essence, I was informed that the introduction of the Armed Forces Act 2006 had fundamentally overhauled the Service Justice System by the introduction of two key changes:

a. Imposing a statutory obligation on commanding officers to refer allegations of certain serious offences[5170] to the Service Police.

b. Removing the Service Police's ability to discontinue investigations into such incidents without prior consultation with the Service Prosecuting Authority.

5.142 In line with this, in February 2006, a standard operating instruction (SOI J3-16 – *"The Reporting, recording, review and investigation of shooting incidents that have, or may have, resulted in death or injury*") has been drafted and implemented in relation to Operation Herrick (British operations in Afghanistan). The latest version of that instruction (issued in October 2012), requires that a serious incident report ("SINCREP") be produced in respect of every Incident where shots or munitions employed by UK conventional forces are known to have resulted in death or injury. The SINCREP details the type of evidence and information that should be

[5170] Schedule 2 Armed Forces Act 2006

collated and also gives instruction to the Commanding Officer in relation to whether further investigation is required and gives the following guidance:

a. The Commanding Officer is permitted to take no further action in the event that he considers that only positively identified enemy forces have been killed or injured and there are no grounds to suggest that civilians may have been killed or injured as a result of the action of UK forces (or that there has been a breach of law or the rules of engagement).

b. The Commanding Officer must initiate a Shooting Incident Review in circumstances where it appears that civilians may have been killed or injured by UK Forces (or those operating under UK command) but where information suggests that they acted lawfully in accordance with the Rules of Engagement.

c. In all other circumstances, the Commanding Officer must inform the Service Police within 24 hours. In some circumstances where a Shooting Incident Review has taken place, the incident will be referred to the Service Police for investigation.

5.143 SOI J3-16 also places time limits on the Shooting Incident Review which is to be completed within 48 hours and forwarded to the relevant Higher Authority within 14 days of completion. Before a proposal not to conduct any further investigation is authorised, the Force Provost Marshall must be consulted. Contrary to the views of the Higher Authority, they are able to decide that the matter is in fact to be subject to investigation.

5.144 On 29 September 2014 I also received submissions in relation to this recommendation from the Iraqi Core Participants. Their primary concern centred round the fact that any Shooting Incident Policy was required to comply with Article 2 European Convention on Human Rights; the protection of the right to life. In brief, it was submitted to me that the current policy as contained in SOI J3-16, was deficient in a number of areas, principally because of the significant decision making power afforded to the Commanding Officer who lacks independence and impartiality:

a. It is inappropriate and against the notion of independence that the Commanding Officer is permitted to take no further action without further scrutiny (in the limited circumstances explained in 6.41(a) above). Moreover, the information on which the Commanding Officer makes such a decision is provided entirely by the unit involved and therefore operates without impartiality in placing reliance on reporting by potentially culpable units.

b. The time frame for review (two days for the Shooting Incident Review) and a further 14 days for review by a Higher Authority had the potential to frustrate a prompt investigation thereafter by the independent Service Police.

c. The Higher Authority and the Force Provost Marshall are reliant upon investigative steps completed by the Commanding Officer (who lacks independence).

d. Where a Service Police investigation is necessary, many of the witnesses/suspects will have already given an account in an investigation which lacked independence and thus was not compliant with human rights obligations requiring an independent review.

e. The officer conducting a Shooting Incident Review may have already played a part in the incident subject of the review.

5.145 I have taken these submissions into account. I have also carefully considered the judgment of the European Court of Human Rights ("ECHR") in *Al-Skeini v United Kingdom* Application No. 5571/06 [2011], which considered the relevant Shooting Incident Policy in place in

Iraq in 2003. In 2003, policy dictated that all shooting incidents were reported (by means of a SINCREP). After this there would be an investigation into the incident by the Soldier's Commanding Officer or the Company Commander. Thereafter there was no requirement to initiate an investigation if the Commanding Officer/Company Commander were satisfied that the soldier had acted lawfully within the Rules of Engagement. However, if they were unsatisfied or had insufficient information, they were required to initiate an SIB (Special Investigation Branch) investigation. Whilst this Shooting Incident Policy was reviewed and replaced on 24 April 2004, the fundamental principles outlined by the Grand Chamber in *Al-Skeini v United Kingdom* Application No. 5571/06 [2011] are, in my view, of particular relevance, as follows:

a. It was particularly important for the investigating authority to be operationally independent. Those investigations which remained entirely within the military chain of command and were limited to taking statements from the soldiers involved fell short of the requirements of Article 2 ECHR. The SIB in 2003 was not operationally independent since in the first instance, investigations were reported to the Commanding Officer who had the authority to decide whether the SIB should be called in to investigate.

b. It was essential that the military witnesses, and particularly the alleged perpetrators, were questioned by an expert and fully independent investigator, and that this was to be done as soon as possible.

5.146 I have not heard argument on the issue and it may be that my preliminary impression is entirely wrong. However, whilst the Shooting Incident Policy has clearly been reviewed and amended since 24 April 2004 (the policy with which this Inquiry is concerned), as it seems to me, some of the fundamental deficiencies with that policy are yet to be fully considered.

5.147 First, one of the main deficiencies with the policy as it was in 2004, was the concern as to whether the RMP(SIB) investigation should begin immediately, regardless of any separate decision that may be made to dispense with such an investigation at a later date. As the policy now operates (as per SOI J3-16), the Service Police are to be notified of a shooting incident within 24 hours in certain circumstances.[5171] However, the Commanding Officer is allowed to dispense with the need for the matter to be referred to the Service Police in limited circumstances, and is given 48 hours to conduct a Shooting Incident Review, with the Higher Authority being given a further 14 days for review thereafter. This means that if an investigation is launched thereafter, there will be substantial delay before the Service Police are involved.

5.148 Second, the current policy affords the Commanding Officer discretion not to inform the Service Police where there is no known breach of law or of the rules of engagement. This appears to be at odds with the notion of "*operational independence*" as discussed in *Al-Skeini v United Kingdom* Application No. 5571/06 [2011]. I repeat that in expressing that view, I do so without the benefit of argument, in particular argument from the MoD.

5.149 I therefore make the following recommendation (**Recommendation 4**) that:

> ***"A Shooting Incident Policy should be drafted which is achievable in practice in Theatre, which is compliant with Article 2 of the ECHR and which enables the ascertainment of the relevant facts leading up to, during and consequent upon the***

[5171] Those circumstances are whenever there is information that indicates that there has been a breach of law, a breach of the Rules of Engagement, action which has or may have resulted in death/injury to friendly forces and in other circumstances if the Commanding Officer deems it appropriate

Shooting Incident by an independent body such as the Royal Military Police within a time limited but reasonable period after the Shooting Incident."

3. Arrest Records

5.150 In Part two, paragraphs 2.472 – 2.502 of the Report, I deal with the circumstances relating to the capture of Hamzah Joudah Faraj Almalje (detainee 772) on the Southern Battlefield on 14 May 2004. In fact, Hamzah Almalje was the only live detainee captured during the Southern Battle. However, as is apparent from Part three of the Report, the documentation prepared in respect of Hamzah Almalje at Camp Abu Naji on 14 May 2004 draws no distinction between the circumstances of his capture and those relating to the capture of the other eight live detainees during the Northern Battle the same day. The result is that the documentation relating to Hamzah Almalje appears to suggest that it was WO2 David Falconer who had detained him that day, whereas it is beyond doubt that WO2 Falconer was at least eight kilometres from where Hamzah Almalje was actually captured. In truth, as is clear from the Report, WO2 Falconer had nothing whatsoever to do with the capture of Hamzah Almalje on 14 May 2004.

5.151 In my view, in order that a satisfactory evidential chain can be maintained and that the circumstances of any prisoner's detention can be accurately established, any soldier who detains a prisoner should be responsible for the completion of a suitable note, recording the date, time, circumstances and location of the detention in question. That note should be completed as soon as possible after the prisoner's detention and then handed to the officer in charge of the prisoner handling area, at the same time as the prisoner is handed over. The officer in charge of the prisoner handling area should himself then make a note of any obvious physical injuries to the detainee on arrival at the prisoner handling area and obtain, from the soldier responsible for the detention of the prisoner, an explanation as to how the injury/injuries in question occurred. That explanation should be recorded and signed by both the soldier who detained the prisoner and the officer in charge of the prisoner handling area.

5.152 Accordingly, by letter dated 18 August 2014, the Solicitor to the Inquiry informed the Core Participants that I was considering making a recommendation in the following terms:

> *"Consideration should be given to implementing procedures to ensure that there is an accurate contemporaneous record of the circumstances of detention of a prisoner and his general physical condition on arrival at a prisoner handling area together with an explanation from the soldier responsible for the detention of the individual of any obvious physical injuries suffered by the detainee."*

5.153 By letter dated 5 September 2014, I received a response from the MoD in relation to this particular proposed recommendation. I was informed that the policy with regard to the handling and treatment of captured persons had been thoroughly overhauled since 2004. The current policy in relation to the treatment of captured persons ("CPERS") during military operations is now JDP 1-10 "*Prisoners of War, Internees and Detainees.*" This was first introduced in May 2006 and replaced JDN 2/05 "*Prisoners of War, Internees and Detainees*" and JWP 1-10 "*Prisoners of War Handling*" (which had been published in June 2005 and March 2001 respectively). It is now mandatory that certain documentation, as detailed below, must be completed in respect of each detainee.[5172] Failure to comply with the requirements of JDP 1-10 will be investigated and can lead to criminal prosecution. Furthermore, Chapters seven

[5172] i.e. (i) The Prisoner of War Capture Tag, (ii) The Initial Capture Report, (iii) The Detail of Capture Report and (iv) the Record of Captivity

and nine of the forthcoming third edition of JDP 1-10 contain detailed guidance that is of particular relevance to this particular recommendation.

(i) The Prisoner of War Capture Tag

5.154 At the point of capture or as soon as possible thereafter, the Prisoner of War Capture tag is to be filled in by the capturing unit. It requires certain information to be recorded, including the circumstances in which the captured person was apprehended and the physical condition of the captured person at the time. Part B of the tag (which includes the above information) is then passed to the personnel escorting the captured person to the holding facility.

(ii) The Initial Capture Report and (iii) the Detail of Capture Record

5.155 In addition to the Prisoner of War Capture tag, the Initial Capture Report and the Detail of Capture Record must also be completed by the capturing unit and then retained by the escort until the captured person is handed over. The Detail of Capture Record includes an instruction to provide written details of the capture of the detainee in question, any injuries that he has suffered and an explanation of how such injuries occurred.

(iv) The Record of Captivity

5.156 Upon handover of the captured person at the Unit Holding Area, the personnel at the Holding Area are required to ensure that the above forms have been completed. Additionally, they are required to complete a Record of Captivity Form, which then accompanies the captured person into the holding facility itself. That form includes appropriate provision for recording any concerns that a captured person may have about the nature of his treatment prior to arrival.

5.157 I also received a response from the Iraqi Core Participants, both in relation to the proposed recommendation and the Ministry of Defence ("MoD") response to that proposal. The Iraqi Core Participants invited me to consider recommending that a detailed record of all injuries should be made during the initial medical process at the unit holding area, going further than that apparently required by the Detail of Capture Record. The Iraqi Core Participants also invited me to consider recommending that Service Police officers should make a photographic record of any injuries, upon the detainee's arrival at the unit holding area.

5.158 Having considered the information provided by the MoD and the submissions by the Iraqi Core Participants, I am of the view that a recommendation is still appropriate. My principal reason for making this particular recommendation is to ensure that appropriate consideration has been given to what can be done in order to establish a satisfactory procedure for ensuring that any injuries that have been suffered by captured persons are properly recorded and explained at the time, not least so that any allegations of ill-treatment whilst in British custody can be properly investigated. In my view, a contemporaneous photographic record, made in conjunction with a detailed medical examination, would go a long way towards achieving this aim. I can see no obvious or compelling reason for not routinely photographing all injuries at the stage when each detainee is first examined by a Medical Officer after arrival at a detention holding facility. I therefore make the following recommendation (**Recommendation 5**):

> ***"Appropriate procedures should be introduced to ensure that there is an accurate and detailed contemporaneous record of the circumstances relating to the original capture/detention of a prisoner and his general physical condition (including an***

appropriate photographic record) on arrival at the prisoner handling area together with an explanation from the soldier responsible for the detention of the individual of any obvious physical injuries suffered by the detainee in question".

4. Areas of deficiency for further consideration by the Ministry of Defence

5.159 In the course this Report I have noted a number of areas where I have come to the conclusion that certain existing practices were unsatisfactory and/or deficient. In letters dated 13 October 2014 and 15 October 2014, the Inquiry raised these concerns with the Ministry of Defence ("MoD").

5.160 For the reasons set out below, I feel it is necessary to make further recommendations that each of these various areas of deficiency be considered by the MoD with a view to improvement. In fact, the MoD informed the Inquiry, by letter dated 16 October 2014, that the latest version of JDP 1-10 "*Prisoners of War, Internees and Detainees,*" which was due for publication at the end of October 2014, may be delayed to enable any recommendations made by the Inquiry and accepted by the MoD to be acted upon promptly.

Notice of Rights

5.161 Shortly after their arrival at Camp Abu Naji, all the detainees underwent an admission procedure called "*Processing*", as discussed in Part Three, Chapter Two of this Report. As part of this process, the detainees were each informed of the reason for their detention by means of an "Apprehension Notice," which each detainee was asked to read and sign at the time. Given that the detainees were only to be held at Camp Abu Naji for a short period of time (its custodial role being that of a temporary holding facility), the Processing procedure was a brief affair and the detainees were not given any further information about the facility in which they were to be held or the general nature of the treatment they could expect to receive.

5.162 Upon transfer to the Divisional Temporary Detention Facility ("DTDF") at Shaibah, the detainees underwent a second and more thorough admission process, during which they were given a briefing.[5173] Notably, that briefing contained the following notification:

> *"You are now an internee of the British Coalition Forces in Iraq. You will be held and treated fairly and humanely in accordance with the rules of the Geneva Conventions of 1949 and International Humanitarian Law."*[5174]

5.163 The purpose of the briefing at the DTDF at Shaibah, as was explained in the policy relevant at the time, was to allay any fears that the detainees might have had about how they would be treated whilst they were detained there. A notice in Arabic, with an English translation, was also displayed on the wall in the reception area of the Administration building at the DTDF. That notice also informed the detainees that they would be treated fairly and humanely in accordance with the rules of the Geneva Conventions of 1949 and International Humanitarian Law.

5.164 As it seems to me, informing the detainees that their human rights would be properly respected during the period of their detention was an entirely sensible and appropriate

[5173] See Part 4, Chapter 1
[5174] (MOD042716)

matter to have been included in the admission briefing at the DTDF at Shaibah. Thus, it seems to me that the failure to provide the detainees with a "*Notice of Rights*", upon their arrival at Camp Abu Naji on 14 May 2004, was unsatisfactory. In their letter dated 29 September 2014, the Iraqi Core Participants raised a similar concern and invited me to consider making an appropriate recommendation to deal with the matter.

5.165 On 13 October 2014, the Solicitor to the Inquiry wrote to the MoD in order to inform the MoD that I was considering making a recommendation that consideration should be given to providing detainees with an appropriate "*Notice of Rights*", which should be standardised across all holding facilities. The Notice of Rights should inform detainees, upon admission to any detention facility, of the reasons why they were being detained and should expressly inform them that their human rights would be protected and respected.

5.166 In its response, dated 16 October 2014, the MoD confirmed that the latest edition of JDP 1-10 (at Chapter 10, section II) provides that, upon admission to a CPERS holding facility[5175] all captured persons are to be provided with written information and a verbal briefing about the regulations covering their treatment and all matters that are necessary to enable them to understand their rights and obligations. However, the Guidance on Standing Orders for captured persons which apply to CPERS facilities,[5176] states that the following information is to be provided to captured persons: [5177]

a. A copy of the Geneva Conventions/applicable law is to be displayed and made available to all CPERS in a language that they understand.

b. All CPERS are to be provided with a verbal brief on the contents of the Geneva Conventions/applicable law, as part of their in-processing.

c. Those CPERS who are unable to read are to be provided with assistance to ensure that they understand their rights and entitlements.

5.167 Whilst JDP 1-10 contains a stipulation that CPERS are to be informed of their rights, including those arising under the 1949 Geneva Conventions, it does not make any express reference to the terms in which the information in question is to be imparted to the CPERS, whether by use of a standardised script or otherwise, nor does it deal with the provision of any explanation of the CPERS' obligations whilst detained. However, by letter dated 17 October 2014, the MoD informed me that, on arrival at the Theatre Holding Facility at Bastion, CPERS were currently given an admission brief that provided them with (inter alia) a detailed explanation of their rights and obligations in carefully expressed terms, that commenced as follows:

> *"You are currently being held by British Forces. Whilst held you will be treated fairly and humanely in accordance with International Law and the Geneva Conventions. British Soldiers will treat you with respect and in return you are expected to do the same. You are expected to obey the rules of this facility and you are to immediately comply with all orders given to you. The Geneva Conventions are a set of books that set out minimum standards of treatment for captured persons detained; a copy is available in your language should you wish to see it. ..."*

5.168 Accordingly, whilst it is apparent that the current edition of JDP 1-10 envisages that detainees should be provided with a notice of their rights, it does not expand upon what is required

[5175A] CPERS holding facility is defined at [623] of JDP 1-10 as '*a facility which is of an established nature and designed to hold larger numbers of CPERS for extended periods of time.*'

[5176] A CPERS facility is defined at [206] of JDP 1-10 as '*any facility where a CPERS is held in captivity whether temporarily or permanently including unit holding areas, collection points and CPERS holding facilities.*'

[5177] JDP 1-10 at Annex 2A

during the verbal brief "*on the contents of the Geneva Conventions/applicable law*", nor does it appear to deal with the detainees' obligations whilst detained. In any event, as is clear from the preceding two paragraphs, not all the requirements of JDP 1-10, such as Chapter 10 section II of JDP 1-10 stated above, apply to short term holding areas. In my view, this particular matter should be dealt with in a way that ensures a proper understanding by all CPERS of the general nature of both their rights and obligations, preferably by the appropriate use of a standardised form of words, along the lines of the notification/explanation of their rights and obligations that is given to CPERS in the "Admission Brief to Detainees", currently used at the Theatre Holding Facility at Bastion in October 2014 and quoted in part above. This should be explained to all CPERS across all holding facilities, including temporary holding areas. I therefore make the following recommendation (**Recommendation 6**):

> ***"All detainees should be clearly informed of their rights and obligations as soon as is practicable upon arrival at any detention facility. As a minimum this should include informing the detainee as to the reason(s) for his detention and explaining, in clear and basic terms, that his human rights will be protected and respected".***

Strip Searching

5.169 As I concluded in Part 3 of this Report,[5178] a number of the detainees had their clothes removed during their initial processing at Camp Abu Naji. Although I accept that there were sound reasons for requiring the detainees to remove their clothes and that the soldiers present at the time did not taunt or deliberately seek to humiliate the detainees, it is understandable that the detainees did feel very humiliated by the process. This was particularly so given that the detainees were Iraqi Muslim men. The likely emotional impact that requiring an Iraqi Muslim man to strip naked in front of strangers would actually have had was not given sufficient thought, nor was it adequately provided for in the relevant governing policy. As it was, I believe the policy in 2004 to have been deficient in a number of ways:

a. There were no provisions in place to ensure that screens or some such were provided, so that each detainee was afforded some degree of privacy whilst his clothes were removed and whilst he was wholly and partly naked. Moreover, there were a large number of personnel unnecessarily in the room whilst the detainees were undressed and on occasions other than 14 May 2004, some of those personnel were women.

b. No adequate explanation was given to the detainees as to why it was necessary for them to remove their clothes. If such an explanation had been given it might, in some instances, have obviated the need to resort to a forcible strip search of the detainees in question. In the event, recourse was had to forcible strip searching far too readily during Processing at Camp Abu Naji on 14 May 2004.

5.170 By letter dated 29 September 2014, the Iraqi Core Participants invited me to make a recommendation with regard to strip searching. In addition to asserting that detainees should be notified of the reasons for being strip searched, they suggested the following:

a. proper records should be kept of the purpose and authorisation of any strip search; separate authorisation should be required where a detainee has to be forcibly strip searched (and such a procedure should only be used in very limited circumstances);

[5178] Part 3, chapter 2

b. detainees should not have all their clothing removed at the same time, except in very limited circumstances where there is an obvious need, e.g. for certain medical reasons, such as to the proper examination of an injury;

c. any strip search should take place in front of the minimum number of people necessary, should be carried out by persons of the same gender (unless none is available) and, where possible, a screen should be used to shield the prisoner from as many as possible of those attending; and specific instruction and training should be given that makes it clear that strip searching for improper purposes is prohibited.

5.171 On 15 October 2014, the Solicitor to the Inquiry wrote to the MoD and stated that I was considering making a recommendation with regard to the strip-searching of CPERS at a detention holding facility and, in particular, that:

a. before any clothing is removed from a detainee, (s)he should be given a careful explanation as to why it was necessary and the CPERS' cooperation should be requested;

b. any search should take place in the presence of the minimum number of people necessary;

c. those present should be the same gender as the detainee, unless completely unavoidable; and

d. a screen should be used to shield the detainee from as many as possible of those actually attending.

5.172 In their response dated 16 October 2014, the MoD informed me that JDP 1-10 does not specifically make reference to the type of strip searches referred to above. It does however recognise that at the point of capture, any searches should be conducted by a person of the same gender, unless absolutely unavoidable, and that the need for the search should be explained.[5179] It also provides that if an intimate search is required at the unit holding area, the reason for this should be explained to the detainee and should be authorised by the Force Provost Marshal.[5180]

5.173 Having seen and considered the proposed recommendation, it appears that the Provost Marshal (Army's) staff have recommended that the following paragraph be inserted into the new edition of JDP 1-10:

> ***"913. Strip-searches.*** *Strip-searches constitute the removal of CPERS clothing layer to the skin. Therefore such a search should not be conducted at the point of capture but may be required at semi permanent locations such as a Unit Holding Areas or theatre CPERS facilities, where dedicated CPERS personnel will be operating. The process and reasons for conducting a Strip-search must be covered within theatre Standing Operating Procedures (SOPs). Strip-searches will only be carried out:*
>
> *a. After the reason for the search has been explained (an interpreter may be required) to the CPERS. The CPERS cooperation should be requested. [The fact of explanation of reasons and co-operation / non co-operation / requirement to use must be recorded].*
>
> *b. There must be a minimum of two search personnel of the same sex of the CPERS to conduct the search. Strip-searches by any personnel of a different sex to that of the CPERS must be authorised in advance by the Force Provost Marshal (FPM). More*

[5179] See JDP 1-10 Chapter 7, section III
[5180] See JDP 1-10 Chapter 7, section IV

than 2 search personnel may be utilised to assist the search only if it is necessary to use force to conduct a strip-search.

c. *The search should be conducted in a location where privacy from persons not conducting the search can be afforded; screening from non search personnel may be required to afford additional privacy.*

d. *The CPERS should never be fully naked; above the waist and below the waist clothing should be removed separately.*

e. *The use of force to remove clothing should be seen as a last resort, and only when strictly necessary and proportionate. A strip-search requiring the use of force must be authorised in advance by the FPM.*

5.174 It seems to me that the terms of the paragraph recommended for insertion in the new edition of JDP 1-10 does address satisfactorily all the areas of concern that I have identified with regard to this particular matter.[5181] In my view, since the new edition of JDP 1-10 has not yet been published and the recommended insertion of the new paragraph has not yet been carried into effect, it seems to me that it is still necessary for me to make the recommendation in question.

5.175 I therefore make the following recommendation (**Recommendation 7**):

> ***"Appropriate measures should be taken to ensure that minimum safeguards are in place where a detainee is to be strip searched. These include informing a detainee as to the necessity of the strip search and requesting his/her cooperation. Those conducting a strip search should always bear in mind the need to respect the detainee's dignity, particularly having regard to any cultural sensitivities. Searches should be conducted by, and in front of, the minimum number of persons necessary and screens or other measures should be taken to shield the detainee from as many of those attending as possible. Those persons should be of the same gender as the detainee unless none are available".***

Provision of adequate facilities for interpretation

5.176 In Part 3 of this Report I have drawn attention to a number of shortcomings with regard to the ways in which the detainees were treated overnight at Camp Abu Naji on 14/15 May 2004. Common to those various shortcomings was the unavailability and/or the failure to make use of interpreters. There were obvious and significant language barriers, given that the detainees spoke few words of English and their guards knew little or no Arabic. The fact that there was not an interpreter present and available in either the prisoner handling compound or the prisoner holding area meant that it was difficult for the detainees to make themselves understood when (for example) making requests for medical attention, to use the lavatory or for the provision of drinking water. Coupled with a strict enforcement of the no talking policy, these language problems and the lack of an interpreter to assist meant that detainees' requests were invariably met with orders to be quiet or, at the least, were simply not understood and thus went unanswered.[5182]

[5181] In particular, it would seem that this new insertion would apply to all types of holding facility as it refers to strip-searches at Unit Holding Areas and theatre CPERS facilities.

[5182] See paragraph 3.599

5.177 There are two other areas of the Report in which I have expressed concern about the absence of available interpreters. First, it is clear that an interpreter was not always present on every occasion when a detainee was seen by medical staff. Thus, I heard evidence about how one of the detainees, Ibrahim Gattan Hasan Al-Ismaeeli (detainee 774), had been given medication forcibly and without his consent having been obtained beforehand or at all.[5183] As I concluded earlier in this Report,[5184] I am quite sure that this could have been avoided had an interpreter been present to explain what was happening. Second, no interpreters were present during the detainees' transfer by helicopter on 15 May 2004 from Camp Abu Naji to the Shaibah Logistics Base.[5185] As it seems to me, it would have been best practice to have interpreters on hand in order to provide a basic safety briefing, to reassure them, to inform them about what was happening and to address any concerns they might have had during the journey (particularly the helicopter flight).

5.178 Furthermore, it was also clear from the evidence that there were some problems with interpretation at the Divisional Temporary Detention Facility ("DTDF"). As I stated earlier in this Report:

> *"Another impediment was the limited ability of the JFIT interpreters to understand and interpret the Arabic language in the Iraqi dialect. One of the interpreters, Junior Technician M029 explained that the interpreters had to make frequent use of a bilingual dictionary during interviews. Some detainees also commented in their evidence that they found it difficult to communicate with the JFIT interpreters."*[5186]

5.179 By letter dated 13 October 2014, the Solicitor to the Inquiry informed the Ministry of Defence ("MoD") that I was considering making a recommendation in the following terms:

> *"Consideration should be given to the undertaking of a review to ensure that a sufficient number of suitably trained interpreters are readily available and on hand during all aspects of prisoner detainee handling, including to give safety briefings prior to flight transfers, in prisoner holding areas to ensure that basic requests for water/food/toilet breaks are understood, and during the issuing of medication."*

5.180 In the event, the response from the MoD in relation to this recommendation did not take the matter any further. In their letter dated 29 September 2014, the Iraqi Core Participants submitted that it was a matter for concern that the interpreters available during detention were inadequately trained and were not sufficiently proficient in carrying out interpretation to the requisite standard.

5.181 As it currently stands, the second edition of JDP 1-10 notes on various occasions that interpreters should be on hand, for example, in both long and short term holding facilities when the provisions of the Geneva Conventions are read to CPERS, in order to ensure that they understand them,[5187] and in long term facilities during medical examinations.[5188] JDP 1-10 also mentions "*interpreter support*" as an issue to consider when "*planning for CPERS activities*."[5189] The same section of JDP 1-10 also refers to the need for and use of interpreters, although apparently not for the specific purposes of processing and questioning, as follows:

[5183] See paragraph 3.830
[5184] See paragraph 3.829
[5185] See paragraphs 3.965 – 3.966
[5186] MO29 [156/178-179]
[5187] See JDP 1-10, Chapter 2, Section I [207]
[5188] See JDP 1-10, Chapter 3, Section III [310] (m)
[5189] See JDP 1-10, Chapter 6, Section 1 [607] (g)

> *"Interpreters are often essential for the management and questioning of CPERS. Experience has shown that the best method for using interpreters during routine in/out-processing is to issue them with a script that they are to read to the CPERS, although this method will not be suitable on all occasions. All personnel that use interpreters are to ensure that they have been carefully briefed and understand their tasks. The potential for them to exceed or be short of their remit may have serious consequences for the gathering of intelligence and the management of CPERS, including the safety of the guard force. Interpreters may need to conceal their identity by the use of screens, dark glasses or face scarves."*

5.182 Furthermore, JDP 1-10 envisages that interpreters may be required at the point of capture.[5190] It also envisages that interpreters may be required upon the transporting and escorting of detainees,[5191] including during air movement of detainees.[5192]

5.183 The outline establishment for management and administrative staff for a long term holding facility, as contained in JDP 1-10,[5193] states that there should be two interpreters for up to 250 detainees. JDP 1-10 notes that interpreters are "*essential*" in a long term holding facility.[5194] It also states that there are to be "*sufficient*" interpreters available in the unit holding area.[5195]

5.184 While the current edition of JDP 1-10 appears to cover most aspects of Prisoner Handling that might require the use of an interpreter, there appears to be no specific provision that deals with the need for and/or the use of interpreters to assist in the general handling of CPERS (as opposed to matters such as Tactical Questioning/Processing/Transfer etc). I am therefore of the view that a recommendation is required to ensure that there is adequate provision of available interpreters, at both long and short term detention facilities, to avoid the sort of problems during the general handling of CPERS as those identified in paragraph 5.176 above.

5.185 I therefore make the following recommendation (**Recommendation 8**):

> ***"There should be an appropriate review of all current policy and procedures to ensure that a sufficient number of suitably trained interpreters are readily available and on hand during all aspects of prisoner detainee handling and at all holding units, including all forms of interrogation and questioning, during the issuing and provision of medication, the need to ensure that basic requests for water/food/lavatory breaks are properly understood in prisoner holding areas and to give safety briefings and to help deal with any problems prior to and/or during flight transfers."***

Fitness for interrogation

5.186 As is clear from Part 3, Chapter 2 of this Report, in May 2004, the relevant Standard Operating Instructions stipulated that a Medical Officer was to sign a "*fit for detention and questioning form*," although no such standard form actually existed in May 2004. In fact, the Baha Mousa Inquiry gave detailed consideration to the issue of whether a healthcare professional could properly state that a detainee was fit for detention and questioning. Having considered the

[5190] See JDP 1-10, Chapter 7, Section I [705], [712]
[5191] See JDP 1-10, Chapter 8, Section I [805](h)
[5192] See JDP 1-10, Annex 8B
[5193] See JDP 1-10, Annex 6A (4)
[5194] See JDP 1-10, Chapter 10, Section III, [1015]
[5195] See JDP 1-10, Chapter 9, Section II [907] (e) JDP 1-10 defines the unit holding area at [618] as '*the first point in the CPERS handling chain where detailed documentation of CPERS may begin.*'

competing arguments, Sir William Gage expressed the following conclusion in the Baha Mousa Report:

> *"The medic may validly advise that someone is not fit for detention or questioning; alternatively, the medic may validly advise that no specific intervention different from the normal process is required. The practical effect of the latter course is the same as stating that someone is fit for detention...[and] the latter course avoids any breach of ethics...I think it would be prudent for military medics to take this approach, which has no practical disadvantages and which may avoid breaches of ethical duties.*[5196]

5.187 Sir William Gage then went on to say this:

> *"I therefore conclude that Armed Forces medical personnel can and should be involved in providing advice that a CPERS is not fit for detention or questioning; alternatively, the medic may validly advise that no specific intervention different from the normal process is required in respect of that CPERS. They should not advise that a CPERS is fit for detention or fit for questioning."*[5197]

5.188 For my part, my principal concern was that, as the position existed in May 2004, there was nowhere to record the outcome of any such medical examinations, whether expressed in the terms indicated as acceptable by Sir William Gage or otherwise. For this reason, the Ministry of Defence ("MoD") were advised in a letter dated 15 October 2014, that:

> *"Consideration should be given to ensuring that appropriate forms are made available to allow a medical examiner to declare a detainee unfit for detention and tactical questioning and stating the reasons for that decision."*[5198]

5.189 The MoD advised me that both their current policy on Tactical Questioning and Interrogation stated that a decision as to whether a detainee was unfit for questioning should be recorded on the captured person's file and on medical form F Med 1026.[5199]

5.190 That being so, I note that the F Med 1026 form does not have a specific place for this information to be recorded, nor does it explain, under the list entitled "*Purpose of the Examination*", that one of the purposes is to consider whether the detainee is unfit to be detained or questioned.[5200] Furthermore, there is currently no requirement for the reasons for such a decision to be recorded.

5.191 I therefore make the following recommendation (**Recommendation 9**):

> ***"Appropriate forms should be made available to allow a medical examiner to declare a detainee unfit for detention and questioning. The decision as to whether a detainee has been declared unfit for detention and questioning should be readily apparent and the reasons for that decision should be recorded. Any conclusion to the contrary effect should be expressed in ethically acceptable terms".***

[5196] The Report of the Baha Mousa Inquiry (Volume III) [16.236]
[5197] The Report of the Baha Mousa Inquiry (Volume III) [16.235]–[16.237]
[5198] This should be read as indicating the need for forms that would allow the medical examiner to express any conclusions to the contrary effect in an ethically acceptable manner; see the Report of the Baha Mousa Inquiry (Volume III) [16.236]
[5199] This form is included at JDP 1-10 Annex 3A. Presumably the MoD have in mind the use of the acceptable form of wording identified by Sir William Gage in the Baha Musa Report to express any conclusion to the contrary effect
[5200] Again, any contrary conclusion being expressed in ethically acceptable terms